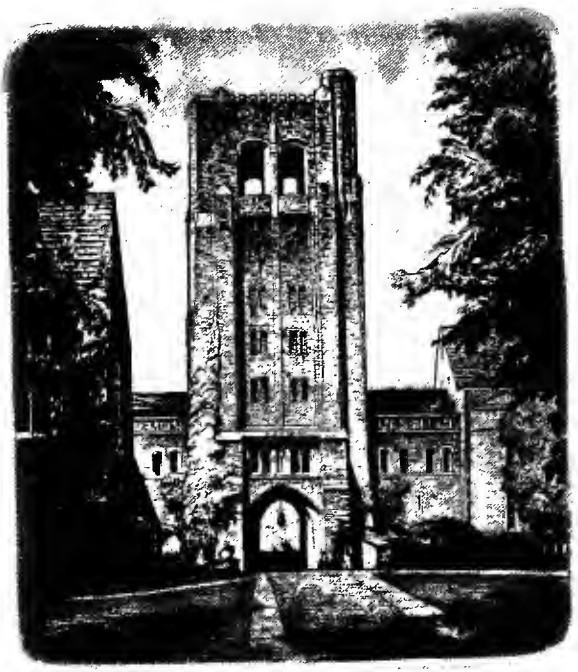

INSURANCE LAW

RELATING TO

ALL RISKS

OTHER THAN MARINE

AND INCLUDING

LIFE, FIRE, ACCIDENT, GUARANTEE, BURGLARY, THIRD PARTY RISKS, AND EMPLOYERS' LIABILITY

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LONDON
SWEET AND MAXWELL, LIMITED
3, CHANCERY LANE
1912

PREFACE.

As I go to press the Money-lenders (No. 2) Bill, 1911, stands for third reading in the House of Lords, and will doubtless have received the Royal Assent before the end of the year. The principal object of the Bill is to amend the law as decided in *Robinson, In re*, [1910], 2 Ch. 571, to the effect that where an agreement with a money-lender is void *ab initio* under the Money-lenders Act, 1900, the agreement is equally void against third parties deriving title from the money-lender in good faith and for value. Under Clause 1 of the Bill any agreement with or security taken by a money-lender shall be and shall be deemed always to have been valid in favour of any *bonâ fide* assignee or holder for value taking without notice of any defect due to the operation of Section 2 of the Money-lenders Act, 1900. This will come as a very welcome relief from the anxiety which the Money-lenders Act created as to the validity of countless securities which might unknown to the holder have been acquired from or through an unregistered money-lender.

The scheme of compulsory insurance under the National Insurance Bill, 1911, the contributions and benefits payable thereunder and the conditions under which insurance societies may become approved societies with power to do business under the Act, have been so much discussed that it would be out of place to refer to them here in detail. The Bill grants special facilities to societies desirous of doing such business to enable them to extend their powers and to make agreements for amalgamation or transfer of business. Special provisions are made for the transfer of members, the keeping and auditing of accounts, the valuation of assets and liabilities, and the making of such returns as the Insurance Commissioners may require.

Another Bill affecting the subject-matter of this book and likely to become law is the Agricultural Credit and Insurance Societies Bill, 1911. The object of the Bill is to promote the formation or extension of industrial and friendly societies specially adapted to the development of the agricultural industry. Such societies will be registered either under the Industrial and Provident Societies Acts, 1893 to 1895, or under the Friendly Societies Acts, 1896 to 1908, and will be approved by the Board of Agriculture and Fisheries. Provision is made for grants towards the cost of the formation of such societies or the payment of the expenses of management of any such society recently formed. The accounts of the societies will be audited by an auditor appointed by the Board, and an inspector or inspectors may be appointed to examine into and report on the affairs of the Society. For the purposes of the Act a society for carrying on the work of insurance agency shall be deemed to be an insurance society.

A Bill which is not likely to become law this session is the Married Women's Property Bill, 1911 [127]. The object of the Bill is to remedy a defect in Section 1 of the Married Women's Property Act, 1907. It was decided in *Harkness and Allsopp, In re,* [1896] 2 Ch. 358, that, notwithstanding the Married Women's Property Act, 1882, a disposition of trust property to a married woman operates to pass an interest to the husband. The Act of 1907 only enables a married woman to dispose of trust property held by her, and therefore it is still necessary in some cases to join the husband in dealing with trust property which has been conveyed or assigned to the wife during coverture. The Bill, if passed into law, would enable the married woman to hold and dispose of such property without the intervention of her husband.

My warmest thanks are due to Mr. J. E. Faulks, F.I.A., late actuary of the Law Life Assurance Society, Mr. A. B. Langridge, of the Middle Temple, Mr. G. J. Lidstone, V.P.I.A., actuary and secretary of the Equitable Life Assurance Society, and Mr. B. R. Warren, for giving me the benefit of their wide experience and learning, and for reading all or some of the proof sheets. Mr. O. Morgan Owen, joint secretary of the Alliance Assurance Company, Limited, Mr. W. E. Osborn, of Messrs. Selfe & Co.,

Fire Loss Assessors, and Dr. A. E. Sprague, F.I.A., secretary and actuary of the Edinburgh Life Assurance Company, have also been very kind in giving me their assistance in some matters of detail. Mr. R. R. Formoy, of the Inner Temple, has kindly assisted me in the arduous task of revising the references.

E. J. MACGILLIVRAY.

3, Temple Gardens,
December, 1911.

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INSURANCE LAW

CHAPTER I

INSURANCE COMPANIES (*a*)

Section I.—How Constituted

Mutual and proprietary companies.

INSURANCE companies or associations may be primarily divided into those which are known as mutual and those which are known as proprietary. The mutual insurance company is established and carried on solely or mainly for the purpose of insuring its own members upon the most economical basis, and only incidentally for the purpose of earning profits by the insurance of non-members, the surplus funds, if any, being ultimately returned to the members by way of addition to the amount of their insurances or otherwise. The proprietary insurance company is established and carried on solely or mainly for the purpose of providing profits to its shareholders by the insurance of others. At the present day, however, most proprietary companies carrying on ordinary (*aa*) life assurance business combine the mutual element with the proprietary and divide their profits, apportioning part rarely exceeding one-fifth to the shareholders as dividends on their shares and the balance to the policy-holders.

(*a*) Bunyon on Life Assurance, 4th edition, by FitzGerald, 1904. Buckley on the Companies Act, 9th edition, by the Author, 1909. The New Law Regulating Assurance Companies, by FitzGerald and Quin, 1910. The Assurance Companies Act, 1909, by Truelove, 1910. Friendly Societies, 3rd edition, by F. Baden Fuller, 1910. Trade Unions, by D. R. Chalmers Hunt, 1902. Trade Union Law, by H. Cohen, 1907.

(*aa*) As distinguished from industrial.

Constitution before the Companies Acts.

Before the passing of the various Acts relating to companies, an insurance company was constituted in one or other of the following ways :—

(1) as an association of mutual insurers with individual liability only.
(2) as a common law partnership under a partnership deed.
(3) as a corporation, either
  (i) by royal charter,
  (ii) by private act of parliament.

Mutual associations.

The association of mutual insurers is the oldest type of the mutual insurance company. It consists of an association of individuals who contract with one another, that each shall contribute upon an agreed basis to the insurance claims of the other members. Such an association is neither a partnership nor a corporation, and the liability of each member is limited to a several, or individual, liability for the agreed proportion of each claim (*b*). The officers and agents of such an association have no authority to make contracts on behalf of the association as a collective entity, and therefore the association as such has no creditors, and if it were wound up the sole duty of the liquidator or the Court, after payment of the costs of the liquidation, would be to adjust the rights of members *inter se* (*b*). Although a mutual insurance company was sometimes formed as a common law partnership, the presumption was that such a company was not a partnership, but was an association of individual insurers with individual liability only (*c*).

The liability of the members of such a mutual insurance association to contribute towards the losses of or benefits payable to the other members may be entirely unlimited or it may be limited in various ways. The contributions to the claims of other members may be by way of a fixed premium on their insurance, or it may be by way of calls or assessments which

(*b*) *Great Britain Mutual, In re* (1880), 16 Ch. D. 246; *London Marine Insurance, In re* (1869), L. R. 8 Eq. 176; *Oldham Burial Society* v. *Taylor* (1887), 3 T. L. R. 472.

(*c*) *Tyser* v. *Shipowners' Syndicate*, [1896] 1 Q. B. 135; *Leo Steamship Co.* v. *Corderoy* (1896), 1 Com. Cas. 379, 381.

will vary according to the number of claims which have to be met; and the liability of a member to pay calls or assessments may be unlimited, or it may be and is more usually limited by a table of maximum rates defining the maximum sum which any member can be called upon to pay in respect of claims in any one year (*d*). The members may also be divided into different classes, and the liability of each member may be limited to meet the claims of other members in his own class (*e*).

Common law partnerships.

Both mutual and proprietary companies might be formed as common law partnerships under a partnership deed or deed of settlement. Where a mutual company was formed as a common law partnership the liability of members to pay the insurance claims was joint instead of several, and as members of the partnership they might also be liable to outside creditors upon contracts made by the officers or agents of the company (*f*). Where a proprietary company was formed as a common law partnership it took the form of a joint stock company, that is to say, it had a share capital held by the members and the profits were divided by way of dividends upon the shares. The claim of a policy holder in such a company was usually limited to a right to receive payment out of the property stock or funds of the company, and therefore the liability of a shareholder to contribute in respect of the claims of policy-holders was limited to the amount unpaid upon his shares (*g*). Each shareholder, however, was liable to be sued as a member of the partnership if there were any funds of the partnership available to meet the claim, notwithstanding that his own shares were fully paid up (*h*). The liability of the shareholders to meet the claims of general creditors was *primâ facie* unlimited, and although the deed of partnership might purport to limit their liability to the amount of their shares the limitation was only operative against creditors who contracted with actual or constructive knowledge of the terms of the deed (*i*). The policy holders in a proprietary common

(*d*) *Mutual Reserve Life* v. *Foster* (1904), 20 T. L. R. 715.

(*e*) *Lion Insurance* v. *Tucker* (1883), 12 Q. B. D. 176.

(*f*) *Kent Mutual, In re, Hummel's Case* (1871), Alb. Arb. 16 Sol. J. 65.

(*g*) *Accidental Death Insurance, In re* (1878), 7 Ch. D. 568.

(*h*) *Hallett* v. *Dowdall* (1852), 18 Q. B. 2.

(*i*) *Sadler's Case* (1872), Alb. Arb. 16 Sol. J. 571.

law partnership might be entitled by their contracts to receive a share in the profits of the company by way of bonus or addition to their insurances and they might be so entitled without being made members of the company or being in any way liable for the debts or engagements of the partnership (*k*). The sharing in the profits of an undertaking does not in itself constitute a person a partner in the undertaking (*l*).

Corporations by royal charter or act of parliament.

Companies both mutual and proprietary were frequently incorporated by royal charter or act of parliament. Such companies became corporations and had a separate legal entity apart from the individual members thereof. The funds and property of the corporation alone were liable upon the contracts made on its behalf, and there was no individual liability of members except in so far as they had contracted to contribute to the funds of the corporation or might be made liable under the provisions of the incorporating act of parliament.

Chartered Companies Act, 1825.

In 1825 the Chartered Companies Act of that year (*m*) enacted that in any charter thereafter to be granted for the incorporation of any company or body of persons it should be lawful in and by such charter to declare and provide that the members of such corporation should be individually liable in their persons and property.

Chartered Companies Act, 1837, authorising letters patent to unincorporated companies.

The principal defect of the old common law partnership companies was that, owing to the very large number of members, actions by and against the companies became very cumbersome. It was difficult to know whom to sue or how to serve them, or to ascertain who were in fact partners. The absolutely unlimited liability of the partners for the engagements of the company was also a serious defect in that it discouraged capitalists from investing in such enterprises. The Chartered Companies Act, 1837 (*n*), was aimed at remedying these defects. It gave the Crown power by letters patent to grant to any body or company, although unincorporated, any privileges which might be granted by a charter of incorporation (*o*). Letters patent might provide that suits should be carried on in the name of one of the two officers of the company registered in that behalf in the Enrolment Office of the

(*k*) *English and Irish Church Assurance, In re* (1863), 1 Hem. & M. 85.

(*l*) Partnership Act, 1890; 53 & 54 Vict. ch. 39, sec. 2 (2).

(*m*) 6 Geo. IV. ch. 91, sec. 2.

(*n*) 7 Will. IV. and 1 Vict. ch. 73.

(*o*) Sec. 2.

Court of Chancery (*p*). The individual liability of members might be limited to the amount of their shares (*q*). A deed of partnership or association or other agreement in writing of that nature had to be executed specifying the name and style of the company, the business or purpose for which it was formed, its principal or only place of business, and the total shares and liability on each share (*r*). A return of the above particulars had to be made to the Enrolment Office of the Court of Chancery together with the names and addresses of the shareholders for registration (*s*). Shareholders were to be deemed members until the transfer of their shares should be registered. Any change in the name or place of business was to be notified to the Enrolment Office (*t*), and service of any process might be made by serving it on the clerk of the company or leaving it at the registered office (*u*). Companies incorporated by charter might also be made subject to the provisions of the Act (*x*).

Joint Stock Companies Act, 1844.

Until 1844 there was no statutory prohibition against the formation of unincorporated and unregistered common law partnerships or mutual associations, but in that year the first of the Joint Stock Companies Acts (*y*) was passed. A joint stock company is defined by the Act as meaning—

(1) Every partnership with a transferable share capital.

(2) Every assurance company or association (including friendly societies making insurances to an amount exceeding £200), whether such companies, associations, or societies be joint stock or mutual.

(3) Every partnership which at its formation or by subsequent admission should consist of more than twenty-five members.

The Act did not apply to—

Companies incorporated by charter or act of parliament.

Companies authorised by letters patent under the Chartered Companies Act, 1837, to sue and be sued in the name of a registered officer or person.

The Act provided that it should not be lawful for a joint

(*p*) Sec. 3.
(*q*) Sec. 4.
(*r*) Sec. 5.
(*s*) Sec. 21.
(*t*) Sec. 7.
(*u*) Sec. 26.
(*x*) Sec. 29.
(*y*) 7 & 8 Vict. ch. 110: amended 10 & 11 Vict. ch. 78.

stock company as therein defined thereafter to be formed to act until it should receive a certificate of registration from the Registrar of Joint Stock Companies. A certificate of registration was only granted upon the execution of a deed of settlement specifying the name of the company, its business or purpose, its principal office, the amount of its capital, the holders of shares, and the mode of dissolution. Provision was made for half-yearly returns of changes of membership and for a return of individual transfers on the request of a shareholder, and it was provided that the liability of a member should continue until the transfer of his shares should be returned (*z*). Upon complete registration the company became incorporated, and as incidental to its incorporation acquired power to use the registered name, to have a common seal, to sue and be sued in the registered name, and to perform all acts necessary for carrying into effect the purposes of the company (*a*). The acts of directors were declared valid and binding on the company notwithstanding any defect or error in appointment (*b*). Contracts made on behalf of the company were required to be in writing and signed by at least two directors and sealed with the common seal, and in the absence of such requisites the contract was void and ineffectual except as against the company on whose behalf it was made (*c*). This did not apply to deeds executed by another party creating unilateral obligations in favour of the company (*d*). All joint stock companies as defined by the Act existing before the date of the Act were enjoined to register their name, objects, and principal place of business, but such registration did not carry with it the privileges of incorporation or any other privileges conferred by the Act (*e*). Companies

(*z*) Shares not fully paid up were not transferable unless such transfer was expressly sanctioned by the Deed of Settlement.

(*a*) Sec. 25: Companies registering under this Act were first provisionally registered and did not receive complete registration until they had satisfied the registrar that all the provisions of the Act had been complied with. As the company did not become incorporated until there was complete registration, it was held that a company could not be provisionally registered with 'Corporation' as part of the registered name (*Sea, Fire and Life, In re* (1850), 14 Jur. 348), and it was also held that the company could not after complete registration change its name (*Sheffield, Rotherham Fire, In re* (1847), 10 Q. B. 839). Consequently no company registered under this Act could assume the word 'Corporation' as part of its registered name.

(*b*) Sec. 30.

(*c*) Sec. 44.

(*d*) *British Empire Assurance* v. *Browne* (1852), 12 C. B. 723.

(*e*) Sec. 58.

existing at the date of the Act (other than assurance companies) might, if fulfilling the necessary conditions, be completely registered under this Act and obtain the privileges thereof including incorporation (*f*). Judgments obtained against a company incorporated under the Act might, after due diligence had been used to obtain satisfaction from the property and effects of the company, be enforced against the property, person, and effects of any shareholder who was a shareholder at the time of the contract upon which the judgment had been obtained, provided such shareholder had not ceased to be a shareholder, and had his shares transferred, three years before the enforcement of such judgment (*g*). The liability of each shareholder upon such a judgment was unlimited (*h*), but when a shareholder was made liable he was entitled to be re-imbursed by contribution from the other shareholders (*i*).

In the same year, 1844, a supplementary Act was passed, providing for the winding up of companies incorporated under the first-mentioned Act (*j*).

In 1855 an Act was passed which enabled a company to register under the Act of 1844, with the liability of shareholders limited to the amount of their shares in the company (*k*).

In 1856 an Act was passed which for the first time introduced the method of registration with a memorandum and articles of association instead of a deed of settlement (*l*). The Act did not apply to persons associated together for the purpose of banking or insurance (*m*), but, at the same time, it repealed the Act of 1844, and the subsequent amending Acts, the repeal not to take effect as regards any company completely registered under the Act of 1844 until it should be registered under the new Act (*n*). The Act provided for the formation of an incorporated

Joint Stock Companies Act, 1856, did not apply to insurance companies but repealed the Act of 1844.

(*f*) Sec. 59.

(*g*) Sec. 66. *Woodhams* v. *The Anglo-Australian* (1863), 9 Jur. 1276.

(*h*) *Norwich Equitable Fire, In re* (1888), 58 L. T. 35.

(*i*) Sec. 67.

(*j*) 7 & 8 Vict. ch. 111; 8 & 9 Vict. ch. 98; 11 Vict. ch. 45; 12 & 13 Vict. ch. 108.

(*k*) 18 & 19 Vict. ch. 133.

(*l*) Joint Stock Companies Act, 1856; 19 & 20 Vict. ch. 47, amended 1857, 20 & 21 Vict. ch. 14.

(*m*) Sec. 2. The exemption only applied when the company was formed for the sole purpose of insurance or banking and not to companies which carried on such business in conjunction with some other business, *London Monetary Advance and Life, In re* (1858), 27 L. T. Ex. 479; *London and Provincial and Ashton* (1862), 12 C. B., N. S. 709.

(*n*) J. S. C. Act, 1856, sec. 107; 1857, sec. 23.

company by seven or more persons subscribing their names to a memorandum of association and registering the company with or without limited liability of members. It made provision for the winding-up of companies registered under the Act. It also provided that not more than twenty persons should, after November 3, 1856, carry on trade for gain unless registered as a company under the Act or authorised by act of parliament, royal charter, or letters patent, and that if any persons should do so contrary to the provisions of the Act, they should be severally liable for the whole debts of the partnership (*o*). Every company completely registered under the Act of 1844 was enjoined to register under the new Act on or before November 3, 1856, and any other company duly constituted by law was permitted to register itself under the Act with or without limited liability (*p*).

Position of companies formed after the passing of the Act of 1856.

The fact that this Act did not apply to insurance companies and yet repealed the Act of 1844, gave rise to considerable doubt as to the position of insurance companies formed after the date of the Act. The Registrar took the view that, by the Act of 1856, the Act of 1844 had been repealed as to all classes of companies, and that no insurance company could thereafter be registered under either Act. Promoters of new insurance companies were thus placed in a position of some difficulty. If they did not obtain an act of parliament, charter, or letters patent, they could only form the new company as a common law partnership or association in the same manner as such companies had been formed before 1844. In the view of the Registrar the formation of common law partnerships and associations had again become legal, but there was, nevertheless, sufficient doubt expressed in other quarters as to make the promoters of a company pause before they embarked it on what might prove to be an illegal enterprise. A certain number of new companies, however, were formed in this manner.

Amending Act, August 25, 1857.

On August 25, 1857, a short Act was passed (*q*) to clear up the difficulty, which it did by enacting that the Joint Stock Companies Acts, 1856, 1857, should not be deemed to have repealed the Act of 1844 as respects companies carrying on the business of insurance and registered thereunder or "as respects companies hereafter to be formed for the said purpose."

(*o*) J. S. C. Act, 1856, sec. 4; 1857, sec. 3.

(*p*) J. S. C. Act, 1856, sec. 110.

(*q*) 20 & 21 Vict. ch. 80.

Companies formed between July, 1856, and August, 1857.

On and after August 25, 1857, it was therefore again compulsory to form new insurance companies under the Act of 1844; but the Act of 1857 did not affect the validity of insurance companies formed as common law partnerships or associations during the interval between July 14, 1856, and August 25, 1857, and the court subsequently adopted the view which the Registrar took at the time, and held that such companies were lawfully formed, and could be wound up under the Companies Act, 1862, as unregistered companies (*r*).

Companies Act, 1862.

In 1862 the Companies Act of that year was passed (*s*). The Act applied to all companies, including insurance companies (*t*). The Act of 1844 was repealed and every insurance company completely registered thereunder was required to register itself under the new Act within thirty-one days from the passing thereof (*u*), and any company which did not so register itself was debarred from suing in any court of law or from being wound up on its own petition until registered and the officers of the company became liable to penalties (*x*). The Act of 1862 enacted that no company, association or partnership consisting of more than twenty persons should thereafter be formed for the purpose of carrying on any business that had for its object the acquisition of gain by the company association or partnership, or by the individual members thereof unless registered as a company under the Act or formed in pursuance of some other act of parliament or letters patent (*y*). This enactment applied to all insurance companies including purely mutual associations. A mutual insurance society, the members of which paid a deposit of 25*s.* per cent. on the amount of their insurance, and became severally liable to contribute rateably to losses, was held to be an association carrying on a business which had for its object the acquisition of gain to the individual members thereof (*z*). A mutual association is deemed to be formed

Illegality of unregistered partnerships and associations.

(*r*) *Bank of London and National Provincial, In re* (1871), L. R. 6 Ch. 421.

(*s*) 25 & 26 Vict. ch. 89.

(*t*) Comp. Act, 1862, sec. 176; 1900, sec. 31; 1908, sec. 245.

(*u*) Comp. Act, 1862, sec. 209.

(*x*) Ibid., sec. 210; *Waterloo Life, In re* (1862), 32 L. J. Ch. 370. A company registered compulsorily under this provision is in the same position as a company voluntarily registered under the Companies Acts, *European Assurance, In re, Ramsay's Case* (1876), 3 Ch. D. 388.

(*y*) Comp. Act, 1862, sec. 4; 1908, sec. 1.

(*z*) *Padstow Total Loss, In re* (1882), 20 Ch. D. 137; *Arthur Average Association, In re* (1875), L. R. 10 Ch. 542. But see *One and All, etc., Assurance In re* (1909), 25 T. L. R. 674.

when the association is first constituted. If the basis of association remains the same the addition after 1862 of a large number of members does not render illegal a society which was lawfully constituted before 1862 with a membership of more than twenty members (*a*). But if a society constituted before 1862 with less than twenty members increases its membership to more than twenty after 1862 it becomes an illegal association unless and until it registers (*b*). A society lawfully constituted under some act of parliament does not necessarily become illegal when such act of parliament is repealed (*c*).

What insurance companies can legally carry on business since 1862.

Since the passing of the Companies Act, 1862, a company or association consisting of more than twenty members and carrying on insurance business must be constituted in one or other of the following ways, and if constituted otherwise will be an illegal company incapable of suing; its contracts cannot be enforced against it by persons having knowledge of the illegality, and it cannot be wound up on its own petition or on the petition of any one who knowingly took part in the illegal enterprise (*d*):—

(1) Incorporated by charter.
(2) Incorporated by special act of parliament.
(3) Unincorporated but authorised by letters patent under 7 Will. IV. and 1 Vict. ch. 73.
(4) Formed before 1844 as a common law partnership or mutual association and formally registered under sec. 58 of the Act of that year.
(5) Formed between July 14, 1856, and August 25, 1857, as a common law partnership or association.
(6) Formed under the Act of 1844 and re-registered under the Companies Act, 1862.
(7) Formed as a friendly society and registered under the Friendly Societies Act.

(*a*) *Shaw* v. *Simmons* (1883), 12 Q. B. D. 117.
(*b*) *Thomas, In re* (1884), 14 Q. B. D. 379.
(*c*) *Smith's Trustees* v. *Irvine* (1903), 6 F. 99.
(*d*) *Padstow Total Loss, In re* (1882), 20 Ch. D. 137; *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225; *Shaw* v. *Benson* (1883), 11 Q. B. D. 563; *Ilfracombe Permanent Mutual, In re*, [1901] 1 Ch. 102; *South Wales Atlantic S.S. Co., In re* (1876), 2 Ch. D. 763.

(8) Formed as a trade union, whether registered or unregistered.

(9) Formed after 1862 under the Companies Acts.

Companies (Consolidation) Act, 1908.

The Companies Act, 1862, and various amending Acts are now consolidated in the Companies (Consolidation) Act, 1908 (*e*). Any seven or more persons may be incorporated under the Companies Acts as a company limited by shares or limited by guarantee or with unlimited liability (*f*).

Memorandum of association.

The company is formed by at least seven members subscribing the memorandum of association (*f*). In the case of a company limited by shares, the memorandum must state (i) the name of the company with the word "Limited" as the last word in the name; (ii) the part of the United Kingdom in which the registered office is to be situated, (iii) the objects of the company, (iv) that the liability of the members is limited, (v) the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount (*g*). In the case of a company limited by guarantee, the memorandum must state the first four of the items above mentioned, and in place of the fifth the amount which each member undertakes to contribute in the event of the company being wound up (*h*). In the case of an unlimited company the memorandum must state the first three of the items above mentioned (*i*).

Articles of association.

In the case of a company limited by shares, there may, and in the case of other companies there must, be registered with the memorandum articles of association containing the rules and regulations for the management of the company's affairs (*k*). In the case of a company limited by shares, if articles are not registered or if articles are registered in so far as they do not exclude or modify the regulations in Table A in the First Schedule of the Companies Act, those regulations shall be the regulations of the company (*l*).

Incorporation of company.

The memorandum and articles are binding on the company and on all members thereof (*m*). They are to be delivered to

(*e*) 8 Edw. VII. ch. 69.
(*f*) Comp. Act, 1908, sec. 2.
(*g*) Sec. 3.
(*h*) Sec. 4.
(*i*) Sec. 5.
(*k*) Sec. 10.
(*l*) Sec. 11.
(*m*) Sec. 14.

the Registrar of Companies in that part of the United Kingdom in which the registered office is situated, who shall register them (*n*), and upon registration shall grant a certificate of incorporation, whereupon the company becomes incorporated (*o*).

Register of members.

Subscribers of the memorandum and every other person who agrees to become a member and is entered in its register of members are members of the company (*p*). Every company must keep a register of members and in the case of a company with a share capital, a statement of the shares held by each member distinguishing each share by its number, the amount paid or agreed to be considered as paid on each share, the date on which each member was entered, and the date when any person ceased to be a member (*q*).

The share register of the company is open to inspection by members gratis, and by others on payment of a sum not exceeding one shilling (*r*).

Transfer of shares.

The shares of each member are personal estate and transferable in manner provided by the articles of association (*rr*).

Reserve capital.

A limited company may have a reserve capital to be called up only in the event of the company being wound up (*s*).

Application of profits to reduce paid capital.

A company in distributing profits may by special resolution return the same or any part thereof to the shareholders in reduction of paid-up capital, the unpaid capital being thereby increased to a similar amount (*t*).

Increase or readjustment of share capital.

A company limited by shares may, if so authorised by the articles, alter its memorandum of association by a special resolution so as to increase its share capital by the issue of new shares, or it may consolidate or divide its share capital into shares of larger amount, subdivide its shares or cancel unissued shares (*u*).

Reduction of share capital.

A company limited by shares may, by special resolution confirmed by an order of the Court, reorganise its share capital by consolidation of shares of different classes or by division of its shares into different classes (*x*) or reduce its share capital, and in particular extinguish or reduce liability on unpaid-up share capital, cancel paid-up share capital not represented by available assets or

(*n*) Sec. 15.
(*o*) Sec. 16.
(*p*) Sec. 24.
(*q*) Sec. 25.
(*r*) Sec. 30.
(*rr*) Sec. 22.
(*s*) Sec. 59.
(*t*) Sec. 40.
(*u*) Sec. 41.
(*x*) Sec. 45.

pay off any paid-up share capital (*y*). When capital is reduced the words "and reduced" must be added to the name of the company until such time as the court may fix (*z*). Creditors of a company are entitled to object to a reduction of capital, and reduction will not be confirmed by the court until they are paid off, or consent, or their debt has been secured (*a*). When the capital has been reduced there is no further liability in respect of the shares extinguished or reduced, except to such creditors of the company as can prove that they were ignorant of the reduction or of the nature thereof and had no opportunity of objecting to the reduction (*b*).

Unlimited company may subsequently register as limited.

A company registered as unlimited may subsequently register as a limited company, but debts previously contracted may be enforced against the shareholders as if the company were still unlimited (*c*).

Registered office.

Every company registered under the Companies Act must have a registered office to which all communications and notices may be addressed, and notice of the situation of the registered office, and of any change therein, must be given to the Registrar (*d*).

Name of company.

Every limited company must paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on. The name of a limited company must also be engraven on its seal and mentioned on all notices, advertisements, bills, cheques, receipts, and other documents issued by the company (*e*). The word "Limited" must form the last word in the name of every company in which the liability of the members is limited either by shares or guarantee, except in special cases where exemption has been obtained by licence from the Board of Trade (*f*).

Registers of mortgages.

Every company registered under the Companies Act is bound to keep a register of mortgages, in which every mortgage or charge on the company's capital or other assets must be entered (*g*), and the register of mortgages and copies of the instruments creating any mortgage or charge shall be open to inspection by all shareholders and creditors of the company gratis, and by any other

(*y*) Sec. 46.
(*z*) Sec. 48.
(*a*) Sec. 49.
(*b*) Sec. 50.
(*c*) Sec. 57.
(*d*) Sec. 62.
(*e*) Sec. 63.
(*f*) Secs. 3, 4, 20.
(*g*) Sec. 100.

person on payment of a fee not exceeding one shilling (*h*). The Registrar of Joint Stock Companies also keeps a register of mortgages with respect to each company, and every mortgage or charge on the company's capital or other assets is void against the liquidator, and any creditor of the company, unless particulars thereof are delivered to the Registrar of Companies for registration in manner required by the Act within twenty-one days after the date of its execution (*i*). The register of mortgages kept by the Registrar is open to inspection by any person on payment of a fee of one shilling (*i*). The entry of the required particulars in the register of mortgages is constructive notice of the mortgage or charge to subsequent incumbrancers. But the entry of the particulars of a floating charge, although constructive notice of the charge is not constructive notice of a restriction in the charge prohibiting the creation of any subsequent charge or mortgage ranking in priority or *pari passu* with the floating charge (*j*). If any person obtains an order for the appointment of a receiver or manager of the company's property or business, or appoints such receiver or manager under any power contained in any instrument, he must within seven days notify the fact to the Registrar, who will enter the fact in the register of mortgages (*k*).

Registration under Companies Acts of companies not formed thereunder.

The Companies Acts contain provisions for the registration of companies not formed thereunder. Any company consisting of seven or more members which was in existence on November 2, 1862, and any company formed after the date aforesaid in pursuance of any act of parliament, charter or letters patent, or otherwise duly constituted according to law, may, at any time, register under the Companies Act (*l*). A company with the liability of members limited by act of parliament, charter or letters patent, and not being a joint stock company, cannot be registered under these provisions (*m*). The assent of a majority of members at a general meeting is necessary before any company can be

(*h*) Sec. 101.

(*i*) Sec. 93. Where by a re-insurance agreement the monthly balances of premiums over losses were to be paid by the brokers to trustees on trust to recoup further losses and ultimately to pay the ascertained profit to the re-insurers, it was held that there was no charge on the book debts of the re-insured company, and that the agreement was valid against the liquidation, although not registered: *Law Car and General, In re* (1911), 55 Sol. J. 407.

(*j*) *Wilson* v. *Kelland*, [1910] 2 Ch. 306.

(*k*) Sec. 94.

(*l*) Sec. 249.

(*m*) Sec. 249.

so registered (*n*), and when it is proposed to register an unlimited company as a company with limited liability the consent of three-quarters of the members is necessary (*o*). When a company not formed under the Companies Acts is registered in accordance with the above provisions, all the provisions of the act of parliament, deed of settlement, or other instrument constituting or regulating the company, have the same effect as if inserted in a memorandum and articles of association, and all the provisions of the Companies Acts apply with certain specified exceptions (*p*). Table A does not apply unless adopted by special resolution (*q*). The provisions for the numbering of shares does not apply where the shares have not previously been numbered (*r*). The company has no power to alter any provision contained in an act of parliament (*s*); it has no power to alter any provision in a royal charter or letters patent with respect to the objects of the company (*t*); and it has no power to alter any provision contained in letters patent without the consent of the Board of Trade (*u*). In the winding-up of any such company every person shall be a contributory in respect of debts and liabilities contracted before registration to the same extent as if the company had not been registered (*x*). Provisions in the Companies Act relating to the registration of an unlimited company as limited, or to the power of a limited company to determine that a portion of the share capital shall not be called up except in the event of winding up, apply to such a company notwithstanding any provision to the contrary in the act of parliament incorporating the same (*y*); but nothing in the Companies Acts derogates from the power of such company to alter its constitution or regulations which may be vested in it by act of parliament (*z*). Where the instrument constituting or regulating such company is a deed of settlement, contract of copartnery or other instrument not being an act of parliament, royal charter, or letters patent, the company may by special resolution alter the form of its constitution by substituting a memorandum and articles of association (*a*).

Insurance companies not formed

Some of the provisions of the Companies Acts relating to companies in general are applied to insurance companies not

(*n*) Sec. 249 (2) (d).
(*o*) Sec. 249 (2) (e).
(*p*) Sec. 263 (i).
(*q*) Sec. 263 (ii) (a).
(*r*) Sec. 263 (ii) (b).
(*s*) Sec. 263 (ii) (c).
(*t*) Sec. 263 (ii) (e).
(*u*) Sec. 263 (ii) (d).
(*x*) Sec. 263 (ii) (f).
(*y*) Sec. 263 (iii).
(*z*) Sec. 263 (v).
(*a*) Sec. 264.

or registered under the Companies Acts.

registered under the Companies Act by the Assurance Companies Act, 1909, which is dealt with fully in Section II. of this chapter.

Friendly Societies Act, 1896.

A large volume of insurance in small amounts is effected with friendly societies. Such societies have long been controlled by statutory provisions. The earliest Friendly Societies Act was passed in 1793 (*b*), and was followed by numerous amending Acts during the nineteenth century. These enactments were consolidated in 1875 (*c*) and again in 1896. The Friendly Societies Act, 1896, as amended by the Act of 1908, contains the present statutory provisions (*d*).

Registrars of Friendly Societies.

The affairs of all societies registered under the Act are controlled by the Chief Registrar and Assistant Registrars, who together constitute the Central Office (*e*). An Assistant Registrar is appointed for Scotland and Ireland respectively, and the Assistant Registrars exercise in those countries most of the functions of the Chief Registrar in England (*f*).

Societies which may be registered.

Societies which may be registered under the Act are, friendly societies, cattle insurance societies, benevolent societies, working men's clubs, and certain specially authorised societies (*g*). Of these friendly societies and cattle insurance societies alone may be considered as companies carrying on insurance business.

Friendly societies defined.

Friendly societies are defined in the Act (*h*) as societies for the purpose of providing by voluntary subscriptions of the members thereof, with or without the aid of donations, for

(*a*) the relief or maintenance of members and relations during sickness, old age, widowhood, etc.

(*b*) insuring money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member (*hh*), or of the widow of a deceased member, or, as respects persons of the Jewish persuasion, for the payment of a sum of money during the period of confined mourning.

(*b*) 33 Geo. III. ch. 54.
(*c*) 38 & 39 Vict. ch. 60.
(*d*) 59 & 60 Vict. ch. 25; amended 8 Edw. VII. ch. 32.
(*e*) F. S. Act, 1896, secs. 1, 2.
(*f*) Sec. 8.
(*g*) Sec. 8 (1).
(*h*) Sec. 8 (2).
(*hh*) Such insurances are accordingly authorised by law although made without interest within the meaning of 14 Geo. III. ch. 48. *Vide infra*, pp. 159, 160.

(*c*) the relief or maintenance of members when on travel in search of employment, or in case of shipwreck, or for loss or damage to boats or nets.

(*d*) the endowment of members or nominees of members.

(*e*) insurance against fire to any amount not exceeding £15 of the tools or implements of the trade or calling of members.

Amount of insurance limited.

A society which contracts with any person for the insurance of an annuity exceeding £52 per annum, or of a gross sum exceeding £300, cannot be registered (*i*).

Cattle insurance societies defined.

Cattle insurance societies are defined (*j*) as societies for the purpose of insurance to any amount against loss of neat cattle, sheep, lambs, swine, horses, or other animals by death from disease or otherwise.

Conditions of registration.

A society in order to be registered must consist of at least seven members (*k*). The application for registration must be signed by seven members and the secretary, and must be accompanied by a copy of the rules of the society, and a list of the names of the secretary, and of every trustee or other officer appointed under the rules to sue and be sued on behalf of the society (*k*).

Rules.

The rules shall state the name and place of office of the society, the objects of the society and conditions of membership, and shall contain provisions as to the mode of holding meetings and altering the rules, the appointment of a committee of management and other officers, the relative powers of the central body and any branches of the society, the investment of funds, the keeping and auditing of accounts, annual returns to the Registrar of the society's affairs, the inspection of the society's books and the manner of settling disputes (*k*). The rules of every friendly or cattle insurance society shall also contain provisions for the keeping of separate accounts in respect of the separate classes of benefits assured, and of the expenses of management, for the voluntary dissolution of the society by consent of not less than five-sixths in value, (or in the case of a cattle insurance society three-fourths in number) of the members,

(*i*) The Act by sec. 8 (1) says £50 and £200, but this is inconsistent with sec. 41, where the maximum amount payable to a member is now (as amended by the Act of 1908) £52 annuity and £300 lump sum, and presumably sec. 8 (1) ought to be read as amended accordingly.

(*j*) Sec. 9.

(*k*) Schedule I.

and of every person entitled to benefit, whose claim is not satisfied or provided for, and for the right of the members to apply to the Registrar for an investigation of the society's affairs or winding up the same (*k*). The rules of every friendly society shall also provide for a quinquennial valuation of the assets and liabilities of the society (*k*). No alteration of the rules is valid until the alteration is registered (*l*). Every registered society or branch shall deliver to any person on demand on payment of a sum not exceeding one shilling a copy of the rules of the society or branch (*m*).

List of branches.

When the society has branches, a list of such branches and of the place of office of each branch must be sent to the Registrar (*n*).

Trustees.

Every registered society or branch must have one or more trustees (*o*).

Annuity tables to be certified.

A society assuring a certain annuity shall not be entitled to registration unless the tables of contributions are certified by the actuary of the National Debt Commissioners, or by some other actuary approved by the Treasury (*p*).

Subscriptions not recoverable at law.

The subscriptions of members of a registered friendly society are not recoverable at law (*q*), but the subscriptions of members of a registered cattle society are recoverable (*r*).

Limitation of amounts recoverable.

The Act contains special provisions limiting the amount of benefit which any member is entitled to receive to £52 annuity or £300 lump sum from any friendly society or societies (*s*), and in the case of children limiting the amount payable on the death of any child to £6 where the child is under 5 years of age and to £10 where the child is over 5 but under 10 years of age (*t*).

Nomination.

The Act enables a member to dispose, by nomination, of sums payable on his death not exceeding £100 (*u*).

Proof of claims.

The Act provides for the proof of claims and the payment thereof to or on behalf of the persons entitled (*x*) and in particular for the distribution without administration of a fund payable on the death of a member who has made no nomination and has died intestate (*y*) and for the payment of estate duty when death benefits are paid without probate or administration (*z*).

(*k*) Schedule I.
(*l*) Sec. 13.
(*m*) Sec. 38.
(*n*) Sec. 17.
(*o*) Sec. 25.
(*p*) Sec. 16.
(*q*) Sec. 23.
(*r*) Sec. 31.
(*s*) Sec. 41.
(*t*) Secs. 62, 67, 84 (f).
(*u*) Sec. 56.
(*x*) Secs. 56, 60, 61, 63, 64, 67.
(*y*) Sec. 58.
(*z*) Sec. 59.

Disputed claims must be decided by arbitration or otherwise as directed by the rules of the society or branch (*a*). Arbitration.

The Act also provides for and regulates the making of advances or loans to members (*b*). Loans to members.

The policies, receipts, and certain other documents issued by a registered society are exempt from stamp duties (*c*). Exemption from stamp duty.

The Registrar may cancel the registration of a society on the request of the society; or with the approval of the Treasury on proof to his satisfaction that registration has been obtained by fraud or mistake, or that the society exists for an illegal purpose, or has wilfully violated the provisions of the Act, or has ceased to exist (*d*). The Registrar may also suspend the registration instead of cancelling it (*d*). On cancellation or suspension the society shall cease to enjoy the privileges of the Act but without prejudice to the claims of members against the society (*d*). Cancellation of society's registration.

The Act also contains provisions enabling a registered society by special resolution to make an agreement for an amalgamation or transfer of its engagements (*e*) or to convert itself into a company under the Companies Act (*f*). After having been converted into a company it can, like any other registered company, apply to the court for an extension of its objects (*g*). Where a society was in fact registered with larger objects than those defined by its constitution as a friendly society, the Court held that, as the certificate of registration was conclusive, the fact that it ought not to have been so registered was not material, and that it must be deemed to possess the extended powers (*h*). A registered society may, by special resolution, convert itself into a branch of any other registered society (*i*), or may by special resolution and the approval in writing of the Chief Registrar change its name (*j*). Amalgamation, transfer, or conversion.

A registered society or branch may contribute to the funds and take part in the government of another registered society or branch (*k*). When a society contributes to the funds of a medical society the society shall not withdraw from contributing to the Society's contributions to funds of another society.

(*a*) Sec. 68. *Catt* v. *Wood*, [1910] A. C. 404.

(*b*) Secs. 45, 46.

(*c*) Sec. 33.

(*d*) Sec. 77.

(*e*) Sec. 70.

(*f*) Sec. 71. *Wilkinson* v. *City of Glasgow Friendly Society*, [1911] 1 S. L. T. 86.

(*g*) *Blythe* v. *Birtley*, [1910] 1 Ch. 228.

(*h*) *M'Glade* v. *Royal London Mutual*, [1910] 2 Ch. 169.

(*i*) Sec. 73.

(*j*) Sec. 69.

(*k*) Sec. 22.

funds of such medical society except on three months' notice and payment of all contributions accrued or accruing due to the date of the expiration of the notice (*k*).

Trade Union Acts.

A very large amount of small insurance is also effected with Trade Union Societies. At common law the majority of such societies were illegal as being formed for purposes which were held to be in restraint of trade (*l*). All contracts made with such societies were accordingly void and unenforceable, and the members were probably liable to be prosecuted for conspiracy. The Trade Unions Acts, 1871 (*m*) and 1876 (*n*) were passed to protect the members of such societies from criminal proceedings and to provide machinery for controlling their affairs.

Agreements to pay benefits are unenforceable where the union is in restraint of trade.

The Act of 1871 provides that the purposes of any trade union shall not by reason merely that they are in restraint of trade be deemed to be unlawful so as to render any member liable to criminal prosecution (*o*), or so as to render void or voidable any agreement or trust (*p*), but nothing in the Act is to enable any court to entertain any legal proceeding in respect of (*inter alia*) any agreement for the payment by any person of any subscription or penalty to a trade union or for the application of the funds of a trade union to provide benefits for members or any agreement made between one trade union and another (*q*). The result of those provisions is that the acts of the trustees and officers of a union in the administration of the funds in accordance with the rules thereof are rendered legal notwithstanding that the purposes of the union may be in restraint of trade. As regards the contracts of members to pay contributions, or of the union or of the trustees thereof to pay benefits, such contracts are left in the same position as they were before the Act was passed, that is to say, if they would have been unenforceable at common law because the purposes of the trade union are illegal, as being in restraint of trade or

(*k*) Sec. 22.

(*l*) *Nordenfelt* v. *Maxim Nordenfelt Co., Ltd.*, [1894] A. C. 535.

(*m*) 34 & 35 Vict. ch. 31.

(*n*) 39 & 40 Vict. ch. 22.

(*o*) T. U. Act, 1871, sec. 2.

(*p*) Sec. 3.

(*q*) Sec. 4. An agreement by a member to refund a benefit in the event of his resuming work is not an agreement covered by this section (*Baker* v. *Ingall*, [1911] 2 K. B. 132; *Wilkie* v. *King*, [1911] 2 S. L. T. 206).

otherwise they remain unenforceable (*r*), but if the purposes of the trade union are not in restraint of trade and are otherwise legal they are enforceable as before (*s*).

Registration of trade unions.

The Trade Union Acts provide for the registration of trade unions under those Acts and the Registrars are the Registrars under the Friendly Societies Act (*t*). The provisions of the Friendly Societies Act (except as hereinafter mentioned), the Industrial and Provident Societies Acts and the Companies Acts do not apply to a trade union, and any registration of a trade union under any of those Acts is void (*u*).

Conditions of registration.

Any seven or more members of a trade union may by subscribing their names to the rules of the union register under the Acts, but if any purposes of the trade union be unlawful the registration is void (*x*). Printed copies of the rules of the union together with a list of the titles and names of the officers must be sent to the Registrar with the application to register (*y*).

Rules.

The rules shall state the name of the trade union and the place of meeting for the business of the trade union, the objects of the union and conditions of membership, and shall contain provisions as to the manner of altering the rules, the appointment of a committee of management and other officers, the investment of funds, the periodical auditing of accounts, the inspection of the books of the trade union and the manner in which the union may be dissolved (*z*). The union must have a registered office to which all communications and notices may be addressed and notice must be given to the Registrar of any change (*a*). All the funds and property of the union are vested in the trustees for the time being, and the trustees or any other officer authorised thereto by the rules are empowered to bring or defend any action or proceeding (*b*); but the trustees are only liable in respect of the money received by them (*c*).

Cancellation of registration.

The Registrar may cancel the registration of a union at the request of the trade union, or on proof to his satisfaction that a

(*r*) *Rigby* v. *Connol* (1880), 14 Ch. D. 482.

(*s*) *Swaine* v. *Wilson* (1889), 24 Q. B. D. 252; *Osborne* v. *Amalgamated Society*, [1911] 1 Ch. 540.

(*t*) T. U. Act, 1871, sec. 17.

(*u*) Sec. 5.

(*x*) Sec. 6.

(*y*) T. U. Act, 1871, sec. 13; 1876, sec. 6. A copy of all alterations in the rules must be sent to the Registrar each year with the annual accounts of the Union, 1871, sec. 16.

(*z*) T. U. Act, 1871, sec. 14, Sched. I.

(*a*) Sec. 13.

(*b*) Sec. 9.

(*c*) Sec. 10.

certificate of registration has been obtained by fraud or mistake or that any of the purposes of the union are illegal or that such trade union has wilfully violated the provisions of the Acts or has ceased to exist. On cancellation the union shall cease to enjoy the privileges of a registered trade union but without prejudice to claims which may be enforced against it (*d*).

Disposition of benefits by nomination.

The Act also contains provisions enabling a member to nominate any person to whom any sum payable at his death not exceeding £100 may be paid (*e*).

Payments on the death of children.

The provisions of the Friendly Societies Act relating to the payment of money upon the death of any child apply to any trade union registered or unregistered which insures or pays money on the death of a child under the age of 10 years (*f*).

Amalgamation.

The Acts also contain provisions for the amalgamation of trade unions (*g*).

Contributions to funds of medical society.

The provisions of sect. 22 of the Friendly Societies Act as to the withdrawal of contributions to a medical society apply to trade unions (*h*).

Collecting societies and industrial assurance companies.

Collecting societies and industrial assurance companies are made the subject of special statutory provision designed for the protection of the insurers who being mainly persons in humble circumstances are easily imposed upon by unscrupulous agents. Those provisions are now consolidated in the Collecting Societies and Industrial Assurance Companies Act, 1896 (*i*). The Act applies to every friendly society or branch whether registered or unregistered (referred to as a collecting society) and to every person or body of persons granting assurance on any one life for a less sum than £20 (*k*) (referred to as an industrial assurance company) which in either case receives contributions or premiums by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the society or company and in the case of an industrial assurance company at less periodical intervals than two months (*l*).

(*d*) T. U. Act, 1876, sec. 8.
(*e*) Sec. 10; 46 & 47 Vict. ch. 47.
(*f*) Sec. 2. *Vide supra*, p. 18.
(*g*) Sec. 13.
(*h*) F. S. Act, 1896, sec. 22.
(*i*) 59 & 60 Vict. ch. 26.
(*k*) See *Cowling* v. *Topping*, [1906] 1 K. B. 466.
(*l*) Coll. Soc. Act, 1896, sec. 1.

Obligation to deliver rules with policy.

The societies or companies to which the Act applies must deliver to every person on becoming a member or insuring a copy of the rules and a printed policy signed by two of the committee of management and by the secretary (*m*). In the case of a family enrolled on one book or card one copy of the rules and one family policy is sufficient for the family (*n*). Every collecting society registered after December 1, 1895, must have the words "Collecting Society" as the last words in the name (*o*).

Non-forfeiture of policy without notice of default in payment of premium.

No policy issued by a collecting society or industrial insurance company can be forfeited for default in payment of any contribution until after notice has been sent to the member that the amount is due and that in default of payment within a reasonable time (not less than fourteen days) his interest or benefit will be forfeited and default has been made in accordance with the notice (*p*).

Insurance not to be transferred to another company without written consent.

No member insured with a collecting or industrial assurance company may be made a member of any other such society or company without his written consent except in the case of an amalgamation or transfer of the business of the society or company under the provisions of the Friendly Societies Act or the Assurance Companies Act (*q*). Any society or company to which an insurance is sought to be transferred shall within seven days give notice in writing to the society or company from which it is sought to be transferred (*r*).

Provisions of Act to be set forth in rules.

The provisions of the Act, secs. 1 to 9 inclusive, must be set forth in the rules of every collecting society and of every industrial assurance company so far as they are applicable (*s*).

Arbitration.

Provision is made for the settlement of disputes by the County Court or a court of summary jurisdiction, anything in the society's rules to the contrary notwithstanding (*t*).

Certificate of exemption of society from above provisions.

The Chief Registrar of Friendly Societies, upon the application of a collecting society registered or applying for registration, may with the approval of the Treasury grant a certificate exempting such society from the necessity of complying with the provisions of secs. 1 to 10 inclusive of the Act (*u*).

(*m*) Sec. 2 (1).
(*n*) Sec. 2 (2).
(*o*) Sec. 9.
(*p*) Sec. 3.
(*q*) Sec. 4 (1).
(*r*) Sec. 4 (2).
(*s*) Sec. 10.
(*t*) Sec. 7. The jurisdiction in respect of policies issued by an industrial insurance company is limited to policies granted for a less sum than £20: *Cowling* v. *Topping*, [1906] 1 K. B. 466.
(*u*) Sec. 11.

Payments on the death of children.

The provisions of the Friendly Societies Act relating to payments on the death of children under 10 years of age apply to all friendly societies whether registered or unregistered and are by this Act extended to all industrial assurance companies without reference to whether or not they receive premiums by means of collectors or at short periodical intervals (*x*). An insurance effected on the life of a child with an industrial assurance company which would have been valid if effected by a registered friendly society is not to be deemed invalid by reason of being made without interest or otherwise contrary to 14 Geo. III. ch. 48 (*a*).

Conversion of collecting society into company under the Companies Act.

By the Assurance Companies Act, 1909 (*b*), it is provided that the committee of management of any collecting society having more than 100,000 members may petition the Court for its conversion into a mutual company under the Companies Act. Notice of the intention to present the petition must be published in the *Gazette* and in such newspapers as the Court thinks fit, and before making the order the Court must be satisfied on a poll being taken that at least 55 per cent. of the members consent to the conversion.

Section II.—Deposit and Accounts

Albert Life and European liquidations.

About the year 1868, the confidence of the insuring public was very considerably shaken by the failure of two large insurance companies, the Albert Life Assurance Company and the European Assurance Society. Each of these companies had previously absorbed the businesses of a very large number of smaller offices. The investigation and winding-up of their affairs was consequently a matter of enormous complication, and the then state of the law and the machinery provided by the Courts were wholly inadequate to cope with the unprecedented situation. A special Act of Parliament was passed in respect of each company, providing for the appointment of an arbitrator with wide discretionary power to adjudicate upon all questions arising in the course of the winding-up, and to decide them either according to law or in such manner as he should think fit, equitable, and expedient (*c*). The arbitrator

(*x*) Sec. 13 (1). *Vide supra*, p. 18.
(*a*) Sec. 13 (2). *Vide supra*, p. 16.
(*b*) Ass. Comp. Act, 1909, sec. 36 (4).
(*c*) Albert Arbitration Act, 1871, 34 & 35 Vict. ch. xxxi. European Arbitration Act, 1872, 35 & 36 Vict. ch. cxlv.

was given power to state a case for the opinion of the Court of Appeal in Chancery, but he was not compellable to do so, and otherwise no appeal lay from his decisions. Lord Cairns was appointed arbitrator in the Albert arbitration. Lord Westbury was appointed arbitrator in the European arbitration, and on his death Lord Romilly was appointed arbitrator. The decisions of those arbitrators are reported in Reilly's reports of the arbitration proceedings, and also in the *Law Times* and *Solicitors' Journal*. The decisions are not binding on the Court as judicial decisions, but they will, nevertheless, be regarded by all Courts with considerable deference as the decisions of very eminent judges, in whose capacity the Legislature had so great confidence as to give them authority paramount to all the Courts of law and equity (*d*).

Life Assurance Companies Acts, 1870, 1871 and 1872.

More or less as a direct consequence of the Albert and European liquidations the Life Assurance Companies Act of 1870 (*e*) was passed and was followed by amending Acts in 1871 (*f*) and 1872 (*g*). In order to prevent a repetition of such gigantic failures and of the misery and loss involved thereby, every company which might thereafter establish a life assurance business in the United Kingdom was compelled to deposit a sum of £20,000 in the Court of Chancery as a security for policy-holders, such sum to remain deposited until the company should have accumulated a life assurance fund of £40,000 (*h*). Upon proof that it had accumulated such a fund, it was entitled to withdraw the deposit (*h*). Every life assurance company not registered under the Companies Acts was required to keep a shareholders' address-book pursuant to sec. 10 of the Companies Consolidation Act, 1845, and to furnish a copy to each shareholder or policy-holder on application. Every such company was required to keep printed copies of its deed of settlement, and to furnish a copy to any shareholder or policy-holder on application. Provision was also made for the preparation and audit of accounts and for official investigation into the affairs of any life assurance company. Amalgamation of life assurance companies or the transfer of their business and engagements from one company to another was made

(*d*) *Blakely Ordnance, In re, Brett's Case* (1873), L. R. 8 Ch. 800.
(*e*) 33 & 34 Vict. ch. 61.
(*f*) 34 & 35 Vict. ch. 58.
(*g*) 35 & 36 Vict. ch. 41.
(*h*) Life Assurance Companies Act, 1870, sec. 3.

subject to the sanction of the Court. The Acts also provided specially for the winding-up of insurance companies, and where one company had absorbed one or more other companies, provided that the principal and subsidiary companies might be wound up together.

Extended to employers' liability.

By the Employers' Liability Insurance Companies Act, 1907 (*i*), now repealed but substantially re-enacted in the Assurance Companies Act, 1909, the provisions of the Life Assurance Companies Acts, 1870 to 1872 were applied *mutatis mutandis* to companies carrying on the business of employers' liability insurance.

Assurance Companies Act, 1909.

By the Assurance Companies Act, 1909 (*k*) the Life Assurance Companies Acts, 1870 to 1872 are consolidated, and the principal provisions thereof are applied to practically all insurers other than companies and individuals insuring only marine risks. The Act specifies five classes of insurance business, viz. (1) life assurance, (2) fire insurance, (3) accident insurance, (4) employers' liability insurance, and (5) bond investment business. Subject to the undermentioned exceptions the general provisions of the Act, with certain modifications and additions in respect of each class, are applied to every individual insurer or company carrying on any one or more of such classes of business within the United Kingdom and to any company registered under the Companies Acts carrying on such business in any part of the world (*l*). The Act does not apply to the following individuals, companies, and associations :—

Classes of business to which it applies.

Companies and individuals exempt from the general provisions thereof.

(1) Friendly Society registered under the Friendly Societies Acts (*m*).

(2) Unregistered Friendly Society to which the Board of Trade has given special exemption (*n*).

(3) Trade Union registered under the Trade Union Acts (*o*).

(4) Unregistered Trade Union established more than twenty years before the passing of the Assurance Companies Act, 1909, to which the Board of Trade has given special exemption (*p*).

(*i*) 7 Edw. VII. ch. 46.
(*k*) 9 Edw. VII. ch. 49.
(*l*) Ass. Comp. Act, 1909, sec. 1.
(*m*) Secs. 1, 2.
(*n*) Sec. 35.
(*o*) Sec. 1; Trade Union Act, 1876, sec. 7.
(*p*) Ass. Comp. Act, 1909, sec. 35.

(5) National Debt Commissioners or the Postmaster-General acting under the Government Annuities Acts or the Post Office Savings Banks Acts (*q*).

(6) Member of Lloyd's or any other association of underwriters approved by the Board of Trade, who complies with the requirements of Schedule VIII. of the Act (*r*).

The five classes of insurance business to which the Act applies are specially defined as follows:—

Life assurance business defined.

Life assurance business is defined as the issue of or the undertaking of liability under policies of assurance upon human life, or the granting of annuities upon human life (*s*). Policy on human life means any instrument by which the payment of money is assured on death (except death by accident only), or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life (*t*). An endowment policy assuring a sum payable in the event of the assured attaining a specified age is a policy of assurance upon human life whether or not any sum is payable in the event of earlier death (*u*). An ordinary policy against sickness or accident does not, however, become a life policy merely because there is an incidental provision that in the event of the policy continuing in force without any claim having been made until the assured attains a specified age, the company will return a certain proportion of the annual premiums (*v*). There is no policy of assurance on human life unless the money is assured by some written document. Where a friendly society collected contributions through collectors who entered the names of the contributors and the amounts collected on a card, and there was no other record of the transaction, except such card and the corresponding entries in the society's books, it was held that the society did not issue policies, and was not therefore a life insurance company within the meaning of the Life Assurance Companies Act, 1870 (*x*). A tea company undertaking to give pensions

(*q*) Sec. 28 (1).

(*r*) Sec. 28 (2). At present no association of underwriters other than Lloyd's has been approved by the Board of Trade so as to entitle its members to the benefit of this exemption.

(*s*) Sec. 1 (a).

(*t*) Sec. 30 (a).

(*u*) *Prudential Insurance* v. *Inland Revenue*, [1904] 2 K. B. 658.

(*v*) *General Accident* v. *Inland Revenue* (1906), 43 S. L. R. 367.

(*x*) *Newbold Friendly Society* v. *Barlow*, [1893] 2 Q. B. 128.

to their customers during their widowhood was held, under the Act of 1870, to be liable to make a deposit as a company granting annuities upon human life (*y*). But the expression "annuities on human life" does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged, or who have been engaged in any particular profession, trade, or employment, or of the dependents of such persons (*z*). Any business, however, carried on by an assurance company which, under the provisions of any special Act relating to that company, is to be treated as life assurance business, shall continue to be so treated, and shall not be deemed to be other business, or a separate class of insurance business (*a*).

Fire insurance business defined.

Fire insurance business is defined as the issue of or undertaking liability under policies of insurance against loss by or incidental to fire (*b*). A policy includes any document which evidences a contract to insure against such risks (*c*); but a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy (*d*). The object of this saving clause is to exclude from the operation of the Act such policies as marine insurance policies, which merely insure against fire as an incident of a much wider risk.

Accident insurance business defined.

Accident insurance business is defined as the issue of or the undertaking of liability under policies of insurance upon the happening of personal accidents, whether fatal or not, disease, or sickness, or any class of personal accidents, disease, or sickness (*e*). An insurance policy indemnifying third parties against liability for accident is not an accident policy (*f*).

Employers' liability insurance business defined.

Employers' liability insurance business is defined as the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment (*g*), but the Act does not apply to such business when carried on by an association of employers which satisfies the Board of Trade that it is established wholly or mainly for mutual insur-

(*y*) *Nelson & Co.* v. *Board of Trade* (1901), 17 T. L. R. 456.
(*z*) Ass. Comp. Act, 1909, sec. 29.
(*a*) Sec. 30 (g).
(*b*) Sec. 1 (b).
(*c*) *Norwich Equitable Fire* v. *Royal* (1887), 57 L. T. 241.
(*d*) Sec. 23 (3).
(*e*) Sec. 1 (c).
(*f*) *Lancashire Ins. Co.* v. *Inland Revenue*, [1899] 1 Q. B. 353.
(*g*) Ass. Comp. Act, 1909, sec. 1 (d).

ance against employers' liability or other risks incident to their trade or industry (*h*), nor to such business when carried on as incidental only to the business of marine insurance by issuing marine policies or policies in the form of marine policies covering employers' liability risks as well as the ordinary marine risks (*i*), nor to such business when carried on outside the United Kingdom (*k*).

Bond investment business defined.

Bond investment business is defined as the business of issuing bonds or endowment certificates by which the company in return for subscriptions payable at periodical intervals of two months or less contract to pay the bond holder a sum at a future date, and not being life assurance business as hereinbefore defined (*l*).

Obligation to make and keep a deposit of £20,000.

Subject to the exceptions and modifications mentioned below, every insurance company or insurer to which the Assurance Companies Act applies is required to make and keep a deposit of £20,000 with the Paymaster-General for and on behalf of the Supreme Court in respect of each of the five classes of insurance business to which the Act applies which is carried on by such company or insurer (*m*). Companies carrying on a life business which having commenced life business before 1870 had never made a deposit, or which had made a deposit, and, on accumulating an assurance fund of £40,000, had withdrawn it under the provisions of the old Acts, are required to make or renew the deposit (*n*). No company is required to make a deposit in respect of fire, accident or bond-investment business where such business has been established in the United Kingdom before December 3, 1909 (*o*), or in respect of employers' liability business where such business has been established in the United Kingdom before August 28, 1907 (*p*). No company is required to make a deposit in respect of fire or accident business where such company has already made a deposit in respect of any other class of insurance business (*q*), and where a deposit has been made in respect of fire

(*h*) Sec. 33 (1) (a).
(*i*) Sec. 33 (1) (b).
(*k*) Sec. 33 (1) (i).
(*l*) Sec. 1 (e).
(*m*) Sec. 2 (1); English and Scottish companies make the deposit with the High Court of Justice in England; Irish companies with the High Court of Justice in Ireland.
(*n*) Sec. 30 (c).
(*o*) Secs. 31 (b), 32 (b), 34 (b).
(*p*) Sec. 33 (1) (d).
(*q*) Secs. 31 (d), 32 (c).

or accident business, it may be transferred to the account of any life or employers' liability business which the company may thereafter establish (*r*). No deposit is required to be made in respect of fire insurance business where the company is an association of owners or occupiers of property which satisfies the Board of Trade that it is carrying on the business wholly or mainly for the purpose of the mutual insurance of its members (*s*).

Where a life company established in 1866 found itself unable to make the necessary deposit owing to the fact that it had recently transferred the larger part of its business to another company the directors and officers of the company resigned. On the motion of a policy-holder the Court appointed a receiver to collect the premiums and receive the dividends on the life assurance trust fund and gave liberty to apply with reference to the payment of any policies which might mature (*t*).

Deposit in certain cases to form part of a separate insurance fund.

In the case of life insurance business, employers' liability insurance business, or bond investment business, if the company transacts any other business than the one class of insurance business in respect of which it was deposited, the deposit shall form part of a separate insurance fund which must be kept as the security of the policy-holders in that class (*u*).

Manner of making the deposit.

The deposit is made either by the company required to make the deposit or by the subscribers of the memorandum of association of a company in process of formation (*x*). The depositors must make an application to the Board of Trade for a warrant authorising them to make the deposit (*y*). The warrant shall authorise the lodgment of the money either in cash or in the option of the depositors in any stocks, funds or securities in which cash under the control of the Court may for the time being be invested (*z*). The warrant shall also in the case of a deposit made in respect of life insurance business, employers' liability business, or bond investment business by a company which transacts any

(*r*) Ass. Comp. Act, 1909, secs. 31 (d), 32 (c); Rules 1910, A. 6 (a).

(*s*) Sec. 31 (c).

(*t*) *Cryer* v. *Universal Insurance* (1910), The Times Newspaper, July 8.

(*u*) Secs. 2 (4), 3, 31 (e), 32 (d). There is, however, apparently no method of realising the security except in a winding-up.

(*x*) Sec. 2 (3); no certificate of incorporation of a new insurance company formed under the Companies Acts will be granted until the necessary deposit has been made. Sec. 2 (3).

(*y*) Sec. 2 (5).

(*z*) Sec. 2 (6); Rules, 1910, A. 2.

other business specify the particular insurance business in respect of which the deposit is made (*a*). When the depositor has obtained the necessary warrant the deposit is made in accordance with the terms thereof at the Bank of England (Law Courts Branch) and the cash or securities are placed to the account of the Paymaster-General for and on behalf of the Court and to the credit of the company, and when the deposit is made in respect of life insurance business, employers' liability business, or bond investment business by a company carrying on any other business it is marked accordingly to a special ledger credit (*b*).

Application to Court for order as to investment of deposit and payments of interest.

When a deposit of cash or securities has been made the company may apply to the Court for an order as to the investment thereof or as to the payment of the interest, dividends, or income accruing due thereon. Upon such application the Court may order any deposit to be invested in such stocks, funds, or securities in which cash under the control of or subject to the order of the Court may for the time being be invested as the applicants desire or the Court thinks fit either by way of original investment or by way of variation of investment, and may order payment to the company of the interest, dividends, or income (*c*).

Investment in trust securities other than those authorised by the rules of Court.

The rules under the old Life Assurance Companies Acts provided that the deposit might be invested "as the applicants desire and the Court thinks fit." Under those rules it was decided that an investment might be made in a security authorised by the Trust Investment Act, 1889, although such security was not among the securities authorised by the rules of Court for the investment of cash under the control or subject to the order of the Court (*d*). By the rules under the present Act the scope of investment is confined to the securities authorised by the rules of Court. These are—

Authorised securities.

Two and Three-quarters per Cent. Consolidated Stock (to be called after the 5th of April, 1903, Two and a Half per Cent. Consolidated Stock):
Consolidated Three Pounds per Cent. Annuities:
Reduced Three Pounds per Cent. Annuities:
Two Pounds Fifteen Shillings per Cent. Annuities:
Two Pounds Ten Shillings per Cent. Annuities:
Local Loans Stock under the National Debt and Local Loans Act, 1887:
Exchequer Bills:
Bank Stock:

(*a*) Rules, 1910, A. 3.
(*b*) Rules, 1910, A. 1, 2, 3.
(*c*) Sec. 2 (2); Rules, 1910, A. 4.
(*d*) *Blue Ribbon Life, In re* (1889), 59 L. J. Ch. 276.

India Three and a Half per Cent. Stock:

India Three per Cent. Stock:

India Two and a Half per Cent. Stock:

Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment:

Stocks of Colonial Governments guaranteed by the Imperial Government; or in respect of which the provisions of the Colonial Stock Act, 1900, and of section 2 (2) of the Trustee Act, 1893, are for the time being complied with:

Mortgage of freehold and copyhold estates respectively in England and Wales:

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.:

Three per Cent. Metropolitan Consolidated Stock:

Two and a Half per Cent. Metropolitan Consolidated Stock:

Two and a Half per Cent. London County Consolidated Stock:

Three per Cent. London County Consolidated Stock:

London County Council 3½ per Cent. Stock:

Inscribed 2½ per Cent. Debenture Stock issued by the Corporation of London, and secured by a trust deed dated 24th of June, 1897:

Inscribed 3 per Cent. Debenture Stock issued by the Corporation of London, and secured by a supplemental trust deed dated 1st June, 1905:

Debenture, preference, guaranteed, or rentcharge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares:

Debenture, preference, guaranteed, or rentcharge stocks of railways in Great Britain or Ireland guaranteed by Railway Companies owning railways in Great Britain or Ireland which have for ten years next before the date of investment paid a dividend on ordinary stock or shares:

Nominal debentures or nominal debenture Stock under the Local Loans Act, 1875, or under the Isle of Man Loans Act, 1880, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment:

Guaranteed Land Stock issued under the Act 54 & 55 Vict. ch. 48:

Guaranteed 2¾ per Cent. Stock issued under the Act 3 Edw. VII. ch. 37:

Guaranteed 3 per Cent. Stock issued under the Act 9 Edw. VII. ch. 42.

Depreciation of securities deposited.

There is no specific provision in the Assurance Companies Act for any additional deposit in the event of depreciation in the value of the securities deposited. It may be said that the provision that the company shall make and keep a deposit of £20,000 implies an obligation to keep the deposit at the actual value of £20,000. It is submitted that on the true construction of the Act a company is not required to supplement its deposit in the event of depreciation. The absence of machinery for doing so is significant and the obligation to "keep" a deposit merely means that the deposit which has been made in accordance with the provisions of the Act must be kept deposited and cannot be withdrawn except when specially provided by the Act (*dd*).

(*dd*) The Board of Trade has officially expressed the opinion that this is the correct interpretation of the Act; J.I.A. vol. xlv. p. 335.

Withdrawal or transfer of deposit.

Every assurance company which is required to make a deposit must always keep at least one sum of £20,000 in deposit.

A deposit made in respect of life assurance business forms a permanent part of the life assurance fund and can never be withdrawn or transferred to the credit of any other class of insurance business. A deposit made in respect of employers' liability insurance or bond investment business may be withdrawn by the depositor when an insurance fund of £40,000 has been accumulated in respect of that business, and a deposit has been made by the company in respect of some other class of business (*e*); or, when an insurance fund of £40,000 has been accumulated in either of the classes of business just mentioned, and the company intends to commence another class of insurance business, the deposit may be transferred to the credit of such new business, or apparently where the new business is fire or accident business the deposit may be transferred to the general credit of the company (*f*). Where a foreign company makes a deposit for the purpose of transacting employers' liability insurance or bond investment business in the United Kingdom, the company may obtain repayment or transfer of the deposit by showing that the assurance fund of the company appropriated to the particular class of business in respect of which the deposit is made amounts to £40,000, notwithstanding that the fund consists of accumulations already existing abroad and arising from the original business of the company (*g*). Upon an amalgamation and transfer of an employers' liability or bond investment business together with all the assets of the company the deposit will not be paid out to the transferee company so long as any claims against the transferor company remain undischarged, or until the transferee company have since the amalgamation accumulated a separate assurance fund of £40,000 in respect of the transferred business (*h*). But where all policy holders in the transferor company have consented to the transfer, or their claims have otherwise been discharged, the deposit will be paid out to the transferee company although the transferor company never accumulated an assurance fund (*i*).

(*e*) Ass. Comp. Act, 1909, secs. 33 (1) (e), 34 (c).

(*f*) Rules, 1910, r. 6 (b).

(*g*) *Colonial Mutual Life, In re* (1882), 46 L. T. 282.

(*h*) *Scottish Economic Life, In re* (1890), 45 Ch. D. 220; *Life and Health Assurance, In re*, [1910] 1 Ch. 458.

(*i*) *Popular Life Assurance, In re*, [1909] 1 Ch. 80.

Any deposit may be paid out to the company or its transferee when the company has ceased to transact business and all claims against it have been transferred or discharged (*k*). A deposit may also be paid out when it has been paid in by mistake under a misapprehension of the requirements of the statute (*l*), and in any case where a fund deposited is standing to the credit of the company and is not required to be kept deposited by the Act it may be paid out to the company (*m*).

Petition for transfer or payment out to be served on Board of Trade.

Applications to the Court as to investment, payment of interest, transfer or payment out should be made by petition which in the case of an application for the transfer or payment out of a deposited fund must be served on the Board of Trade (*n*).

Accounts, statements of affairs, and investigation of affairs.

The obligation placed upon insurance companies of making a cash deposit of £20,000 as a security for their policy holders affords a great protection to the insuring public against mushroom companies; but the provision in itself would be of comparatively little value if it were not for the further obligation which is placed upon every company of rendering public accounts and statements of affairs. The Companies Act requires every company registered thereunder to comply with the statutory provisions for periodical accounts and statements of affairs and when necessary to submit to an investigation of its affairs by inspectors appointed by the Board of Trade. The Assurance Companies Act contains provisions for periodical accounts and statements of affairs which on the whole are more stringent than those contained in the Companies Act, and every company or individual to which the Assurance Companies Act applies is bound to comply with them. The Assurance Companies Act does not contain any provision for investigation of the companies' affairs by inspectors, and the liability to such inspection under the Companies Acts only applies to assurance companies which are formed or registered thereunder. The Friendly Societies Act, Collecting Societies and Industrial Assurance Companies Act and Trade Union Acts, contain special provisions with regard to the accounts and

(*k*) Rules, 1910, A. 7 (d); *Popular Life Assurance, In re*, [1909] 1 Ch. 80.

(*l*) *Wool Industries Employers' Insurance, In re*, [1899] W. N. 259.

(*m*) Rules, 1910, A. 7; *Welsh Insurance, In re* (1910), *The Times* Newspaper, July 21.

(*n*) Rules, 1910, A. 9.

investigation of the affairs of the societies to which they respectively apply. All foreign insurance companies carrying on business in this country are required to file an annual balance sheet with the Registrar of Companies as well as to make returns under the Assurance Companies Act to the Board of Trade.

Provisions of Companies Act. List of members, and summary of affairs.

Every company registered under the Companies Act with a share capital is required to make at least annually a list of all persons who are members (*nn*) or who have ceased to be members since the date of the last return together with a summary of the company's affairs showing among other things the amount called up on each share, the total amount of calls received, the total amount of shares forfeited, the names and addresses of the directors for the time being, and the total amount due from the company in respect of all mortgages and charges (*o*). The summary must also include a statement in the form of a balance sheet audited by the company's auditors and containing a summary of its share capital, its liabilities and its assets (*p*). A copy of the above list and summary signed by the manager or secretary must be forwarded to the Registrar of Companies (*q*). Where a registered company is an assurance company to which the provisions of the Assurance Companies Act, 1909, apply and copies of the accounts and balance sheet required by that Act to be prepared and deposited at the Board of Trade are sent to the Registrar it is not necessary to send any other statement in the form of a balance sheet as required by the Companies Act (*r*).

Half-yearly statement of share capital, liabilities and assets.

Every company registered under the Companies Act being a limited banking company or an insurance company or a deposit provident or benefit society (except as hereinafter mentioned) is required before it commences business and also on the first Monday in February and first Tuesday in August in every year to make a statement giving particulars of the share capital and specifying the liabilities and assets of the company on the preceding first of January or first of July (*s*). A copy of such statement must be put up in a conspicuous place in the registered

(*nn*) That is shareholders, as these returns are not required in the case of a mutual office.
(*o*) Comp. Act, 1908, sec. 26 (1), (2).
(*p*) Sec. 26 (3).
(*q*) Sec. 26 (4).
(*r*) Ass. Comp. Act, 1909, sec. 7 (4).
(*s*) Comp. Act, 1908, sec. 108 (1).

office of the company and in every branch office or place of business where the business of the company is carried on (*t*). Assurance companies to which the Assurance Companies Act applies and which comply with the provisions thereof as to the annual statements to be made by such a company are not required to make the above statement (*u*).

Investigation of affairs under provisions of Companies Act.

The Board of Trade may on the application of members holding not less than one-tenth of the shares issued, or in the case of a company having no share capital on the application of not less than one-fifth of the members, appoint one or more competent inspectors to investigate the affairs of any company registered under the Act. The inspectors will report their opinion to the Board of Trade and a copy of the report must be sent to the registered office of the company and a further copy delivered to the applicants for investigation at their request. The expenses of the application will be paid by the applicants, unless the Board of Trade directs the same to be paid by the company (*x*). A company registered under the Companies Acts may by special resolution appoint inspectors to investigate its affairs and such inspectors shall have the same powers as inspectors appointed by the Board of Trade except that they will report to the Company (*y*).

Annual appointment of an auditor under the Companies Act.

Every company registered under the Companies Acts must at each annual general meeting appoint an auditor or auditors for the current year, and in default the Board of Trade may on the application of any member of the company appoint an auditor (*z*). A director or officer of the company cannot be appointed auditor of the company (*a*). Every auditor of a company has a right of access at all times to the books and accounts and vouchers of the company, and is entitled to require any necessary information or explanation from the directors or officers

(*t*) Comp. Act, 1908, sec. 108 (2).

(*u*) Sec. 108 (6). The annual statements referred to in this subsection are the revenue account and balance sheet which were the only annual statments required by the Life Assurance Companies Act, 1870. Every assurance company to which the Assurance Companies Act applies is now bound to prepare an annual account and balance sheet, and if it complies is apparently relieved from the obligation of complying with this section of the Companies Act. It will be observed that this is so even in the case of companies carrying on a purely fire business and which are not required by the Assurance Companies Act to submit to any periodical investigation or make any periodical statement of their business.

(*x*) Comp. Act, 1908, sec. 109.

(*y*) Sec. 110.

(*z*) Sec. 112 (1), (2).

(*a*) Sec. 112 (3).

of the company (*b*). The auditors must make a report to the members on the accounts examined by them and on every balance sheet laid before the company (*c*).

Provisions of Assurance Companies Act relating to accounts and statements of affairs.

The Assurance Companies Act, 1909, imposes upon all assurance companies to which the Act applies the following provisions with regard to accounts, statements, and investigation of affairs.

Statements as to amount of capital.

When any notice, advertisement, or other official publication of an assurance company contains a statement of the amount of authorised capital of the company the publication shall also contain a statement of the amount of the capital which has been subscribed, and the amount paid up (*d*).

Separate accounts and separate assurance funds for different classes of business.

When an assurance company transacts other business than one class of assurance business, it must keep a separate account in respect of each class of assurance business which it transacts (*e*), and when such company transacts life, employers' liability, or bond investment business, all receipts in respect of each of such classes of business must be carried to a separate assurance fund which will form a security for the policy holders in each class in the same manner as if it belonged to a company which carried on no other business (*f*). In the case, however, of a company doing life business, and established before August 9, 1870, the liability of the life assurance fund for contracts entered into before that date are not affected by the above provisions (*g*), and where under the deed of settlement the life policy holders in such a company are exclusively entitled to share in the company's profits and on the face of their policies the liability of the life assurance fund in respect of other business distinctly appears the provisions for the separation of funds do not apply (*h*).

Annual accounts.

Every assurance company must at the end of each financial year prepare in the form of the appropriate schedule to the Act (*i*), (a) a revenue account in respect of each class of assurance business (*k*); (b) a profit and loss account except where the company

(*b*) Sec. 113 (1).
(*c*) Sec. 113 (2).
(*d*) Ass. Comp. Act, 1909, sec. 12.
(*e*) Sec. 3.
(*f*) Secs. 3, 31 (e), 32 (d).
(*g*) Sec. 30 (e).
(*h*) Sec. 30 (f).
(*i*) Sec. 4; the Board of Trade may alter any of the forms contained in the Schedules so as to suit the circumstances of any particular company (sec. 22).
(*k*) Sch. I. Where a company carries on any one of the five classes of

carries on one class of assurance business only and no other business (*l*); (c) a balance sheet (*m*).

Audit of accounts.

Where the accounts of an insurance company are not subject to audit in accordance with the provisions of the Companies Act, 1908, or the Companies Clauses (Consolidation) Act, 1845 (*n*), relating to audit, such accounts must be audited in accordance with the provisions of sec. 113 (1) and (2) of the Companies Act, 1908 (*o*). In the case of a company having a share capital the auditor must be elected annually by the shareholders (*p*). No director or officer of the company can be elected as auditor (*p*).

Periodical investigation and actuarial report on all life and bond investment business.

Every assurance company transacting life business or bond investment business shall once in every five years, or at such shorter intervals as may be required by the instrument constituting the company or by its regulations or by-laws, cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the appropriate form or forms in the fourth schedule to the Act (*q*).

Actuarial report required on every investigation,

If at any other time an investigation is made into the financial condition of a company transacting life or bond investment business with a view to the distribution of profits or the results of which are made public, the liabilities shall be valued by an actuary and an abstract of his report shall be made as in the case of the periodical investigation (*r*).

but under certain circumstances actuarial report may be made and returned quinquennially.

In the case of a mutual company whose profits are allocated to members wholly or mainly by annual abatements of premium, the abstract of the report of the actuary required by the Act may notwithstanding the above provisions be made and returned at intervals not exceeding five years provided that where such return is not made annually it shall include particulars as to the rates of abatement of premiums applicable to different classes or

business to which the Act applies, a revenue account is required in respect of all insurance business, whether coming within the five classes or not. A separate revenue account is required in respect of each of those five classes and also in respect of any marine business and of any sinking fund or capital redemption business, but any additional insurance business, including employers' liability business transacted outside the United Kingdom, will be shown in a separate inclusive general account.

(*l*) Sch. II.

(*m*) Sch. III.

(*n*) 8 & 9 Vict. ch. 16, secs. 101–108.

(o) Ass. Comp. Act, 1909, sec. 9; Ass. Comp. Rules, 1910.

(*p*) Ass. Comp. Rules, 1910.

(*q*) Secs. 5 (1), 31 (a), 32 (c), 33 (1) (c).

(*r*) Sec. 5 (2).

series of assurances allowed in each year during the period which has elapsed since the previous return (*s*).

Periodical statement of life or bond investment business.

Every assurance company transacting life busiuess or bond investment business, must also prepare a statement of its assurance business at the date to which the accounts of the company are made up for the purposes of the periodical investigation in the form or forms in the fifth schedule to the Act; provided that if the investigation is made annually the company may prepare such statement once in every five years (*t*). The statement must be signed by the actuary (*u*).

Qualification of actuary.

The actuary who signs the above-mentioned abstracts and statements must be either

(1) a Fellow of the Institute of Actuaries or of the Faculty of Actuaries; or

(2) *where application is made by a company and where in the opinion of the Board of Trade special circumstances exist*, an Associate of the Institute of Actuaries or of the Faculty of Actuaries; or

(3) the actuary on June 6, 1910, to an assurance company to which the Act applies, having its head office within the United Kingdom, or to any closed fund of such a company established in consequence of an amalgamation or transfer; or

(4) such other person *having actuarial knowledge* as the Board of Trade may on the application of the company approve (*v*).

Annual statement of accident or employers' liability business.

In the case of a company transacting accident or employers' liability business the company must annually prepare a statement of its business in the form in schedule four of the Act applicable thereto (*x*). In the case of accident business the Act does not require such statement to be prepared or signed by an actuary. In the case of employers' liability business the estimated liability on claims of five years' duration and upwards outstanding as at the end of the year of account must be made and signed by an actuary who must be qualified as above, omitting the words printed in italics (*y*).

No periodical statement of fire business

In the case of a company transacting fire business the Act does not require any periodical investigation into its financial

(*s*) Sec. 30 (h).
(*t*) Sec. 6.
(*u*) Sch. V.
(*v*) Ass. Comp. Rules, 1910.
(*x*) Ass. Comp. Act, 1909, secs. 32 (a), 33 (c).
(*y*) Sch. IV. (D) (7); Ass. Comp. Rules, 1910, E. 2.

unless company registered under Companies Act.

condition in respect of such business nor does it require any periodical statement of such business.

Shareholders' address book.

The Companies Act, 1908, requires that every company registered under that Act shall keep a register of its members (*a*). The Assurance Companies Act, 1909, requires that every assurance company not registered under the Companies Act, or which has not incorporated in its deed of settlement sec. 10 of the Companies Clauses (Consolidation) Act, 1845, shall keep a shareholders' address book in accordance with the provisions of that section which provides that the secretary shall from time to time enter in alphabetical order the name, places of abode, and description of shareholders (*b*). The book is open for inspection gratis by every shareholder, and every shareholder or policy holder is entitled to a copy on payment of a copying fee (*b*).

Printed copies of deed of settlement.

Every assurance company not registered under the Companies Acts is required to keep a sufficient number of printed copies of its deed of settlement or other instrument constituting the company, and to furnish a copy to any shareholder or policy holder on payment of a maximum fee of one shilling (*c*). Companies registered under the Companies Acts are required to send to every member on payment of a maximum fee of one shilling a copy of the memorandum and articles, and these documents may be inspected by any person at the office of the Registrar of Joint Stock Companies (*d*).

Accounts and other statements of affairs prepared under Assurance Companies Act to be deposited at the Board of Trade.

Every account, balance sheet, abstract, or statement required to be prepared under the Assurance Companies Act must be printed and four copies thereof, one of which shall be signed by the chairman and two directors of the company and by the principal officer of the company and if the company has a managing director by the managing director, shall be deposited at the Board of Trade within six months after the close of the period to which the account, balance sheet, abstract, or statement relates or within such further period not exceeding three months as the Board of

(*a*) Comp. Act, 1908, sec. 25.
(*b*) Ass. Comp. Act, 1909, sec. 10; Comp. Clauses Act, 1845, sec. 10.
(*c*) Ass. Comp. Act, 1909, sec. 11.
(*d*) Comp. Act, 1908, secs. 18, 243 (b).

Trade thinks fit (*e*). The Board of Trade will communicate with the company with a view to the correction of any inaccuracies or deficiencies found in the documents deposited (*f*). The company must deposit with every revenue account and balance sheet any report on the affairs of the company submitted to the shareholders or policy holders in respect of the financial year to which the account or balance sheet relates (*g*). A printed copy of the last deposited accounts, balance sheet, abstract, or statement must on the application of any shareholder or policy holder of the company be forwarded to him by the company by post or otherwise (*h*). A copy of every account, balance sheet, abstract, statement or report deposited with the Board of Trade is kept by the Registrar of Joint Stock Companies and is open to inspection by any person on payment of a fee of one shilling for each inspection, and any person may procure a copy of any such document on payment of 4*d*. a folio of 72 words (*i*). Any document purporting to be certified by the Registrar or by an Assistant Registrar as a copy of a document deposited with the Board of Trade is *primâ facie* evidence of the contents of the original document (*k*). It is the duty of the Board of Trade to lay annually before Parliament the accounts, balance sheets, abstracts, and statements deposited with them during the preceding year (*l*).

Requirements for members of Lloyds.

Deposit of £2000 with trustees under trust deeds and annual statement of business.

Underwriters at Lloyds may, instead of complying with the general provisions of the Act, comply with the modified provisions in Schedule VIII. and in the rules made in pursuance thereof. Subject to the alternative mentioned below in the case of fire or accident business, every underwriter at Lloyds must deposit and keep deposited with trustees appointed by the committee of Lloyds a sum of £2000 in respect of each of the five classes of insurance business to which the Act applies and which is carried on by him (*m*). The payment, repayment, investment of and dealing with such deposit, and the payment of interest and dividends on such deposit, are regulated by the terms of a trust deed executed

(*e*) Ass. Comp. Act, 1909, sec. 7 (1).
(*f*) Sec. 7 (2).
(*g*) Sec. 7 (3).
(*h*) Sec. 8.
(*i*) Sec. 20; Ass. Comp. Rules, 1910.
(*k*) Sec. 21; Ass. Comp. Rules, 1910.
(*l*) Sec. 27.
(*m*) Ass. Comp. Act, 1909, Sch. VIII.

by the underwriter, by Lloyds, and by the trustee (*n*). Such trust must be executed in accordance with a model form approved by the Board of Trade, and there must be a separate deed in respect of each deposit (*o*). As soon as the deposit has been made and the deed executed, it is the duty of Lloyds to notify to the Board of Trade the name and address of the underwriter, the date of the deed, and the class of assurance business in respect of which the deposit is made, and the trustees of the deed shall from time to time notify any change in the name or address of the underwriter or any other material information with regard to the deposit or investment thereof (*p*). The deposit will, so long as any liability under any policy issued by the underwriter in the class of assurance business in respect of which the deposit is made remains unsatisfied, be available solely to meet claims under such policies (*q*). The underwriter must also in respect of each class of insurance business furnish every year to the Board of Trade a statement of the extent and character of such business in the appropriate form or forms contained in the Assurance Companies Rules (*r*).

Alternative requirements in fire and accident business.

In the case of fire or accident business, an underwriter at Lloyds may, instead of depositing a sum of £2000 as above, comply with the following alternative requirements (*s*). All premiums received in respect of each class of business must be placed in a trust fund in accordance with the provisions of a trust deed approved by the Board of Trade (*t*). The underwriter must also furnish security to the satisfaction of the Committee of Lloyds, such security to be in the form of a deposit or guarantee or partly one and partly the other, and never to be less than the aggregate of the premiums received or receivable by the underwriter in the last preceding year in connexion with fire and accident business, and any other non-marine business not being one of the five classes of insurance business to which the Act applies (*u*). The security shall be available solely to meet claims under policies issued by the underwriter in connexion with fire, accident, or such other non-marine business (*u*). The underwriter must also have his accounts audited

Separate assurance fund, security to the satisfaction of the committee, and annual audit of accounts.

(*n*) Ass. Comp. Rules, 1910, B. 2.
(*o*) B. 3.
(*p*) B. 4.
(*q*) Ass. Comp. Act, 1909, Sch. VIII. (A) (1), (B) and (C) (1) (a), (D) (1), (E) (1).
(*r*) Sch. VIII. (A) (2), (B) and (C) (1) (b), (D) (2), (E) (2); Ass. Comp. Rules, 1910, H.
(*s*) Sch. VIII. (B) and (C) (2).
(*t*) Sch. VIII. (B) and (C) (2) (a).
(*u*) Sch. VIII. (B) and (C) (2) (b); Ass. Comp. Act Rules, F.

annually by accountants approved by the Committee of Lloyds, who will furnish a certificate to such committee and to the Board of Trade in the form prescribed by the Assurance Companies Rules (*x*).

Redemption of weekly payments to workmen during incapacity.

In the case of employers' liability business, if a person insured by any policy issued by an underwriter at Lloyds becomes liable to make a weekly payment to any workman during his incapacity and the weekly payment has continued for more than six months, the liability must before the expiration of twelve months from the commencement of the incapacity be redeemed by payment of a lump sum, and the underwriter must pay the lump sum into the County Court (*y*).

Registered Friendly Society's accounts, etc.

Every society registered under the Friendly Societies Act must, once in every year, not later than May 31, send to the Registrar of Friendly Societies a return of the receipts and expenditure funds and effects of the society made out to the previous December 31 and showing separately the expenditure in respect of the several objects of the society or branch (*z*). The accounts of the society must be audited once at least in every year either by one of the public auditors appointed by the Act or by two or more auditors appointed under the rules (*a*). The auditors must examine and verify the annual return and must either sign it as correct or specially report to the society if they find it incorrect (*a*), and any such special report must be sent to the Registrar with the annual return (*b*).

an annual account

and quinquennial statement of affairs.

Once at least in every five years every registered society, except as hereinafter mentioned, must cause to be made and sent to the Registrar a statement showing its assets and liabilities and the benefits assured and contributions receivable from members (*c*). Such statement may either take the form of a valuation and report by a valuer appointed by the society or of a return by the society, and in the latter case the Registrar shall cause the assets and liabilities to be valued and reported on by some actuary and

(*x*) Ass. Comp. Act, 1909, Sch. VIII. (B) and (C) (2) (c); Ass. Comp. Rules, 1910, G.
(*y*) Sch. VIII. (D) (2).
(*z*) F. S. Act, 1896, sec. 27 (1), (2).
(*a*) Sec. 26.
(*b*) Sec. 27 (3).
(*c*) Sec. 28.

shall send to the society a copy of the report and abstract of the valuation (*d*). The Chief Registrar may, with the approval of the Treasury, dispense with the necessity of any such valuation report or return in respect of societies or branches to whose purposes or to the nature of whose operations he may deem the provisions therefor to be inapplicable (*e*).

Public auditors and valuers.

For the purposes of the above audits and valuations the Treasury appoints public auditors and valuers to be paid at a specified rate of remuneration, but the employment of such auditors and valuers is not compulsory (*f*).

Accounts and valuations to be exhibited at registered office.

Every registered society or branch must keep a copy of the last annual return and of the last quinquennial valuation, together with any special report of the auditors, always hung up in a conspicuous place at the registered office of the society or branch (*g*).

Copies of accounts on demand.

Every member or person interested in the society's funds is entitled to receive gratuitously a copy of the last annual return or other document duly audited giving the same particulars (*h*).

Inspection of books.

Every member or person interested in the society's funds has also the right to inspect the books of the society at all reasonable hours at the registered office (*i*).

Special investigations of society's affairs.

Upon the application of one-fifth of the whole members of any registered society, or in the case of a society with 1000 but less than 10,000 members of 100 members, or in the case of a society with more than 10,000 members of 500 members, the Chief Registrar may, with the consent of the Treasury, appoint an inspector or inspectors to examine into and report on the affairs of the society (*k*).

Collecting societies, accounts, etc.

In the case of a friendly society, whether registered or unregistered, which is a collecting society, the balance sheet must during the seven days next preceding the meeting at which it is to be presented be kept open by the society for inspection at every office at which the business of the society is carried on and a copy must be delivered or sent by post to every member on demand (*l*).

(*d*) Sec. 28.
(*e*) Sec. 28 (5).
(*f*) Sec. 30.
(*g*) Sec. 29.
(*h*) Sec. 39.
(*i*) Sec. 40.
(*k*) Sec. 76.
(*l*) Coll. Soc. Act, 1896, sec. 6 (1).

In the case of a registered friendly society which is a collecting society the annual returns must be certified by an auditor who carries on publicly the business of an accountant (*m*). Audit by an accountant.

The above-mentioned provisions of sec. 76 of the Friendly Societies Act, relating to the special investigation of the society's affairs, apply also to every unregistered friendly society which is a collecting society (*n*). Special investigation of affairs.

Every registered trade union must every year before the first day of June make an annual return to the Registrar of Friendly Societies. Such return must contain a general statement of the receipts, funds, effects and expenditure of the union and must show fully the assets and liabilities at the date of the return. The expenditure in respect of the several objects of the union must be shown separately (*o*). Trade union's accounts, etc.

Every member of or depositor in a trade union is entitled to a gratuitous copy of the annual return (*o*).

Every assurance company constituted outside the United Kingdom, whether incorporated or not, which carries on assurance business within the United Kingdom shall, within one month from the establishment of a place of business within the United Kingdom, file with the Registrar of Companies (1) a certified copy of the charter, statutes, or memorandum and articles of the company or other instrument constituting or defining the constitution of the company and if the instrument is not written in the English language a certified translation thereof; (2) a list of the directors of the company; (3) the names and addresses of some one or more persons resident in the United Kingdom, authorised to accept on behalf of the company service of process and any notices required to be served on the company; and notice of any alteration in the above particulars must be given within a month after the alteration (*p*). Every such company must annually file with the Registrar a statement in the form of a balance sheet containing a summary of its share capital, its liabilities and assets (*q*). Every such company Foreign assurance companies carrying on business in the United Kingdom must file particulars with Registrar. Annual balance sheet. Public statement as to

(*m*) Sec. 6 (2).
(*n*) Sec. 12.
(o) T. U. Act, 1871, sec. 16.
(*p*) Ass. Comp. Act, 1909, sec. 19; Comp. Act, 1908, sec. 274.
(*q*) Comp. Act, 1908, sec. 274 (3).

country where constituted.

which uses the word "Limited" as part of its name must on every place where it carries on business in the United Kingdom and on all notices, advertisements, letters, and other documents issued by the company state the name of the company and the country in which it is incorporated or otherwise constituted (*r*).

When foreign company is deemed to be carrying on business in the United Kingdom.

A foreign company is deemed to carry on business in the United Kingdom when it has officers or agents therein conducting business on its behalf (*s*). Where insurance business is transacted for the account of a foreign company through an agent resident in this country, the question is whether it is the business of the company carried on by that agent as representing the company or whether it is really the business of the agent acting independently on his own behalf. An agent carrying on his own business and making contracts on behalf of a foreign company on commission is not in the service of the company and the company is not by reason of the work done by such agent to be deemed to be carrying on business in the United Kingdom (*t*).

Section III.—Amalgamation or Transfer

Statutory restrictions on the transfer of life, employers' liability, or bond investment business.

The Assurance Companies Act places certain restrictions upon the amalgamation (*u*) or transfer of the undertakings of companies carrying on life, employers' liability or bond investment business. Companies carrying on no other class of business to which the Act applies than fire or accident business, or both, may enter into amalgamation agreements, and fire and accident undertakings may be transferred to any other company, as formerly, that is to say, in accordance with the powers and under the provisions in deeds of settlement, articles of association, or other instruments regulating the constitution of the companies concerned (*v*). The following are the provisions of the Assurance Companies Act, relating to amalgamation or transfer in the case of companies carrying on life, employers' liability, or bond investment business. The directors of any one or more of the companies

(*r*) Sec. 274 (4).

(*s*) *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft, &c.*, [1902] 1 K. B. 342; *Compagnie Générale Transatlantique* v. *Law*, [1899] A. C. 431.

(*t*) *The Princess Clémentine*, [1897] P. 18.

(*u*) As to the meaning of "amalgamation," see *South African Supply Co., In re*, [1904] 2 Ch. 268, 287; Buckley, 9th edition, p. 433.

(*v*) Ass. Comp. Act, secs. 31 (f), 32 (e).

concerned must petition the court to sanction the proposed arrangement (*x*). Notice of their intention to make such application must be published in the *Gazette* (*y*). The companies must prepare (1) a provisional agreement or deed under which it is proposed to effect the amalgamation or transfer (*z*), (2) a statement of the nature of the amalgamation or transfer (*a*), (3) an abstract of the provisional agreement or deed (*a*), (4) actuarial reports upon which the agreement or deed is founded, including a report by an independent actuary (*a*).

Copies of documents to be transmitted to policy holders and others interested.

Copies of the statement, abstract and actuarial reports must be transmitted to each policy holder of each company (*a*) and to any person claiming to be interested in any policy who has given to the company notice in writing of his interest (*b*). But it is not necessary to transmit copies of the above documents to policy holders or persons interested in policies unless the policies are life, endowment, sinking fund, or bond investment policies and the business transferred is life or bond investment business (*a*). The documents in the case of policy holders may be addressed and sent to the person to whom notices respecting such policy are usually sent and in the case of a person claiming to be interested to the address specified by him in his notice (*b*), and it is sufficient to prove that the documents were properly directed and put in the post office (*c*). The documents must be sent so as to be received a reasonable time before the hearing of the petition but need not necessarily be sent before the presentation of the petition (*d*). It is not necessary to send the documents or otherwise give notice to new policy holders who have taken out policies between the dates of presentation and hearing of the petition (*e*).

(*x*) Ass. Comp. Act, sec. 13 (1). In Scotland a petition presented in the name of the company was held competent: *Empire Guarantee, &c., Petitioners*, [1911] 2 S. L. T. 269.

(*y*) Sec. 13 (3) (a).

(*z*) Sec. 13 (3) (c).

(*a*) Sec. 13 (3) (b).

(*b*) Sec. 26. This obligation is new and imposes a very heavy burden on the companies. There may be a long chain of notices of assignment of a life policy with nothing to show which assignees have dropped out and have no further interest in the policy. There seems to be no alternative but to send the necessary documents to them all. In the case of the transfer of the business of the Economic Life Assurance Society to the Alliance Assurance Company, Limited, the life assurance fund of the transferee company was unaffected by the agreement, and the Court (Warrington, J.) dispensed with the sending of notices and particulars to the life-policy holders of the transferee company and allowed notice to be given to them by advertisement only (see advt. in *The Times*, 11th July, 1911).

(*c*) Comp. Claus. Act, 1845, sec. 136.

(*d*) *Briton Life, In re* (1887), 56 L. J. Ch. 988.

(*e*) *Universal Life, In re* (1901), 18

The hearing of a petition will not necessarily be delayed until every policy holder wherever resident has had time to send notice of his objection, and where, under the Act of 1870, it appeared, on the hearing of a petition to sanction an amalgamation, that two policy holders resident abroad could not have received the notice in time to communicate their assent or dissent, the Court nevertheless proceeded with the hearing of the petition on being satisfied that the amount of their policies amounted to much less than one-tenth of the total amount insured (*f*). The decision of the Court was based on the ground that the dissent of the two policy holders would not have been sufficient to compel the Court under sec. 14 of the Act of 1870 to withhold its sanction from the scheme, and the contractual rights of those individual policy holders was preserved in that they were not bound to consent to a transfer of their policies.

Provisional agreement to be open to inspection.

The provisional agreement or deed must be open for the inspection of policy holders and shareholders at the office of the companies for a period of 15 days after the notice in the *Gazette* (*g*).

When Court may sanction agreement.

The Court may sanction the proposed agreement for transfer and amalgamation if no sufficient objection thereto is established (*gg*). The Assurance Companies Act does not however confer any power upon the Court to sanction an agreement which apart from the Act would be *ultra vires* of the companies concerned (*h*). In no case can the Court sanction an agreement to amalgamate or transfer the business of a company carrying on life insurance business if life-policy holders representing one-tenth or more of the total amount assured dissent from the amalgamation or transfer (*i*).

Documents to be sent to Board of Trade on completion of agreement.

Upon the completion of an amalgamation or transfer the combined company or purchasing company as the case may be must deposit with the Board of Trade within ten days (1) certified copies of statements of the assets and liabilities of all the companies concerned, (2) a statement of the nature and terms of the transaction, (3) a certified copy of the agreement or deed, (4) certified copies of the actuarial reports upon which it is founded, (5) a declaration

T. L. R. 198. It is, however, proper and usual for the company to inform such new policy holders of the pending scheme of amalgamation or transfer before completion of their policies.

(*f*) *London and Southwark Insurance, In re* (1880), 42 L. T. 247.

(*g*) Ass. Comp. Act, sec. 13 (3) (c).

(*gg*) See *Empire Guarantee, &c., Petitioners*, [1911] 2 S. L. T. 269.

(*h*) *Sovereign Life, In re* (1889), 42 Ch. D. 540.

(*i*) Ass. Comp. Act, sec. 30 (d). But see *infra*, p. 57.

under the hand of the chairman of each company and the principal officer of each company that to the best of their belief every payment made or to be paid to any person whatsoever on account of the amalgamation or transfer is therein fully set forth (*k*).

When is amalgamation or transfer agreement *intra vires?*

Primâ facie it is *ultra vires* of any company to transfer its business and assets to or to amalgamate with another company (*l*) or to purchase the business of another company (*m*). A company cannot, therefore, validly contract to amalgamate with another company or to transfer its business to another company unless it has power to do so under its deed of settlement or other instrument under which it is formed (*mm*). It is sufficient, however, if the deed of settlement or other instrument although not conferring express power to amalgamate gives the company power to alter its powers so as among other things to insert a power to amalgamate (*n*). Where an act of parliament conferred on a company power "to sell, exchange, dispose of, or otherwise deal with or turn to account any part of the undertaking or property of the company for such consideration as the company may think fit and in particular for shares, debentures, or securities of any other company or society," the Court held that the company had power to transfer its whole undertaking to another company (*nn*).

Where a company has power conferred on it to transfer its business, that means, *primâ facie,* power to transfer its whole business as a going concern without any cancellation or reduction of its liabilities (*o*). Thus the Court refused its sanction to an agreement whereby an insurance company carrying on a life and annuity business proposed to transfer the one without the other and subject to a reduction in the amount of the contracts (*o*). If a

(*k*) Sec. 14.

(*l*) *Sovereign Life, In re* (1889), 42 Ch. D. 540; *Rivington's Case* (1873), Eur. Arb. L. T. 57; 17 Sol. J. 403; aff. C. A. (1876), 3 Ch. D. 10; *Albert Life Indemnity Case* (1871), 16 Sol. J. 141.

(*m*) *Ernest* v. *Nicholls* (1857), 6 H. L. C. 401; *Era Company's Case* (1862), 1 De G. J. & S. 29; *Era Assurance, In re* (1860), 2 J. & H. 400.

(*mm*) But see *infra*, p. 54, as to a scheme of arrangement under sec. 120 of the Companies Act, 1908, or a sale under sec. 192 by the liquidator of a company in voluntary liquidation.

(*n*) *Argus Life, In re* (1888), 39 Ch. D. 571.

(*nn*) *Imperial Life, In re*, Buckley, J. (1902), *The Times*, July 28, 1902. See also *Empire Guarantee, &c., Petitioners*, [1911] 2 S. L. T. 269.

(*o*) *Sovereign Life, In re* (1889), 42 Ch. D. 540. In this case the transfer

company has power to transfer its business and assets to another company it may do so notwithstanding its contracts with the policy holders to pay out of the funds of the company (*p*). Such contracts do not import an agreement not to part with the assets but are made subject to the power conferred upon the company to do so (*p*). The power of transferring its business and assets may be conditional upon the company making proper provision for its existing liabilities, and if so the mere undertaking of the transferee company to discharge all claims is not sufficient (*q*). There must be proper security provided by the formation of a special fund to meet such claims (*q*). But where the power given was a power to dissolve and transfer its assets upon obtaining the undertaking of another company to discharge existing liabilities, it was held that the company was not bound to see that the assets transferred were appropriated to meet the claims of the policy holders in the transferor company (*r*).

No power to compel shareholders to become shareholders in transferee company.

The power given to a company to transfer its business and assets or to amalgamate with another company does not give it power to bind its members or shareholders to accept shares in the transferee company (*s*); and each shareholder must have individually agreed to accept the substituted shares and been entered on the register of the transferee company as a shareholder before he can be held liable in respect of such shares (*t*). If a shareholder in the transferor company sends in his share certificates to be exchanged for share certificates in the transferee company in pursuance of a provisional agreement, his offer to accept the substituted shares is conditional upon the transaction being validly completed, and if it is never completed he cannot be made liable as a shareholder in the transferee company (*u*).

with reduced contracts was ultimately effected by means of a scheme of arrangement under Joint Stock Companies Arrangement Act, 1870 (now replaced by the Companies Act, 1908, sec. 120).

(*p*) *Argus Life, In re* (1888), 39 Ch. D. 571; *King* v. *Accumulative Life* (1857), 27 L. J. C. P. 57.

(*q*) *Kearns* v. *Leaf* (1864), 1 H. & M. 681.

(*r*) *Cocker's Case* (1876), 3 Ch. D. 1.

(*s*) *Empire Assurance, In re* (1867), L. R. 4 Eq. 341; *Empire Assurance, Dougan's Case* (1873), L. R. 8 Ch. 540; *Driver's Case* (1871), Alb. Arb. Reilly, 36. But see *infra*, p. 54, where the company is in voluntary liquidation and the liquidator exercises his power of sale under sec. 192 of the Companies Act, 1908.

(*t*) *United Ports and General, Beck's Case* (1874), L. R. 9 Ch. 392.

(*u*) *Empire Assurance, Dougan's Case* (1873), L. R. 8 Ch. 540; *United Ports and General, Wynne's Case*, (1873), L. R. 8 Ch. 1002.

Where a company made an agreement for transfer and a term in the agreement was that all the shareholders in the transferor company should become shareholders in the transferee company, it was held that a shareholder who acknowledged the receipt of the new certificates and retained them was bound as a shareholder in the new company, but that a shareholder who received the notice and the certificates and retained them without acknowledgment was not bound (*x*). Where a company made an agreement for transfer and a term in the agreement was that the shareholders in the transferor company should become shareholders in the transferee company, but that those shareholders who did not execute the deed of settlement of the transferee company should take no benefit from the agreement, it was held that shareholders of the transferor company who did not execute the deed could not be made liable as shareholders of the transferee company (*y*).

Primâ facie company has no power to become a shareholder in transferee company.

Primâ facie a power to transfer or amalgamate its business or to purchase the business of another company does not give a company power to become a shareholder in another company (*z*), but such power may be expressly conferred upon a company by its deed of settlement or other instrument (*a*).

Primâ facie company has no power to relieve its shareholders from liability,

Primâ facie the power to transfer its business and assets does not give a company any power as against its creditors to relieve its shareholders from their liability to pay the debts or contribute to the assets of the company (*b*). It is impossible merely by an agreement between the companies and the shareholders to exonerate the shareholders from liability in the transferor company upon their accepting shares in the transferee company (*b*). A repayment of the capital to shareholders upon a purported surrender or cancellation of their shares will only have the effect of making them liable to the extent of the full nominal value of the shares as upon shares

(*x*) *Empire Assurance, Challis' Case* (1870), L. R. 6 Ch. 266.

(*y*) *British Provident Life and Fire, Webster's Case* (1864), 10 L. T. 288.

(*z*) *British Nation Life, Ex parte Liquidators* (1878), 8 Ch. D. 679.

(*a*) *Durham and Northumberland Assurance* (1872), Alb. Arb. 16 Sol. J. 630.

(*b*) *Norwich Provident Insurance, Bath's Case* (1878), 8 Ch. D. 334; *Bank of London Assurance, Part's Case* (1870), L. R. 10 Eq. 622; *West's Case* (1873), Eur. Arb. L. T. 71; *Lee's Case* (1871), Alb. Arb. Reilly 1; *Pownall's Case* (1872), Eur. Arb. Reilly 8; L. T. 8; *Lancey's Case* (1872), Eur. Arb. Reilly 12; L. T. 15; 17 Sol. J. 8.

wholly unpaid (*c*). A company may by its deed of settlement or other instrument under which it is formed have express power to dissolve itself so as to terminate all liability on the part of its shareholders, but when it has such power it must be exercised strictly in accordance with its powers or the creditors of the company will not be bound (*d*). The shares of a company may under the provisions of its deed of settlement be transferable upon the terms that the shareholders shall be under no further liability in respect of their shares (*e*). Where this is so an amalgamation agreement may relieve shareholders of their liability by providing that all the shares be transferred to a trustee for the transferee company (*f*). In the case of a common law partnership the shares may be transferable so as to relieve the shareholders of liability as against policy holders who have contracted subject to the terms of the deed of settlement, but without relieving them from liability as against general creditors of the company (*g*). In some cases the shares of a common law partnership have been made transferable by special act of parliament, and they must be transferred strictly in accordance with the provisions of the Act in order to relieve the shareholders as against general creditors (*h*). Where a transfer of shares was legally made in accordance with the provisions of a special act of parliament it was held that the transfer of the shares would not be set aside merely because it was made as part of an amalgamation agreement which was *ultra vires* of the powers of the companies (*i*). Where a deed of settlement provided that the directors should have power to cancel and extinguish shares if any call thereon should remain unpaid for two months, it was held that this power could not be used merely to relieve shareholders of their liability, and where the making of the call and the default was only a pretence there was no power to cancel (*k*). Where a life company started a fire business and

but transfer of shares may relieve members from liability.

Power to cancel shares for default cannot be used to relieve shareholders of liability.

(*c*) *Lord Digby's Case* (1873), Eur. Arb. 18 Sol. J. 184; *Murrough's Case* (1872), Eur. Arb. 16 Sol. J. 483.

(*d*) *Wood's Case* (1871), Alb. Arb. Reilly 54.

(*e*) *Clarke's Exors'. Case* (1872), Alb. Arb. Reilly 223; 16 Sol. J. 554.

(*f*) *Doman's Case* (1873), Eur. Arb. L. T. 133; 17 Sol. J. 785.

(*g*) *Clarke's Exors'. Case* (1872), Alb. Arb. Reilly 223; 16 Sol. J. 554.

(*h*) *Doman's Case* (No. 2) (1874), Eur. Arb. L. T. 159; 18 Sol. J. 798; (1876) 3 Ch. D. 21.

(*i*) *Rivington's Case* (1873), Eur. Arb. L. T. 57; 17 Sol. J. 403; (1876) 3 Ch. D. 10.

(*k*) *Manisty's Case* (1873), Eur. Arb. L. T. 87.

issued fire shares in connexion therewith and the validity of the issue was afterwards questioned, and the company by way of settling the dispute cancelled the shares and transferred the business to a new company, it was held that the cancellation was valid as a *bonâ fide* compromise, but that the shareholders might still be made liable as past members (*l*).

Power to transfer contract of policy holder without his consent.

Primâ facie a company cannot transfer its contract with a policy holder without his consent (*ll*); but if the deed of settlement or other instrument under which a company is formed gives the company express power to transfer its liabilities, and the policies of the company are expressed to be issued subject to the deed of settlement, the company may, by an agreement of amalgamation or transfer, substitute the liability of the transferee company for its own liability without the consent of the policy holders (*m*). But the power to transfer must be clearly expressed in order to bind the policy holder (*n*), and the transfer must be carried out strictly in accordance with the deed (*o*). When no power to transfer its liabilities is expressed in the deed but the company has power to alter its deed so as to acquire such power, it would seem that the company cannot thereby bind dissenting policy holders as the contract with them is made subject only to the power clearly expressed in the deed (*oo*). Where a company's deed of settlement gave the company power, if one-tenth of its nominal capital should have been lost, to call a general meeting and dissolve the company, and provided that proper measures for the purpose of effecting such dissolution without prejudice to the rights of the parties then assured should be taken by a committee, and that the affairs and concerns of the company should, with all convenient speed, be wound up, and the debts and liabilities of and claims on the company be satisfied, repurchased, discharged, or otherwise sufficiently provided for by investment or by transfer to other existing and approved assurance offices, it was held that

(*l*) *Norwich Provident Insurance, Bath's Case* (1878), 8 Ch. D. 334.

(*ll*) *Life and Health Assurance, In re*, [1910] 1 Ch. 458. See also *Empire Guarantee, &c., Petitioners*, [1911] 2 S. L. T. 269.

(*m*) *Hart's Case* (1875), 1 Ch. D. 307; *Dowse's Case* (1876), 3 Ch. D. 384; *Merchants and Tradesmen's Assurance* (1870), L. R. 9 Eq. 694; *Waterloo Life, Carr's Case* (1864), 33 Beav. 542.

(*n*) *Barne's Case* (1873), Eur. Arb. L. T. 72; 17 Sol. J. 594; *Blundell's Case* (1872), Eur. Arb. Reilly 84; L. T. 39; 17 Sol. J. 87.

(*o*) *Wood's Case* (1871), Alb. Arb. Reilly 54.

(*oo*) See, however, *Pricst* v. *Symons*, [1903] 2 Ch. 506.

the company had no power to transfer its obligation to pay an annuity without the consent of the annuitant (*p*).

Injunction to restrain company from carrying out an *ultra vires* agreement.

If an amalgamation or transfer agreement is proposed which is *ultra vires* of either company concerned, the Court will, at the instance of any shareholder or policy holder whose interests may be prejudicially affected, restrain the company and its officers from executing it or carrying it into effect (*q*).

Transfer of business under provisions of Companies Act, 1908.

A transfer of business from one company to another, although otherwise *ultra vires* of the powers of the transferor company, may nevertheless be carried through by a scheme of arrangement under sec. 120 of the Companies Act, 1908, or by voluntary liquidation under sec. 192 of the same Act.

Scheme of arrangement under sec. 120.

Sec. 120 of the Companies Act, 1908, applies to all companies which may be wound up under the Companies Act, that is in effect to all lawful companies whether registered or unregistered. The section replaces sec. 2 of the Joint Stock Companies Arrangement Act, 1870. It applies equally to companies which are going concerns, and to companies which are in the course of being wound up. By means of a scheme of arrangement thereunder, the contracts of the company may be reduced, and the whole or part of the assets transferred to another company without reference to the powers of the company or the terms of its contracts. The scheme must be approved by a three-fourths majority of each class of creditors or shareholders affected by the scheme, and thereafter must be sanctioned by the Court. When so approved and sanctioned the scheme is binding on the company and on all its creditors and shareholders.

Sale by liquidator in voluntary winding-up.

Under section 192 of the Companies Act, 1908 (*qq*), if a company is wound up voluntarily under that Act, the liquidator may, with the sanction of a special resolution of the company, transfer or sell to another company the whole or part of its business or property in consideration for cash, shares, policies or other interest in the transferee company for distribution among

(*p*) *India and London Life, In re* (1872), L. R. 7, Ch. 651.

(*q*) *Charlton* v. *Newcastle and Carlisle Rail. Co.* (1859), 5 Jur. N.S. 1096; *Kearns* v. *Leaf* (1864), 1 H. & M. 681; *Jowett* v. *Progressive Assurance* (1909), *The Times* Newspaper, July 29.

(*qq*) Replacing sec. 161 of the Companies Act, 1862.

the members of the transferor company, or may enter into any arrangement whereby the members of the transferor company may participate in the profits of or receive any other benefit from the transferee company. Any such transfer or sale is binding on all members of the company, although the transaction would have been *ultra vires* of the company (*r*). If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing or confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration (*s*). If within a year from the passing of the special resolution an order is made for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court (*t*). A special resolution under sec. 192 is not void merely because the agreement for transfer contains provisions which may prove detrimental to the interest of creditors (*u*). Thus a stipulation that the purchasing company shall take a portion only of the assets and liabilities of the transferor company, leaving the rest of the debts to be paid by the liquidator of the transferor company, or a stipulation that the shares in the purchasing company which are to be given as a consideration for the transfer shall be distributed directly among the shareholders of the transferor company and not given to the liquidator as part of the assets in the winding-up, may be introduced into an agreement for transfer made in pursuance of sec. 192 (*u*). If a creditor is aggrieved in respect of any such stipulation, his remedy is to petition within the year for a winding-up by the Court or a supervision order (*u*). The company cannot, however, by special resolution under sec. 192 place upon

(*r*) The question has been raised whether the power of the liquidator to transfer or sell the business gives him power to transfer the liabilities on policies without the consent of the holders so as to discharge the transferor company. It seems to be reasonably clear that he has no such power apart from express power conferred by the deed or articles. *Life and Health Insurance, In re*, [1910] 1 Ch. 458.

(*s*) Comp. Act, 1908, sec. 192 (3), (4).

(*t*) Sec. 192 (5).

(*u*) *City and County Investment Co., In re* (1879), 13 Ch. D. 475.

its shareholders or members any liability beyond that which might be placed upon them by the exercise of the company's ordinary powers (*v*). Thus, under an agreement for transfer, it was provided that the transferee company should purchase the goodwill and property of the transferor company in consideration of 25,000 shares in the transferee company to be allotted among the shareholders of the transferor company. The assets of the transferor company were to be applied in payment of its liabilities, and then in payment of £6 a share on each of the 25,000 shares, and, if the assets were insufficient, a call was to be made on the shareholders of the transferor company. It was held that such an agreement was *ultra vires* and could not be supported under the section, and it was set aside on the suit of a dissentient shareholder of the transferor company (*v*).

An unregistered company which has no power under its deed of settlement to transfer its business, may effect a transfer under sec. 192 by registering itself under Part VII. of the Companies Act and winding up voluntarily (*w*).

Question whether transfer of business under provisions of Companies Act can be carried through without reference to Assurance Companies Act, sec. 13.

An extremely important question arises with regard to the exercise of the powers of arrangement and transfer under sec. 120 or sec. 192 of the Companies Act. The Assurance Companies Act, 1909, provides, following the precise words of the Act of 1870, that no assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the Court in accordance with sec. 13 of the Act, that is to say, there must be a petition to the Court by the directors, and notices must be sent out in accordance with the section, and in the case of life insurance companies no transfer will be sanctioned if it appears that life-policy holders representing one-tenth or more of the total amount assured in the Company dissent from the transfer. The question is whether the provisions of sec. 13 of the Assurance Companies Act apply to a transfer carried out under the Companies Act, 1908, or whether in such a case it is sufficient to comply with the provisions of the Companies Act without reference to the provisions of the Assurance Companies Act.

It is well known that transfers of life insurance business have,

(*v*) *Clinch* v. *Financial Corporation* (1868), L. R. 4 Ch. 117.

(*w*) *Southall* v. *British Mutual Life* (1871), L. R. 6 Ch. 614.

in fact, been carried through, either by means of a scheme of arrangement or a sale by the liquidator, without complying with the provisions of the Life Assurance Companies Act, 1870. In 1889 the Sovereign Life Company failed to get the sanction of the Court under the Life Assurance Companies Act, 1870, to a transfer of its business to the Sun Life Company on the grounds (1) that the transfer was *ultra vires* of the transferor company, (2) that more than one-tenth of the policy holders dissented (*x*). Afterwards a scheme under the Joint Stock Companies Arrangement Act, 1870, was sanctioned by the Court, whereby the business was transferred, the amounts of the policies were reduced, and the liability of the transferee company was substituted for that of the transferor company (*y*). In the case of the transfer of the business of the Western Counties Assurance Company to the British Empire Mutual Life Assurance Company in 1889, the transfer was carried out by a voluntary liquidation and sale by the liquidator, under sec. 161 of the Companies Act, 1862, and no application was made to the Court for its sanction to the transfer (*z*).

From the practical business point of view, there is an enormous advantage in being able to dispense with the necessity for applying to the Court, or, at least, in being able to get rid of the right of veto of the one-tenth of the policy holders in life companies, and this practical advantage has very probably induced companies to strain the law in order to meet the business point of view (*a*). In support of this view it may be said that the provisions for transfer in the Assurance Companies Act and the Companies Act respectively, are alternative and not cumulative. It may be argued that, as the Assurance Companies Act, sec. 13, provides that "the directors" of the company or companies may apply to the Court and makes no provision for anybody else applying, that section cannot be applicable to a case where the control of the company's affairs has passed from the directors into the hands of the liquidator; and that the express provision that "no company shall amalgamate with another, or transfer its business to another unless such amalgamation or

(*x*) *Sovereign Life, In re* (1889), 42 Ch. D. 540.

(*y*) *Sovereign Life* v. *Dodd* (1892), 1 Q. B. 405; (1892) 2 Q. B. 573.

(*z*) *Parl. P.* (1891), 330 p. 313.

(*a*) See Mr. Clauson's Lectures on the Companies Acts before the Institute of Actuaries (1899), p. 121; and Article by Mr. G. King in J. I. A., Vol. 29, p. 521.

transfer is confirmed by the Court in accordance with this section," must be read with the implied qualification that it only applies to transactions which could be carried out under the section; and that as the section is not applicable to the case of a sale by the liquidator, no restriction is placed by the Assurance Companies Act on the exercise of the liquidator's powers under sec. 192 of the Companies Act. It may be further argued that it ought not to be deemed to have been within the contemplation of the legislature that the conditions, imposed by the Assurance Companies Act, in order to protect the policy holders of the companies concerned against the acts of directors whose powers under the deed of settlement might otherwise be absolutely unrestricted, should also apply in order to place further restrictions upon the statutory powers of the company or its liquidator under the Companies Act, which powers are already carefully restricted by the terms of the Statute which confers them. On the other side it is submitted that it is fallacious to speak of the procedure under the Assurance Companies Acts and the Companies Acts respectively, as alternative methods of transferring the company's business. The different methods of transfer are (1) by the directors in the exercise of the company's powers under the instrument of incorporation; (2) by a scheme of arrangement under sec. 120 of the Companies Act; (3) by a sale by the liquidator under sec. 192 of the Companies Act. These three methods of transfer are applicable to all companies without regard to the nature of the business carried on. As regards one class of company, that is to say insurance companies, the Assurance Companies Act imposes special conditions for the protection of a special class of creditor. These conditions are upon the plain interpretation of the words applicable to any transfer of business by an insurance company. In either of the three methods of transfer just indicated, the transfer is a transfer by the company. The fact that when the company is in liquidation, the power of transfer is exercised by the liquidator, does not make it any the less a transfer by the company. There is nothing to prevent an application being made to the Court under sec. 13 of the Assurance Companies Act, even if the company is in liquidation, because although the directors are indicated as the proper persons to make the application, the powers of the directors are vested in

the liquidator, who thereby becomes entitled to make such application either in the name of the directors or in his own name. In the absence of anything in the Assurance Companies Act expressly restricting the application of sec. 13 to the transfer of the company's business by the directors acting in pursuance of the company's ordinary powers it is submitted that that section applies to every transfer of the company's business, and that the fact that all transfers under the Companies Act are safeguarded by certain conditions does not render inoperative the special conditions imposed by the Assurance Companies Act upon all transfers of a special class of business. There is an entire absence of direct authority upon the point, but in support of the opinion here expressed reference may be made to the dictum of Eve, J., in the case of the *Life and Health Assurance Company* (*b*), where he said, "I think it is hopeless to contend that sec. 14 of the Act of 1870 does not apply to a transfer made by a company in liquidation exactly as it applies to a transfer made by a company as a going concern."

Summary of principal provisions in a transfer agreement.

The following are the principal provisions which will be contained in an agreement for transferring the business of a life assurance company, say the A company, to another company, say the B company, in a normal case.

SUMMARY OF AGREEMENT FOR TRANSFER OF A LIFE ASSURANCE BUSINESS

(i) *As affecting the Policy-holders of the A Company*

(*a*) The A company to transfer to the B company its whole undertaking, and the goodwill of its business, and the benefit of all contracts (including contracts with agents and reassurance contracts, and contracts in the nature of reassurance or guarantee), and all real and personal property and other assets constituting the assurances and annuity fund of the A company.

(*b*) The transfer to take effect as on a specified date, from which date all contracts and transactions, receipts and payments, losses and obligations, shall pass to the B company.

(*c*) Payments to the B company of premiums on any policy in the A company to be deemed to keep such policy on foot as a contract between the policy-holder and the B company, in substitution for the contract with the A company.

(*d*) The assurance and annuity fund to be closed to new entrants, and not to

(*b*) *Life and Health Assurance, In re*, [1910] 1 Ch. 458, 462.

be liable for any liabilities of the B company other than those ranking against the said fund, until such last-mentioned liabilities—including such future bonuses as may be provided by the agreement (*vide* (*e*) *infra*)—have been discharged, after which any remaining funds shall be the absolute property of the B company.

(*e*) The transferred funds, if thus kept distinct, to be managed at a fixed rate of expense, less than the actual rate in the A company: and the transferred policies to receive such future bonuses as may be earned by the working of the separate fund.

(*f*) Alternatively to (*d*) and (*e*). The transferred fund of the A company to merge in the funds of the B company: and the participating policy-holders of the A company to receive either fixed guaranteed bonuses, or bonuses fixed in relation to the bonuses which may be declared by the B company on its own policies.

(*g*) The B company to pay, satisfy, discharge, and fulfil, and keep the A company indemnified against all the debts, liabilities, and obligations of the A company of every description in respect of contracts existing at the date when the agreement becomes absolute, including all insurance, annuity, and other contracts and engagements of the society—save that the primary security therefor shall be the transferred funds if these are kept separate as specific security, *vide* (*d*) *supra*)—and against all costs and expenses of and incidental to the agreement, including the expenses of winding up and dissolution of the A company.

(ii) *As affecting the Shareholders (if any) of the A Company*

(*h*) The B company to pay or allot to the A company, or its nominees, or to its liquidators or their nominees, a specified amount in cash and/or shares and/or debenture stock of the B company, such cash, shares or debentures to be distributed *pro rata* among the shareholders of the A company: shareholders who do not assent within a specified period after notice to be deemed to desire their proportion of shares and/or debentures to be sold, and to be paid the proceeds in cash.

(*i*) The B company to pay the cost of discharging the claim (under subsection (3) of section 192 of The Companies Act, 1908) of any shareholder of the A company who dissents from the special resolution of that company sanctioning the transfer, if effected under the said section 192.

(*j*) The A company or its liquidator to be at liberty to pay out of its assets prior to the transfer, or alternatively the B company to pay after the transfer, dividends in cash of a specified amount among the shareholders of the A company.

The above provisions under heading (ii) contemplate the voluntary winding-up of the A company, and this course is now almost invariably adopted in order to facilitate the transfer, and secure the members of the A company against liability for future claims.

Covenant of transferee company to

Primâ facie the obligation by the transferee company to indemnify the transferor company against all claims, debts, and

indemnify transferor company against claims.

liabilities does not include an obligation to pay the costs of winding up, and, consequently, if it is intended to include such costs in the indemnity, the obligation must be expressed (*c*). Where the transferee company is one in which the liability of members is unlimited, the obligation to indemnify may by its terms be limited to the subscribed capital of the company (*c*), but, if not so expressed, it will not be deemed to be limited (*d*). The obligation to indemnify the transferor company against all liabilities is an obligation to pay the full amount of all claims, and therefore, on the winding-up of both companies, the transferor company could prove, in the winding-up of the transferee company, for the full amount of such claims, notwithstanding the inability of the transferor company to satisfy the claims (*e*). In one of the European arbitration cases, where the transferor and transferee company were both being wound up, Lord Westbury held that the agreement of the transferee company to indemnify the other could not be taken into consideration until all the creditors of the transferee company had been paid (*f*). In another case a transferee company, after the business and assets had been transferred to it, sought to repudiate its liability on the agreement to indemnify the transferor company on the ground that the whole agreement was *ultra vires* of the transferee company, and had been obtained by fraud. The charge of fraud was not proved, and on the question of *ultra vires* it was held that the transferee company, having had the benefit of the transfer of business and assets, could not repudiate liability on the agreement to indemnify on the ground that there was any irregularity or informality in the transaction (*g*). But in an earlier case in the House of Lords it was held that where the transfer agreement had not been submitted to a general

(*c*) *Indemnity Case* (1871), Alb. Arb. 17; 16 Sol. J. 141; *Indemnity Case* (1872), Eur. Arb. Reilly 3; L. T. 4; *Royal Naval Society's Indemnity Case* (1874), Eur. Arb. L. T. 165; *Frère's Case* (1872), Alb. Arb. Reilly 211; 16 Sol. J. 501.

(*d*) *Anglo-Australian Co. Indemnity Case* (1874), Eur. Arb. L. T. 161; 18 Sol. J. 242.

(*e*) *British Provident Life and Fire, Webster's Case* (1864), 10 L. T. 326.

(*f*) *West's Case* (1873), Eur. Arb. L. T. 71. But where certain policy holders had concurrent claims against both companies he would not permit them to prove individually against the transferee company, but directed the liquidator of the transferor company to bring in one proof in respect of all claims under the indemnity covenant. *Line's and Leah's Cases* (1874), Eur. Arb. L. T. 167; 18 Sol. J. 879.

(*g*) *Anglo-Australian Life, In re* (1862), 3 Giff. 521.

meeting of the shareholders, as required by sec. 29 of the Joint Stock Companies Act, 1844, the transferor company could not prove in the winding-up of the transferee company in respect of the contract to indemnify (*h*). In another case it was held that where an agreement for transfer of business was *ultra vires* by reason of the purchasing company having no power to purchase, such company could not afterwards claim against the selling company payments made in discharge of the latter's debts (*i*).

Section IV.—Novation

Differences of judicial opinion.

During the Albert and European arbitrations the arbitrators had frequently great difficulty in deciding in the case of an amalgamation or transfer whether there had or had not been a novation of the policy holders' contracts, that is to say whether the policy holders of the transferor company had or had not accepted the liability of the transferee company in substitution for the liability of the transferor company. This question was frequently of the utmost importance to policy holders, because in many cases a proof in the winding-up of a subsidiary company was, owing to the unlimited liability of its members, of greater value than a proof in the winding-up of the principal company which had taken over its business. In the European arbitration Lord Westbury took the view that a novation of a policy holder's contract ought not to be lightly presumed, and he announced that in all cases of alleged novation he would require proof of the following facts: (1) that the transferee company had legal power to take over the policies of the transferor company; (2) that the power of the transferee company was made known to the policy holder, and that an offer was made to him to accept either a new policy or an indorsement of the transferee company; (3) that such offer was accepted by acts which unequivocally denoted his understanding and acceptance of the proposal (*ii*). On the other hand in the Albert arbitration Lord Cairns held that any evidence was sufficient to establish a novation which showed that the policy holder acquiesced in the transfer and the substitution of the

(*h*) *Ernest* v. *Nicholls* (1857), 6 H. L. C. 401.

(*i*) *Era Company's Case* (1862), 1 De G. J. & S. 29.

(*ii*) *Blundell's Case* (1872), Eur. Arb. Reilly 84; L. T. 39; 17 Sol J. 87.

liability of the transferee company for the original liability of the transferor company. Lord Romilly, who succeeded Lord Westbury as arbitrator in the European arbitration, adopted the view of Lord Cairns in preference to that of Lord Westbury (*j*). Probably as the result of those differences of opinion, and in order to prevent a recurrence in future cases of the great complication which arose from the difficulty of deciding whether or not any individual policy holder had accepted the liability of the transferee company, it was provided by the Life Assurance Companies Act, 1872, sec. 7, that where a company either before or after the passing of the Act had transferred its business to or been amalgamated with another company, no policy holder in the first-mentioned company who should pay to the other company the premiums accruing due in respect of his policy, should by reason of any such payment made after the passing of the Act, or by reason of any other act done after the passing of the Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance were signified by some writing signed by him or his agent lawfully authorised. This provision doubtless made it much easier to ascertain in any given case whether or not a policy holder remained a creditor of the transferor company, but at the same time it added very considerably to the number of cases in which novation was negatived and so increased the difficulty of satisfactorily carrying through an amalgamation or transfer. The provision was largely ignored in practice and has been dropped from the Assurance Companies Act, 1909, thus leaving the matter in the same apparently unsatisfactory condition that it was in before 1872. If, however, the notices which must now be sent to policy holders before any amalgamation or transfer can be carried through are carefully drafted so as to fix such policy holders with notice of the transfer the payment of future premiums to the transferee company will usually be conclusive evidence of novation. Further as it is now the almost invariable practice to wind up the transferor company at the time the transfer is effected, the question of novation will not in the future be of much practical importance

Assurance Companies Act, 1872, required the policy holder's signature in order to establish a complete novation.

(*j*) *Harman's Case* (1873), Eur. Arb. L. T. 129; 18 Sol. J. 25.

because the policy holders who do not accept the transfer may prove in the winding up of the transferor company and upon the completion of the winding-up and final dissolution of the company the contributories will be discharged from further liability.

What is now necessary to establish complete novation.

The law applicable to the novation of the policy holders' contracts presents little difficulty, although it is not always easy to apply it to the facts of any particular case. Where the transferor company has no power to transfer the policy holder's contract without his consent, then the contract will remain a valid and subsisting contract until cancelled by an agreement, tacit or express, whereby the policy holder agrees to accept the liability of the transferee company in substitution for the liability of the transferor company, or until by reason of non-payment of the premium to some person authorised to receive it on behalf of the transferor company the policy lapses (*k*). The transferee company becomes liable when it undertakes to pay the claims of the policy holders either by way of a substituted liability or by way of guaranteeing the original liability. The payment of premiums to the transferee company is in itself an equivocal act, the meaning of which must be construed mainly by reference to the terms of the notice received by the assured with reference to the amalgamation.

When the assured has clear notice that the transferee company has undertaken to pay the claims of the policy holders in the transferor company upon payment of the premiums to the transferee company, then payment of the premiums accordingly without anything else is a sufficient acceptance of the transferee company's offer (*l*). No indorsement of the original policy or issue of a substituted policy is necessary in order to render the transferee company liable (*m*). *Primâ facie* the liability of the transferee company on the policies of the transferor company must be deemed to have been offered and accepted as a substitute

(*k*) If the transferor company ceases to carry on business, and no provision is made for receiving payment of the premiums, the policy does not lapse by reason of the non-payment of premiums because there is no hand to receive them. *Conquest's Case* (1873), Eur. Arb. L. T. 121.

(*l*) *Times Life Assurance, In re* (1870), L. R. 5 Ch. 381; *Anchor Assurance, In re* (1870), L. R. 5 Ch. 632; *Kennedy's Case* (1871), Alb. Arb. Reilly 5; *Fagan's Case* (1871), Alb. Arb. Reilly 179; *Dorning's Case* (1872), Alb. Arb. Reilly 144; *Whitehaven Bank Case* (1871), Alb. Arb. Reilly 62.

(*m*) *British Provident Life and Fire, In re* (1864), 10 L. T. 326.

for the liability of the transferor company, and not as an additional security (*n*). On the other hand, there have been cases where the transferee company has been held liable as providing an additional and not a substituted security (*o*). If a policy holder has not clear notice that the undertaking of the transferor company's obligations by the transferee company is one of the terms of the agreement between the companies, then payment of the premium to the transferee company is by itself no evidence of a novation (*p*). Payment of premium to the transferee company might be made in order to keep alive the original policy with the transferor company, the former merely acting as agents of the latter to receive the premiums (*q*). It is not, therefore, sufficient evidence of a novation merely to show that the assured upon payment of his premium received receipts headed with the name of the amalgamated or transferee company (*r*). But if an order has been made to wind up the transferor company, any implied authority to the transferee company to receive premiums on their behalf is determined by the order, and any payment of premium thereafter to the transferee company by a policy holder who had actual or constructive notice of the winding-up order is sufficient evidence of a novation (*s*). The notice of transfer or amalgamation may be framed so as to give the assured the alternative of keeping alive his original claim upon the transferor company, or of taking the substituted liability of the transferee company, and when such an alternative is presented the mere payment of premium will primarily be attributed to the first alternative, and does not prove a novation (*t*). Thus a circular sent to policy holders in the transferor company stated that the terms and

(*n*) *International Life, Ex p. Blood* (1870), L. R. 9 Eq. 316; *Talbot's Case* (1874), Eur. Arb. L. T. 169; 18 Sol. J. 758; *Dale's Case* (1871), Alb. Arb. Reilly 11; *European Assurance, Miller's Case* (1876), 3 Ch. D. 391.

(*o*) *Gardiner's Case* (1873), Eur. Arb. L. T. 63; 17 Sol. J. 464; *Harman's Case* (1873), Eur. Arb. L. T. 129; 18 Sol. J. 25; reversed (1874), 19 Sol. J. 68; (1875), 1 Ch. D. 326.

(*p*) *Family Endowment Soc., Pitt's Case* (1870), L. R. 5 Ch. 118.

(*q*) *Manchester and London Life, Bartlett's Case* (1870), L. R. 5 Ch. 640.

(*r*) *Manchester and London Life, Bartlett's Case* (1870), L. R. 5 Ch. 640; *Blundell's Case* (1872), Eur. Arb. Reilly 84; L. T. 39; 17 Sol. J. 87; *Count D'Alte's Case* (1873), Alb. Arb. Reilly 253; 17 Sol. J. 365.

(*s*) *Carpmael's Case* (1873), Eur. Arb. L. T. 95; 17 Sol. J. 838; *Line's Case* (1874), Eur. Arb. L. T. 151; 18 Sol. J. 418.

(*t*) *Hort's Case* (1873), Eur. Arb. L. T. 109; 17 Sol. J. 765; reversed (1875), 1 Ch. D. 307; *Swift's Case* (1873), Eur. Arb. L. T. 89.

conditions of their policies would remain unaltered, and that in all future bonuses they would participate on an equality with the other policy holders in the conjoint companies. The circular further invited the policy holders to send their policies for indorsement, or to surrender them in exchange for a new policy in the transferee company. A policy holder having received the above circular, took no notice of it except that she paid the premiums to the transferee company, and received their receipt. Afterwards the transferee company declared a bonus and notified the assured that a certain sum had been allotted and added to her policy. Of this she took no notice. It was held that there was no novation, and that the assured was entitled to prove against the transferor company (*u*). No novation can be inferred from the payment of premium to the transferee company when the assured expressly declines to accept the substituted liability of the transferee company (*x*), or states that the premium is paid to keep alive the original policy with the transferor company (*y*), or that it is made provisionally pending the receipt of further information (*z*), or that he declines to recognise the amalgamation (*a*). In one case a policy holder who had protested against the amalgamation, asked the transferor company where he might pay the premiums in order to keep his original policy alive. He was told that he could not do so, and thereupon he paid the premium, and asked for a receipt indicating that it was paid to keep alive his claim against the transferor company. He was told that he must take the ordinary receipt of the transferee company or nothing. It was held that the assured had not consented to the transfer of his policy (*b*). In another case, however, where the company took up a similar attitude, and told the assured that he had no alternative but to accept the liability of the transferee company, or let the policy lapse, it was held that although the information given was

(*u*) *Conquest's Case* (1873), Eur. Arb. L. T. 67; 17 Sol. J. 328; (1875), 1 Ch. D. 334.

(*x*) *Medical Invalid and General Life, Griffith's Case* (1871), L. R. 6 Ch. 374; *Clarke's Case* (1872), Alb. Arb. Reilly 217; 16 Sol. J. 752; *Dorning's Case* (1872), Alb. Arb. Reilly 144; 16 Sol. J. 673.

(*y*) *Buchner's Case* (1873), Alb. Arb. Reilly 258.

(*z*) *Wood's Case* (1871), Alb. Arb. Reilly 54.

(*a*) *How's Exors'. Case* (1872), Alb. Arb. Reilly 245.

(*b*) *Coghlan's Case* (1872), Eur. Arb. Reilly 46; L. T. 31; 17 Sol. J. 127.

erroneous, the assured did ultimately pay on the footing of transferring his liability, and that there was a complete novation (*c*). A mere protest or objection made by the policy holder in the first instance may be consistent with his subsequent acquiescence in or acceptance of the amalgamation (*d*). The acceptance of the liability of the transferee company may be indicated not only by payment of premium, but by other acts from which such acceptance may be properly inferred. Thus the acceptance of a bonus declared by the transferee company is strong evidence of novation when the bonus is declared out of the profits of the transferee company (*e*). If the assured sends his policy to the transferee company and obtains an alteration of its terms, that is also strong evidence that he has accepted the liability of the transferee company (*f*), although in one case the mere indorsement on the policy by the transferee company of leave to reside abroad upon payment of an extra premium was held not to be sufficient to establish a novation (*g*). When the policy holder is a party to the amalgamation agreement, and executes the documents either as a shareholder or otherwise, and the transfer of all the policies of the transferor company forms part of the amalgamation scheme, such policy holder must be deemed to have consented to a transfer of his own policy, and the Court without further evidence will hold that there has been a complete novation (*h*). When the policy has been indorsed with the undertaking of the transferee company to pay the sum assured, it must in the absence of evidence to the contrary be presumed that the assured consented to the indorsement, and that there was a novation (*i*).

(*c*) *Howell's Case* (1872), Alb. Arb. Reilly 116; 16 Sol. J. 632.

(*d*) *Holme's Case* (1872), Alb. Arb. Reilly 110; *Rivaz's Case* (1872), Alb. Arb. Reilly 104; 16 Sol. J. 590; *German Life Company's Case* (1871), Alb. Arb. Reilly 189; *Warne's Case* (1872), Alb. Arb. 113; 16 Sol. J. 631.

(*e*) *Medical Invalid and General Life, Spencer's Case* (1871), L. R. 6 Ch. 362; *Werninck's Case* (1871), Alb. Arb. Reilly 101; *Benjamin Smith's Case* (1874), Eur. Arb. L. T. 173; *Allen's Case* (1872), Alb. Arb. Reilly 127; 16 Sol. J. 657; *Glazebrook's Case* (1872), Alb. Arb. Reilly 135; *Knox's Case* (1872), Alb. Arb. Reilly 132; 16 Sol. J. 673.

(*f*) *Carpmael's Case* (1873), Eur. Arb. L. T. 95; 17 Sol. J. 838; *German Life Company's Case* (1871), Alb. Arb. Reilly 189; *Butler's Case* (1871), Alb. Arb. Reilly 203.

(*g*) *Grain's Case* (1874), Eur. Arb. L. T. 157; 18 Sol. J. 758.

(*h*) *National Provincial Life, Fleming's Case* (1871), L. R. 6 Ch. 393; *Harman's Case* (1875), 1 Ch. D. 326; *Frere's Case* (1872), Alb. Arb. Reilly 211; 16 Sol. J. 501.

(*i*) *European Assurance, Miller's Case* (1876), 3 Ch. D. 391.

Novation where premiums continue to be paid to same agent.

Where premiums are paid to an agent and after an amalgamation the same agent continues to collect the premiums on behalf of the transferee company, the issue of receipts in the name of the transferee company is *primâ facie* sufficient to show that the assured is paying the premiums to the transferee company (*k*): but where the assured was illiterate, and continued to pay his premiums without any knowledge of the transfer, the issue of receipts to him in the name of the transferee company was held to be no evidence of a novation (*l*).

Where premiums are paid by agent on behalf of the assured.

Where premiums are paid by an agent of the assured the agent has *primâ facie* no power to bind the assured to a novation, and therefore payment by such agent to the transferee company has not necessarily the same significance as payment by the assured (*m*). Even where the agent has expressly accepted the liability of the transferee company in substitution for the liability of the transferor company, if he has done so without the authority of the assured, the latter is not bound, and the payment of the premium may be taken as a payment made to keep alive the original liability (*n*).

Where premiums are paid by trustees or other third persons on behalf of the person beneficially interested.

Where premiums are paid by trustees or by other persons who have not the whole beneficial interest in the policy moneys, such as settlors or mortgagors, the persons who are beneficially entitled will or will not be bound by a novation according as the person paying the premiums has or has not power as against such beneficiaries to substitute one policy for another (*o*). Where, however, the legal holder of the policy purports to effect a novation, the future payment of the premium by him to the transferee company cannot be referred to the original liability, and therefore the beneficiaries cannot recover against the transferor company unless the liability of that company has been preserved by some independent payment or tender of the premium on behalf of such beneficiaries (*p*).

(*k*) *Lancaster's Case* (No. 2) (1871), Alb. Arb. Reilly 95.

(*l*) *Clegg's Case* (1873), Alb. Arb. Reilly 266.

(*m*) *Count D'Alte's Case* (1873), Alb. Arb. Reilly 253; 17 Sol. J. 365.

(*n*) *Dupré's Exors'. Case* (1872), Alb. Arb. Reilly 236.

(*o*) *Balfour's Case* (1871), Alb. Arb. Reilly 207; 16 Sol. J. 534.

(*p*) *Andrew's Case* (1872), Alb. Arb. Reilly 107; 16 Sol. J. 609; *Werninck's Case* (1871), Alb. Arb. Reilly 101; *Talbot's Case* (1874), Eur. Arb. L. T. 169; 18 Sol. J. 758.

Where policy is mortgaged to company and premiums are paid by the company itself out of other property held as collateral security.

Where a life policy issued by the transferor company was, together with an annuity, mortgaged to the company, with power to the company to pay the premiums out of the annuity, and after the transfer of its business, the transferee company, with the knowledge and consent of the assured, received the annuity and paid to itself the premiums on the policy, it was held that there was a complete novation (*q*). In another case a lady being entitled to a rent-charge, payable by a receiver out of the Court of Chancery, insured in the transferor company, and mortgaged the policy and the rent-charge to the company in security for a loan. By a consent order of the Court the premiums and interest on the loan were paid by the receiver to an agent for the company. Upon amalgamation the debt and securities, together with the other assets of the transferor company, were transferred to the transferee company as a trust fund to meet the claims of the policy holders, and the agent thereafter paid the premiums and interest to the trustees of this fund. The assured never heard of the amalgamation, or of the new arrangement for payment of premiums and interest. It was held that there had been no novation, and that the original liability of the transferor company had survived (*r*).

How far a claim made against the transferee company establishes novation.

Where a policy has matured, and the claim become payable, the mere making of a claim against the transferee company, and their admission of liability, does not in itself constitute a complete novation so as to release the transferor company from liability (*s*). A claim, however, made against the transferee company may be evidence to show the intention of the assured in making a previous payment of premium (*t*). And where after the amalgamation agreement a policy holder whose claim had matured obtained from the transferee company an indorsement on the policy to the effect that the transferee company alone were liable, and that the claim was admitted and would be paid in certain specified instalments, and some of the instalments were paid, it was held that there was a good consideration for the undertaking of the company to pay, and that there

(*q*) *Mooney's Case* (1872), Alb. Arb. Reilly 241.

(*r*) *Power's Case* (1872), Alb. Arb. Reilly 232; 16 Sol. J. 732.

(*s*) *Wilson's Case* (1874), Eur. Arb. L. T. 158.

(*t*) *Budden's Case* (1872), Alb. Arb. Reilly 120; 16 Sol. J. 462.

was a complete novation which released the transferor company (*u*).

Novation in annuity contract.

Annuities stand as regards novation on a somewhat different footing from life policies. The general principles of law are the same, that is to say, there must be evidence to show that the annuitant has accepted the liability of the transferee company in substitution for the liability of the transferor company. The same importance, however, cannot be attributed to the receipt of the periodical payment at the hands of the transferee company as is attributed to the payment of premiums in the case of a life policy. Knowledge that the transferee company are taking over the liabilities of the transferor company and receipt of the annuity from them is not in itself sufficient to show that the annuitant has accepted the one liability for the other (*x*). And even when the annuity was accepted from the transferee company after an order for the winding-up of the transferor company had been made, it was held that the annuitant had not released the obligation of the transferor company, and that he was entitled to prove concurrently against both companies (*y*). *Primâ facie*, however, where the annuitant clearly accepts the liability of the transferee company, as where the company indorses upon the deed an undertaking to pay the annuity, such liability must be deemed to be in substitution for and not merely by way of guaranteeing the liability of the transferor company (*z*). A policy holder on a policy upon which all premiums have been paid at the date of the amalgamation is in the same position as an annuitant, and as a rule there must be an indorsement of the policy or some definite acceptance of the transferee company's liability before novation can be presumed (*a*).

Section V.—Winding-Up

Summary of provisions relating to winding-up.

Insurance companies which have been registered under the Companies Acts, may be wound up under the Companies Act,

(*u*) *United Ports and General, Ewen's Claim* (1873), L. R. 16 Eq. 354.

(*x*) *National Provincial Life, In re* (1870), L. R. 9 Eq. 306; *Family Endowment Society, In re* (1870), L. R. 5 Ch. 118.

(*y*) *Burns's Case* (1873), Eur. Arb. L. T. 127; 17 Sol. J. 855.

(*z*) *Dale's Case* (1871), Alb. Arb. Reilly 11.

(*a*) *Hawtrey's Case* (1872), Alb. Arb. Reilly 138; 16 Sol. J. 713.

1908, either (1) by the Court, (2) voluntarily, or (3) subject to the supervision of the Court (*b*). A company not formed or registered under the above Act, but which is capable of being registered under the Companies Act, may register for the express purpose of enabling it to be wound up voluntarily (*c*).

Unregistered companies.

Unregistered companies, if not illegal, either because they ought to have been registered or for any other reason, may be wound up by the Court under the provisions of the Compauies Act (*d*). They cannot be wound up voluntarily (*e*). An "unregistered company" means, for the purpose of winding up, any company not registered under the Companies Acts (*f*), and includes a purely mutual association (*g*) and a friendly society, whether registered or unregistered (*h*). An unregistered company or friendly society may be dissolved under the provisions of its deed of settlement (*i*) or under the provisions of the Friendly Societies Act (*k*), but, notwithstanding such dissolution, it may still be wound up by the Court (*i*). Apart from the Companies Act an unregistered and unincorporated company may also be wound up in an action brought under the general jurisdiction of the Court (*l*).

Illegal companies.

A company or association which is illegal cannot be wound up on its own petition, or on the petition of any member or policy holder who is aware of the illegality (*m*). But if a petition is brought by a member or policy holder who is ignorant of the illegality, the company cannot set up its own illegality as a defence to the petition (*n*).

Jurisdiction of the Courts.

The Courts having jurisdiction to wind up companies registered

(*b*) Comp. Act, 1908, sec. 122; Ass. Comp. Act, 1909, sec. 15.

(*c*) Comp. Act, 1908, sec. 249. But the registration must be before a petition to wind up has been presented. Registration after the commencement of the winding-up is a mere nullity: *Hercules Insurance, In re* (1871), L. R. 11 Eq. 321.

(*d*) Comp. Act, 1908, sec. 267; Ass. Comp. Act, 1909, sec. 15; *Bowling and Welby's Contract*, [1895] 1 Ch. 663.

(*e*) Comp. Act, 1908, sec. 268 (1) (i).

(*f*) *Bank of London and National Provincial, In re* (1871), L. R. 6 Ch. 421.

(*g*) *Great Britain Mutual Life* (1880), 16 Ch. D. 246; *London Marine Insurance* (1869), L. R. 8 Eq. 176.

(*h*) *Independent Protestant Loan Fund*, [1895] Ir. R. 1.

(*i*) *Friendly Endowment Society, In re* (1870), L. R. 5 Ch. 118.

(*k*) Friendly Soc. Act, 1896, secs. 78-83; Collecting Soc. Act, 1896, sec. 12.

(*l*) *Lead Co.'s Workmen's Fund*, [1904] 2 Ch. 196.

(*m*) *Padstow Total Loss, In re* (1882), 20 Ch. D. 137.

(*n*) *South Wales Atlantic S.S. Co., In re* (1876), 2 Ch. D. 763.

in England are the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and such County Courts as have jurisdiction in bankruptcy (*o*). The County Court has jurisdiction when the share capital of the company paid up or credited as paid up does not exceed £10,000 (*p*). The jurisdiction of the Courts of the Counties Palatine and of the County Courts is determined according to the place where the registered office of the company is situated (*q*). In the case of unregistered companies, the jurisdiction of all Courts for the purposes of winding-up is determined according to the place where the principal place of business is situated (*r*).

Foreign companies.

A foreign company carrying on business within the jurisdiction may be wound up by the Court, and the Court may either distribute the assets which are in this country (*s*), or may protect such assets pending proceedings in a foreign Court, until satisfied that the foreign liquidator will admit the English creditors *pari passu* with the foreign creditors (*t*).

When may a company be wound up by the Court.

Any insurance company may be wound up by the Court if it makes default in complying with any of the requirements of the Assurance Companies Act, 1909, and if the default continues for a period of three months after notice of default by the Board of Trade (*tt*).

A company registered under the Companies Act may be wound up by the Court (*u*) (1) if the company has by special resolution resolved that the company be wound up by the Court; or (2) if default is made in filing the statutory report, or in holding the statutory meeting (*v*); or (3) if the company does not commence its business within a year, or suspends its business for a whole year; or (4) if the number of members is reduced below seven; or (5) if the company is unable to pay its debts; or (6) if the Court is of opinion that it is just and equitable that it should be wound up.

An unregistered company may be wound up by the Court

(*o*) Comp. Act, 1908, sec. 131 (1), (5).
(*p*) Sec. 131 (2), (3).
(*q*) Sec. 131 (2), (3).
(*r*) Sec. 268 (1) (i).
(*s*) *Commercial Bank, In re* (1886), 33 Ch. D. 174.
(*t*) *Matheson Bros., Ltd., In re* (1884), 27 Ch. D. 225.
(*tt*) Ass. Comp. Act, 1909, sec. 23.
(*u*) Comp. Act, 1908, sec. 129.
(*v*) Only a shareholder can present a petition in respect of (2) Comp. Act, 1908, sec. 137 (b).

(a) if the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; or (b) if the company is unable to pay its debts; or (c) if the Court is of opinion that it is just and equitable that the company should be wound up (*x*).

When is a company unable to pay its debts.

A company is deemed unable to pay its debts (1) if a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding £50 then due, has served on the company by leaving at its registered office (or in the case of an unregistered company by leaving at its principal place of business, or by delivering to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct) a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor (*y*); or (2) if in the case of an unregistered company any action or other proceeding has been instituted against any member for any debt or demand due, or claimed to be due, from the company, or from him in his character of member, and notice in writing of the institution of the action or proceeding having been served on the company in the manner above specified, the company has not within ten days after service of the notice paid, secured, or compounded for the debt or demand, or procured the action or proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the action or proceeding and against all costs, damages, and expenses to be incurred by him by reason of the same (*z*); or (3) if execution or other process issued on a judgment, decree, or order obtained in any court in favour of a creditor against the company (or in the case of an unregistered company against any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company) is returned unsatisfied in whole or in part (*a*); or (4) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a

(*x*) Comp. Act, sec. 268.
(*y*) Secs. 130 (i), 268 (iv) (a).
(*z*) Sec. 268 (1) (iv) (b).
(*a*) Secs. 130 (ii) (iii), 268 (1) (iv) (c) (d), or in Scotland if the induciae of a charge for payment on an extract decree or an extract registered bond or an extract registered protest have expired without payment being made.

company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities under the policies and annuities, and other existing contracts of the company (*b*).

Who may petition for winding-up.

An application to the Court for a winding-up order is made by petition presented either by (a) the company; (b) any ten or more holders of policies, investment bonds, or annuities of an aggregate value of £10,000; (c) any other creditor or creditors; (d) any contributory or contributories (*c*).

Effect of Assurance Companies Act, sec. 15.

Apart from sec. 15 of the Assurance Companies Act, 1909, the holder of a policy, investment bond, or annuity would be entitled under sec. 137 of the Companies Consolidation Act, 1908, to present a petition as a contingent or prospective creditor of the company (*d*). Section 15, however, limits the right of such creditors, and although a single general creditor of the company could present a petition without reference to the amount of his debt, a policy holder can only present a petition when nine others are associated with him and the total value of their policies amounts to £10,000 (*d*).

Petition by contributory.

A contributory may not present a petition unless (1) the number of members in the company is reduced below seven, or (2) the shares in respect of which he is a contributory have been held by him for at least six months during the previous eighteen months or have devolved on him through the death of the former holder (*e*). *Primâ facie*, every member who is liable to be placed on the list of contributories upon winding up has, subject to the above-mentioned conditions, a *locus standi* to present a petition. A past member of a company registered under the Joint Stock Companies Act, 1844, was held to be entitled to present a petition because, although as between him and the other shareholders the deed of settlement relieved him from further liability after he had transferred his shares, yet he was liable to be sued individually in

(*b*) Comp. Act, 1908, secs. 130 (iv), 268 (1) (iv) (e). See *European Life, In re* (1869), L. R. 9 Eq. 122; *Agriculturist Cattle Insurance, In re* (1849), 1 Mac. & G. 170; but the definition of insolvency was apparently enlarged in the case of life assurance companies by Life Ass. Comp. Act, 1870, sec. 21, and as regards all companies by Comp. Act, 1907, sec. 28. Where part of the assets consists of uncalled capital the Court will have regard not merely to the nominal amount of uncalled capital, but to the amount which upon the evidence can in fact be realized: *National Funds Assurance* (1876), 24 W. R. 1066.

(*c*) Comp. Act, 1908, sec. 137 (1); Ass. Comp. Act, 1909, sec. 15.

(*d*) *British Equitable Bond and Mortgage Corp., In re*, [1910] 1 Ch. 574.

(*e*) Comp. Act, 1908, sec. 137 (1) (a).

respect of the company's debts in the event of a judgment creditor failing to obtain satisfaction after execution against the property of the company (*f*). But where there was an amalgamation agreement whereby the shareholders in the transferor company were to become shareholders in the transferee company and the transferee company was to indemnify the transferor company against all claims, a shareholder who executed the agreement, although liable as a contributory in the transferor company, was held not to be entitled as against shareholders who had dissented from the agreement to petition to wind up the transferor company, because in effect he was calling upon such shareholders to contribute to claims against which he, as a party to the agreement, had contracted to indemnify them (*g*).

Policy holders or other contingent creditors must give security and make a *primâ facie* case.

A petition by policy holders or annuitants, or by any other contingent or prospective creditor or creditors (*h*), can only be presented by leave of the Court, which will not be granted unless a *primâ facie* case for winding up has been established, and such security for costs has been given as the Court thinks reasonable. The object of this provision is to avoid publicity being given to a petition presented upon wholly inadequate evidence or from malicious motives. When the petition is filed it will be referred to a judge in chambers to inquire whether a *primâ facie* case has been made. The judge may summon the respondents to attend the inquiry, but no advertisement of the petition is permissible until the judge is satisfied that a *primâ facie* case has been proved (*i*). Where there is a voluntary winding-up, and a petition is presented for a winding-up by the Court, it is unnecessary to consider whether there is a *primâ facie* case, and security for costs will not be required (*k*).

Who are policy holders.

The Assurance Companies Act, 1909, defines a policy holder as "the person who for the time being is the legal holder of the policy for securing the contract with the assurance company" (*l*). The definition is badly drafted leaving it in doubt upon a literal interpretation whether any other person is a policy holder than the

(*f*) *The Times Fire, In re* (1861), 30 Beav. 596.

(*g*) *Anglo-Australian Assurance, In re* (1860), 1 Dr. & Sm. 113.

(*h*) Comp. Act, 1908, sec. 137 (1) (c).

(*i*) *European Assurance, In re* (1871), 19 W. R. 881.

(*k*) *British Alliance Assurance, In re* (1878), 9 Ch. D. 635.

(*l*) Ass. Comp. Act, 1909, sec. 29.

person for the time being in lawful physical possession of the document. It seems reasonably clear that the definition is not intended to refer to a holding of the policy in the physical sense and that for instance a solicitor exercising his lien for costs upon his client's policy would not be a policy holder entitled to present a petition. It is submitted that the legal holder of the policy means the person who has the legal title to the policy moneys, and therefore includes a trustee or legal mortgagee but not a mere beneficiary, an equitable mortgagee, or the owner of the equity of redemption.

Can persons with only an equitable title petition as policy holders?

It was decided under the Companies Act, 1862, that a creditor in equity was entitled to petition for the winding-up of a company under that Act (*m*). This was decided partly upon the wording of sec. 80, which referred to a creditor "at law or in equity." Those words have now been omitted from the corresponding sec. 130 of the Companies Act, 1908. No doubt the words were omitted as being unnecessary, and it may be assumed that an equitable assignee of a debt would still have a *locus standi* to petition under the Companies Acts. Apparently, however, where the creditors are policy holders or annuitants holding contracts in a company to which the Assurance Companies Act, 1909, applies, they must be legal holders of the policy or other contract, and merely equitable assignees or beneficiaries cannot petition.

Can the holder of the bare legal title in a policy petition without joining the beneficial owner?

It has been held under the Companies Acts that a creditor who is a trustee or who has otherwise a bare legal title to the debt without any beneficial interest, is not entitled to present a petition as a creditor without joining those who are beneficially interested and *sui juris* (*n*). This principle is apparently equally applicable to the case of policy holders, and therefore beneficiaries and equitable assignees of a policy must as a rule be joined with the legal holder. In one case Jessel, M.R., doubted whether a creditor holding a policy upon a young life merely as security for a debt had a sufficient beneficial interest to petition for the winding-up of the company without showing that his debtor was insolvent (*o*).

Security to

Every petitioner resident out of the jurisdiction must give

(*m*) *Montgomery Moore Synd.* (1903), W. N. 121.

(*n*) *Dearle, Ex parte* (1884), 14 Q. B. D. 184; *Pentalta Exploration Co.* (1898), W. N. 55. See *Sovereign Life, In re* (1889), 42 Ch. D. 450.

(*o*) *Great Britain Mutual Life, In re* (1880), 16 Ch. D. 246.

security even although not required to do so as a policy holder or other contingent creditor (*p*). North, J., held that a petitioner resident in Scotland must give security for costs, as the Judgment Extension Act does not apply to winding-up proceedings, but the Court of Appeal held that if he has substantial property in England he need not give security (*q*), and as sec. 180 of the Companies Act makes every order made by an English Court in the course of a winding-up enforceable in Scotland and Ireland as if the order had been made there, it may be doubted whether a petitioner ought to be required to give security merely because he is resident in Scotland or Ireland.

be given by petitioner resident out of the jurisdiction.

On hearing the petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim order or any other order that it deems just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged for an amount up to or in excess of those assets or that the company has no assets (*r*). Under the Life Assurance Companies Act, 1870, the Court was given express power to suspend proceedings on the petition to enable uncalled capital to be called up (*s*), and thus the better to determine whether the company was in fact insolvent (*t*). This provision is omitted from the Assurance Companies Act, 1909, no doubt because the general powers given by the Companies Act, 1908, are sufficiently wide to enable the Court in its discretion to suspend proceedings for this or any other purpose.

Power of Court to dismiss petition or suspend proceedings.

A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up (*u*), and, where the order is made on more than one petition, at the time when the earliest was presented (*x*).

Commencement of winding-up.

Where there has been a transfer of assurance business from one company to another, and the transferor or subsidiary company or the creditors thereof have claims against the transferee or

Power of Court to order winding-up of subsidiary company.

(*p*) *Home Assurance, In re* (No. 2), (1871), L. R. 12 Eq. 112.

(*q*) *Howe Machine Co., Fountain's Case* (1889), 41 Ch. D. 118.

(*r*) Comp. Act, 1908, sec. 141.

(*s*) Sec. 21.

(*t*) *Great Britain Mutual Life, In re* (1880), 16 Ch. D. 246.

(*u*) Comp. Act, 1908, sec. 139. *Russell Hunting Record Co., In re*, [1910] 2 Ch. 78.

(*x*) *Kent* v. *Freehold Land Co.* (1868), L. R. 3 Ch. 493.

principal company, then if the principal company is being wound up by or under the supervision of the Court, and the subsidiary company is also being wound up, the Court shall order the subsidiary to be wound up in conjunction with the principal company (*y*). And if the subsidiary company is not being wound up the Court may order such company to be wound up in conjunction with the principal company, if in the opinion of the Court such a course is just and equitable (*y*). The same person may be appointed to be liquidator for the two companies, and the Court may make such other provision as may seem necessary with a view to the companies being wound up as if they were one company. The commencement of the winding-up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding-up of the subsidiary company. When the winding-up of any subsidiary company is of a simple nature, as in a case where there were only two creditors, the Court may direct that the list of contributories of that company be at once settled and that all other necessary steps be immediately taken for payment of the company's debts without waiting for the corresponding steps being taken in the principal or other subsidiary companies (*z*).

Power of Court to reduce amount of company's contracts instead of winding-up.

The Court, in the case of an assurance company which has been proved to be unable to pay its debts, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order (*a*). A scheme under this provision is a substitution for a winding-up order. Provision will be made for immediate payment, either in full or in part, of policies which have matured, and for the formation of a trust fund into which future premiums will be paid and out of which future claims will be paid on the reduced scale. The costs of a winding-up are thus avoided and the policy holders will ultimately get more. The provision is not intended to enable an insolvent company to continue to carry on business by relieving it of part of its present

(*y*) See *Lancashire Plate Glass, In re* (1911), 46 Law Journal, 683. Ass. Comp. Act, 1909, sec. 16; before the Life Assurance Companies Act, 1870, the Court had no jurisdiction to make one winding-up order in respect of two distinct companies, however much the affairs of the companies might be involved the one with the other: *Shields Marine Association* (1867), 16 W. R. 69.

(*z*) *Dyke's Case* (1872), Eur. Arb. Reilly 12; L. T. 10.

(*a*) Ass. Comp. Act, 1909, sec. 18.

and future liabilities. Such a scheme would not be entertained by the Court (*b*). Where a scheme provided that policy holders whose claims had matured should be paid in full and that other policies should be reduced, the Court held that the crucial time should be the date of the presentation of the petition, and that no policy maturing after that date should be paid in full (*c*). The power of approving a scheme under the above provision cannot be exercised so long as there is a winding-up order in existence, and if after the making of a winding-up order the policy holders desire to present a scheme for the approval of the Court, the winding-up order ought to be discharged and meetings of policy holders and shareholders summoned in order to ascertain their wishes (*d*).

If upon the hearing of a petition for a winding-up it is suggested that a scheme for reduction of contracts might be arranged, the petition may be ordered to stand over in order to enable meetings to be summoned, and the matter will be referred to Chambers (*e*).

Scheme of arrangement.

The Court has also power under sec. 120 of the Companies Consolidation Act, 1908, to sanction an arrangement or compromise between a company and its creditors if approved by a majority in number representing three-fourths in value of the creditors interested (*f*). Such a scheme may either be a means of avoiding a winding-up and enabling the company's business to be carried on (*g*) or it may be a means of facilitating the winding-up and enabling the liquidator to gather and distribute the assets to the best advantage of all concerned. Under such a scheme the contracts of the company may be reduced either to enable the company to continue to carry on its own business or to enable it to transfer the business to another company.

Stay of proceedings against company or contributory.

At any time after the presentation of a petition, and before a winding-up order has been made, the company or any creditor or contributory may apply to the High Court or Court of Appeal for a stay of any proceedings against the company (or, in the case of

(*b*) *Reconstruction Case* (1872), Alb. Arb. Reilly 150; *Nelson & Co., In re*, [1905] 1 Ch. 551.

(*c*) *Great Britain Mutual Life, In re* (1882), 20 Ch. D. 351.

(*d*) *Great Britain Mutual Life, In re* (1880), 16 Ch. D. 246.

(*e*) *Briton Medical and General, In re* (1886), 54 L. T. 14.

(*f*) See *post*, p. 99.

(*g*) *British Widows Assurance, In re*, [1905] 2 Ch. 40.

an unregistered company, against any contributory), pending therein, or may apply to the Court having jurisdiction in the winding-up to restrain any proceedings pending in any other Court (*h*).

When a winding-up order has been made, no proceeding shall be proceeded with or commenced against the company (or, in the case of an unregistered company, against any contributory), except by leave of the Court, and subject to such terms as the Court may impose (*i*).

Statement of affairs to be submitted to the official receiver.

When a winding-up order has been made, a statement as to the affairs of the company, verified by one or more director or directors and by the secretary or other chief officer, must be submitted to the official receiver in bankruptcy within fourteen days from the date of the order, or within such extended time as the official receiver or the Court may, for special reasons, appoint, and any person stating himself in writing to be a creditor or contributory may inspect such statement (*k*). After receipt of the statement, the official receiver makes a report to the Court (*l*).

Official receiver as provisional liquidator summons meetings to select liquidator and committee of inspection.

The winding-up proceedings are managed by a liquidator or liquidators (*m*). The official receiver is provisional liquidator, and acts as liquidator, unless or until some other liquidator is appointed (*n*). When the winding-up order has been made, the official receiver summons separate meetings of the creditors and contributories of the company, for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the official receiver, and whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and to determine who are to be the members of the committee, if appointed (*o*). If there is any difference between the determinations of the meetings, the Court will decide the difference and make such order as it thinks fit (*p*).

Liquidator has custody and control of all property and things in action.

The liquidator takes into his custody or under his control all the property and things in action to which the company is, or

(*h*) Comp. Act, 1908, secs. 140, 270.
(*i*) Secs. 142, 271.
(*k*) Sec. 147.
(*l*) Sec. 148.
(*m*) Sec. 149.
(*n*) Secs. 149, 152 (3).
(*o*) Sec. 152 (1). The committee of inspection is composed of creditors and contributories and acts by a majority; sec. 160.
(*p*) Sec. 152 (2).

appears to be, entitled (*q*). In the case of an unregistered company which has no power to sue and be sued in a common name, or if, for any other reason, it seems expedient, the Court may make an order directing that all or any part of the property and things in action belonging to the company or to trustees on its behalf, shall vest in the liquidator by his official name (*r*), and a company which has been registered since the commencement of the winding-up merely for the purpose of enabling it to be wound up voluntarily, is deemed to be an unregistered company for the purpose of this provision, and a vesting order may be made accordingly (*s*).

Liquidator in Scotland and Ireland.

In Scotland and Ireland there is no official receiver. The Court may appoint a provisional liquidator to act until the wishes of the creditors and contributories have been ascertained (*t*). So long as there is no liquidator, all the property of the company is deemed to be in the custody of the Court (*u*). No committee of inspection is appointed in the case of a winding-up in Scotland or Ireland.

Powers of liquidator with sanction of court or committee of inspection.

The liquidator in a winding-up by the Court has power, with the sanction either of the Court or of the committee of inspection: (a) to bring or defend legal proceedings; (b) to carry on the business of the company so far as may be necessary for the beneficial winding-up thereof; (c) to employ a solicitor or other agent to take any proceedings or to do any business which he is unable to take or do himself (*v*).

Discretionary powers of liquidator.

The liquidator in a winding-up by the Court has power (*x*) (a) to sell the real and personal property and things in action; (b) to do all acts and to execute in the name and on behalf of the company all deeds, receipts, and other documents; (c) to prove in the bankruptcy of any contributory; (d) to draw, accept, make, and indorse, on behalf of the company, any bill of exchange or promissory note; (e) to raise on the security of the assets of the company any money requisite; (f) to take out letters of administration to any deceased contributory; (g) to do all such other

(*q*) Comp. Act, 1908, sec. 150 (1).
(*r*) Sec. 272.
(*s*) *Hercules Insurance, In re* (1871), L. R. 11 Eq. 321.
(*t*) Comp. Act, 1908, sec. 149 (2).
(*u*) Sec. 150 (2).
(*v*) Sec. 151 (1).
(*x*) But in the case of a winding-up in Scotland or Ireland only with the sanction of the Court.

things as may be necessary for the winding-up the affairs of the company and distributing its assets (*y*).

All powers subject to control of Court.

The exercise of the above powers is subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers (*z*).

Liquidator's books and accounts.

The liquidator must keep proper books, and at such times as may be prescribed, but not less than twice in each year during his term of office, must send to the Board of Trade an account of his receipts and payments. The Board of Trade causes the account to be audited, and one copy is filed and kept by the Board and another is filed with the Court, and each copy is open to the inspection of any creditor or other person interested (*a*).

Wishes of creditors and contributories to be ascertained by summoning meetings.

The liquidator must, in the administration of the assets of the company, and in the distribution thereof among its creditors, have regard to any direction that may be given by resolution of the creditors or contributories at any general meeting, and in order to ascertain their wishes may at any time summon a meeting, and must summon a meeting at such times as the creditors or contributories may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be (*b*).

Applications to the Court.

The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding-up (*c*). Subject to the provisions of the Companies Act, he may use his own discretion in the management of the estate and its distribution among the creditors (*d*). If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just (*e*).

Power of Court to settle list of contributories,

As soon as may be after making a winding-up order, the Court will settle a list of contributories, and has power to rectify the register of members in all cases where rectification is required (*f*).

(*y*) Comp. Act, 1908, sec. 151 (2).

(*z*) In Scotland or Ireland the Court may by order provide that the liquidator may exercise any of the above powers, except the power of appointing a solicitor or law agent, without the sanction or intervention of the Court.

(*a*) Comp. Act, 1908, secs. 155, 156.

(*b*) Sec. 158 (1), (2).

(*c*) Sec. 158 (3).

(*d*) Sec. 158 (4).

(*e*) Sec. 158 (5).

(*f*) Sec. 163.

to order contributories to pay debts, to make calls,

The Court may order the payment of debts due from contributories, and may make calls upon contributories for the amount unpaid upon their shares, and in making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call (*g*).

to fix a time within which creditors must prove,

The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved (*h*).

to adjust the rights of contributories *inter se*,

The Court will adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto (*i*).

to make order as to priority of costs of winding-up.

The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding-up in such order of priority as the Court thinks fit (*k*).

Powers of the Court which may be delegated to the liquidator.

The Court may delegate to the liquidator, as an officer of the Court and subject to the control of the Court, the powers of the Court in respect of the following matters, that is to say : (a) holding and conducting meetings of creditors and contributories ; (b) settling lists of contributories ; (c) requiring delivery of property or documents ; (d) making calls ; (e) fixing a time within which debts and claims must be proved ; provided that the liquidator shall not, without the special leave of the Court, rectify the register of the members, and shall not make any call without either the special leave of the Court or the sanction of the committee of inspection (*l*).

Order that the company be dissolved.

When the affairs of the company have been completely wound up, the Court makes an order that the company be dissolved from the date of the order, and the company is dissolved accordingly. The order must be reported by the liquidator to the Registrar of companies, who will make in his books a minute of the dissolution of the company (*m*).

When may a company be wound up voluntarily ?

A company registered under the Companies Acts may be wound up voluntarily (1) when the event (if any) occurs, on the

(*g*) Secs. 165, 166.
(*h*) Sec. 169.
(*i*) Sec. 170.
(*k*) Sec. 171.
(*l*) Sec. 173.
(*m*) Sec. 172.

occurrence of which the articles (or act of parliament, deed of settlement, or other instrument constituting or regulating the company, as the case may be) provide that the company is to be dissolved, and the company has passed a resolution requiring the company to be wound up voluntarily; or (2) if the company resolves by special resolution that the company be wound up voluntarily; or (3) if the company resolves by extraordinary resolution to the effect that it cannot, by means of its liabilities, continue its business, and that it is advisable to wind it up (*n*).

Commencement of voluntary winding-up.

A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorising the winding-up (*o*), and where a petition for a winding-up by the Court was presented, and the Court appointed a provisional liquidator, and thereafter a resolution was passed for a voluntary winding-up, and a supervision order was made on the petition, it was held that the winding-up commenced as at the date of the resolution (*p*).

Notice of resolution.

When a company has resolved to wind up voluntarily, it must give notice of the resolution in the *Gazette* (*q*).

Appointment of liquidator.

The company in general meeting must appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company (*r*), and the liquidator must, within twenty-one days after his appointment, file with the Registrar of companies a notice of his appointment (*s*).

First meeting of creditors.

The liquidator in a voluntary winding-up must, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date not being less than fourteen nor more than twenty-one days after his appointment (*t*). The meeting of creditors must also be advertised in the *Gazette* and in two local newspapers (*t*). At the meeting the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the

(*n*) Comp. Act, 1908, sec. 182.
(*o*) Sec. 183.
(*p*) *Emperor Life, In re* (1885), 31 Ch. D. 78.
(*q*) Comp. Act, 1908, sec. 185.
(*r*) Sec. 186 (ii).
(*s*) Sec. 187.
(*t*) Sec. 188 (1).

creditors so resolve, an application will be made, and the Court may make such order thereon as may seem just (*u*).

Appointment of liquidator by the Court.

If, from any cause whatever, there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator (*x*). The Court may also, on cause shown, remove a liquidator and appoint another liquidator (*y*).

Powers of liquidator.

On the appointment of a liquidator, all the powers of the directors cease except so far as the company in general meeting or the liquidator sanctions the continuance thereof (*z*). The liquidator in a voluntary winding-up may, without the sanction of the Court, exercise all powers given by the Companies Act to the liquidator in a winding-up by the Court, and may exercise the powers of the Court of settling a list of contributories and of making calls, and must pay the debts of the company and adjust the rights of the contributories among themselves (*a*).

Application to the Court.

The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court, and the Court may make such order on the application as the Court thinks just (*b*).

Annual meeting of company.

The liquidator in a voluntary winding-up may summon a general meeting of the company as he thinks fit, and, in the event of the liquidation continuing for more than a year, must summon a general meeting at the end of the first and every subsequent year during which the liquidation continues, and lay before the meeting an account of his acts and dealings (*c*).

Final meeting and dissolution of company.

When the affairs of the company are fully wound up, the liquidator must prepare an account and lay it before a general meeting called by advertisement in the *Gazette* published one month before the meeting. Within one week after the meeting the liquidator must make a return thereof to the Registrar, who will register it, and three months after such registration the company shall be deemed to be dissolved, unless in the mean time the Court, at the instance of the liquidator or other person

(*u*) Comp. Act, 1908, sec. 188 (2), (3), (4), (5).
(*x*) Sec. 186 (viii).
(*y*) Sec. 186 (ix).
(*z*) Sec. 186 (iii).
(*a*) Sec. 186 (v).
(*b*) Sec. 193.
(*c*) Sec. 194.

interested, makes an order deferring the date at which the dissolution is to take place (*d*).

Voluntary winding-up subject to the supervision of the Court.

When a company has resolved to wind up voluntarily, the Court may, upon a petition, make an order that the voluntary winding-up shall continue, but subject to the supervision of the Court upon such terms as the Court thinks just (*e*). When such an order is made, the affairs of the company remain in the hands of the liquidator appointed by the company, and the provisions of the Companies Acts with regard to the filing of a statement of affairs, making a report by the official receiver, the appointment of a liquidator and committee of inspection, the audit of the liquidator's accounts, the keeping of books, and the summoning of meetings in the case of a winding-up by the Court do not apply, but as regards most other matters, and in particular as regards the powers of the liquidator, the staying of actions, the settlement of lists of contributories, the making and enforcement of calls, and the collection and distribution of assets, the winding-up continues as if it were a winding-up by the Court (*f*).

Section VI.—Contributories

In the case of a company formed and registered under the Companies Act.

In the event of a company formed and registered under the Companies Acts being wound up every past and present member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves, with the following qualifications, that is to say, (1) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding-up; (2) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member; (3) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the necessary contributions; (4) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the

(*d*) Comp. Act, 1908, sec. 195.
(*e*) Sec. 199.
(*f*) Sec. 203.

shares in respect of which he is liable as a present or past member (*g*); (5) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up; (6) nothing in the provisions of the Companies Act invalidates any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company alone are made liable in respect of the policy or contract (*h*).

When a call may be made.

The above rules regulate the liability of members to contribute to the assets of the company (*i*); they do not regulate the distribution of the assets (*i*). A call may be made upon members when it appears that the other assets realised or immediately realisable are not sufficient to meet the claims of the creditors (*k*). The liquidator is not bound to wait until all possible assets have been realised (*k*). A call may be made upon past members when it appears that the sum realised from present members is not sufficient to meet the deficiency (*k*). But no past member can be called on to contribute (1) unless there are outstanding debts which were incurred before he ceased to be a member; (2) if he has ceased to be a member for more than a year. If a past member buys up and releases all debts of the company incurred before he ceased to be a member no call can be made on him (*l*). When a call is made upon a past member the amount called up forms part of the general assets of the company and is equally available for the payment of all debts without any preference to the past creditors (*m*). Where a life company commenced a fire business and issued fire shares in respect thereof, and afterwards,

(*g*) Where the deed of settlement provided that a certain portion of profits should be credited to each shareholder in addition to the amount paid up upon his shares it was held that the shareholder might set off such profits against calls notwithstanding that there was no indication of the matter in the annual list of members with the amount of shares and the amount called up on each share. The application of profits to reduce the uncalled share capital was not a calling up of share capital. *Cathie's Case* (1872), Eur. Arb. Reilly 27; 17 Sol. J. 29; L. T. 18.

(*h*) Comp. Act, 1908, sec. 123.

(*i*) *Webb* v. *Whiffin* (1872), L. R. 5 H. L. 711.

(*k*) *Helbert* v. *Banner* (1871), L. R. 5 H. L. 28.

(*l*) *Blakely Ordnance Co., In re, Brett's Case* (1873), L. R. 8 Ch. 800.

(*m*) *Webb* v. *Whiffin* (1872), L. R. 5 H. L. 711.

when doubts were raised as to the validity of the issue, the fire business and assets were transferred to a new company and the old company purported to cancel the original fire shares and to indemnify the shareholders against all liability, it was held in winding-up of the old company that although the holders of the fire shares were liable as contributors to meet fire claims they were liable as past members only, and as the company had contracted to indemnify them they could not be called upon until all the present shareholders of the company had been exhausted (*n*).

Contributories in the case of companies not formed but subsequeutly registered under the Companies Act.

In the case of a company not formed under, but subsequently registered under, the Companies Acts, the above rules apply in respect of the debts and liabilities of the company contracted after registration, but in respect of the debts and liabilities of the company contracted before registration, every person is a contributory who is liable to pay or contribute to the payment of any such debt or liability, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the costs and expenses of the winding-up of the company (*o*).

Contributories in the case of unregistered companies.

In the case of an unregistered company, every person is a contributory who is liable to pay or contribute to the payment of any debt or liability, or to pay or contribute to the payment of any sum for the adjustment of the rights of members among themselves, or to pay or contribute to the payment of the costs of winding-up the company (*p*).

Liability to pay or contribute to the payment of the debts or liabilities of the company.

The liability of policy holders and others to pay or contribute to the payment of the debts or liabilities of an unregistered company depends (1) upon the nature of the company, that is to say whether it is a purely mutual association, a common law partnership, or a corporation; (2) upon the terms of the deed of settlement, contract of co-partnery, charter, letters patent, act of parliament, or other instrument creating the company or defining its constitution and the rights and liabilities of its members; (3) upon the provisions of the Chartered Companies Acts or

(*n*) *Norwich Provident Insurance, Hesketh's Case* (1880), 13 Ch. D. 693.

(o) Comp. Act, 1908, sec. 263 (iii) (f), applies to companies formed under the Joint Stock Companies Act, 1844, and compulsorily registered in pursuance of sec. 210 of the Companies Act, 1862. They are in the same position as companies not formed but voluntarily registering under the Act.

(*p*) *European Assurance, Ramsay's Case* (1876), 3 Ch. D. 388.

Joint Stock Companies Act, 1844, in the case of companies to which any of those Acts apply; (4) upon the terms of the contract with the company as contained in the policy, agreement to take shares, or otherwise.

Specific performance of agreement to become a member.

The Court in settling the list of contributories has power to rectify the register of members. It may therefore put on the register and on the list of contributories the names of persons who had agreed to become members but whose names had not been entered in the register at the commencement of the winding-up. The Court, however, will not thus grant specific performance of an agreement to take shares when it would be unreasonable to do so owing to the lapse of time. On the formation of a company under a deed of settlement registered under the Joint Stock Companies Act, 1844, shares were allotted to an applicant, and he paid a deposit of 2*s.*, and his name was placed on the company's register of shareholders. He died shortly afterwards and certificates were never issued nor dividends paid nor was the deed of settlement ever executed by the applicant or his executors. It was held that the applicant's executors could not twenty-five years afterwards be placed on the list of contributories (*q*).

Ultra vires of one mutual company to be a member of another mutual company.

Primâ facie it is *ultra vires* of one mutual insurance company to become a member of another such company and when the secretary of a mutual company effected a reinsurance with another mutual company on behalf of his company it was held that the secretary as an individual became a member in the reinsuring company but that the company on whose behalf the reinsurance was made did not become a member and could not be placed on the list of contributories (*r*).

Transfers of shares.

Transfers of shares are effected in the manner provided in the articles, deed of settlement, act of parliament, or charter regulating the company's affairs, and the transfer must be strictly in accordance with the terms thereof in order to relieve the shareholder of liability as a present member (*s*). Shares may be made transferable only after the approval of the proposed transfer by the directors (*t*). If the approval of the transfer is obtained by a misrepresentation or concealment as to the means or station in life of the proposed

(*q*) *Mackenzie's Case* (1873), Eur. Arb. L. T. 141; 18 Sol. J. 223.

(*r*) *Security Mutual Life, In re* (1858), 6 W. R. 431.

(*s*) *Morgan, Ex p.* (1849), 1 Mac. & G. 225.

(*t*) *Lloyd's Case* (1872), Eur. Arb. Reilly 35; L. T. 25; 17 Sol. J. 46.

transferee the transfer will be set aside and the transferor placed on the list of contributories as the shareholder (*u*). Where the directors first refused to pass a transfer on the ground of the insufficiency of the proposed transferee, but afterwards agreed as a compromise of a claim for calls against the transferor to pass the transfer on payment of the calls, it was held that the agreement with the shareholder was *ultra vires;* but where the directors were satisfied that they had got all they could out of a transferor, and compromised with him by allowing the transfer, it was held binding (*x*). Where the articles or other instrument regulating the company's affairs contains no clause authorising the directors to reject a proposed transferee, a transfer to a pauper enables the transferor to escape liability provided the transfer is complete and the transferor retains no beneficial interest (*y*).

Agreement to sell shares.

A member does not get rid of his liability as a present member merely by an agreement to sell his shares (*z*). Where a shareholder had sold his shares to his servant for a nominal consideration, but owing to delay in getting the request form of transfer from the company, the transfer was not completed when a petition for winding-up was presented, it was held that there was no equity in favour of the shareholder, and that in the absence of wilful and unnecessary delay on the part of the company the name of the shareholder must stand on the list of contributories (*a*). But where an agreement to take shares was not completed owing to the wilful default of the directors the Court ordered the register to be rectified and the purchaser to be placed on the list instead of the vendor (*b*).

Purchase by infant.

Where an infant purchased shares and afterwards repudiated

(*u*) *Discoveries Finance Co., In re,* [1910] 1 Ch. 312; *Imperial Mercantile Credit, In re, Payne's Case* (1869), L. R. 9 Eq. 223; *Dymock's Case* (1873), Eur. Arb. L. T. 144; *Simpson's Case* (1873), Eur. Arb. L. T. 77; 17 Sol. J. 648; *Paterson's Case* (1873), Eur. Arb. L. T. 79; *William's Case* (1873), Eur. Arb. L. T. 84; 18 Sol. J. 84; *Walton William's Case* (1873), Eur. Arb. L. T. 125; *Mushet's Case* (1874), Eur. Arb. L. T. 139; 18 Sol. J. 202; *Murgatroyd's Case* (1873), Eur. Arb. L. T. 146; *Phillip's Case* (1874), Eur. Arb. L. T. 148; 18 Sol. J. 380.

(*x*) *Hodge's Case* (1873), Eur. Arb. 18 Sol. J. 708.

(*y*) *Discoveries Finance Co., In re,* [1910] 1 Ch. 312.

(*z*) *Lee's Case* (1871), Alb. Arb. Reilly 1; *Nichols's Case* 1871), Alb. Arb. Reilly 40.

(*a*) *Read's Case* (1872), Eur. Arb. Reilly 19; L. T. 10.

(*b*) *Bentinck's Case* (1873), Eur. Arb. L. T. 99; 17 Sol. J. 807; *Brown's Case* (1873), Eur. Arb. L. T. 103; 17 Sol. J. 289; *Murgatroyd's Case* (1873), Eur. Arb. L. T.; *Minshall's Case* (1872), Eur. Arb. L. T. 29.

the transaction, the Court, on the application of the company who had no knowledge of the infancy, ordered the infant's name to be removed from the list of contributories, and the name of the vendor to be substituted (*c*).

Transfer after commencement of winding-up.

In the case of a voluntary winding-up every transfer of shares except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding-up is void (*d*). In the case of a winding-up by or subject to the supervision of the Court every disposition of the property (including things in action) of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding-up is void unless the Court otherwise orders (*e*).

Death of contributory.

If a contributory dies before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees are liable in a due course of administration to contribute to the assets of the company in discharge of his liability, and are contributories accordingly (*f*). If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of the deceased contributory, or either of them, and for compelling payment thereout of the money due (*g*).

Bankruptcy of contributory.

If a contributory becomes bankrupt either before or after he has been placed on the list of contributories, then his trustee in bankruptcy shall represent him, and shall be a contributory accordingly, and may be called on to admit to proof against the estate of the bankrupt a claim for any contribution due and for the estimated liability on future calls (*h*).

Right of a company to prove in the bankruptcy of a member.

Whether the company is in liquidation or not, it may prove in the bankruptcy of a shareholder in respect of the unpaid balance on his shares (*i*). The bankruptcy satisfies all claims provable in bankruptcy, and if the trustee in bankruptcy has disclaimed the shares, and the bankrupt has been discharged, neither trustee nor bankrupt can thereafter be placed on the list of

(*c*) *Bentinck's Case* (1873), Eur. Arb. L. T. 143.
(*d*) Comp. Act, 1908, sec. 205 (1).
(*e*) Sec. 205 (2).
(*f*) Comp. Act, 1908, sec. 126 (1). *Lady Rolt's Case* (1873), Eur. Arb. L. T. 106; *Gunn's Case* (1873), Eur. Arb. L. T. 118.
(*g*) Comp. Act, 1908, sec. 126 (2).
(*h*) Comp. Act, 1908, sec. 127. *National Insurance, Ex p.*, [1894] W. N. 156.
(*i*) *McMahon, In re*, [1900] 1 Ch. 173.

contributories in respect of the unpaid balance on his shares (*k*). Formerly the unlimited liability of a shareholder to general creditors, or for possible costs of winding-up was deemed not provable in bankruptcy, and therefore not satisfied by the bankrupt's discharge (*l*), but apparently under a later decision in the House of Lords all contingent liability is provable in bankruptcy unless an order of the Court is made declaring it to be incapable of being fairly estimated (*m*). Therefore, unless such order is obtained, the claim of the company in respect of any future liability is barred by the contributory's bankruptcy and discharge (*m*).

Husband of female contributory.

The husband of a female contributory married before the date of the commencement of the Married Women's Property Act, 1882 (*n*), shall, during the continuance of the marriage, be liable, as respects any liability attaching to any shares acquired by her before that date, to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and shall be a contributory accordingly (*o*).

Set-off.

A contributory cannot set off a debt due to him by the company against calls until all the creditors are paid in full (*p*).

Order on contributory to pay debts other than calls.

The Court may order any contributory to pay any money due from him to the company exclusive of money payable by virtue of a call (*q*). In making such order the Court may in the case of an unlimited company allow to the contributory by way of set-off any money due to him from the company not being money due to him as a member of the company in respect of any dividend or profit (*q*).

Section VII.—Proof in Winding-Up

Matured and contingent claims.

All policy holders or annuitants in a company in liquidation must like other creditors prove against the company for the value of their contracts (*r*). If the claim became payable before

(*k*) *Brown's Case* (1872), Eur. Arb. Reilly 32; L. T. 21; 17 Sol. J. 310.

(*l*) *Davis's Case* (1873), Eur. Arb. L. T. 80; 17 Sol. J. 670.

(*m*) *Hardy* v. *Fothergill* (1888), 13 A. C. 351.

(*n*) Or in Scotland the Married Women's Property (Scotland) Act, 1881.

(*o*) Comp. Act, 1908, sec. 128. *Murgatroyd's Case* (1873), Eur. Arb. L. T. 105; *Scarisbrick's Case* (1873), Eur. Arb. L. T. 105; *D'Ouseley's Case* (1873), Eur. Arb. L. T. 137; 18 Sol. J. 282.

(*p*) *Black & Co.'s Case* (1872), L. R. 8 Ch. 254.

(*q*) Comp. Act, 1908, sec. 165.

(*r*) Comp. Act, 1908, sec. 206.

the date of the petition or resolution to wind up, and was unpaid at that date, the policy holder will prove for the amount due, and interest thereon down to that date (*s*). Such policy holder has no priority over the other policy holders whose policies have not become payable (*t*). The Court may order that any claim paid after the commencement of the winding-up shall be refunded to the liquidator (*u*), but when a claim is paid while a petition to wind up is pending, the Court may decline to order repayment of the money if the claimant did not know and could not with reasonable diligence have known that a petition was pending (*x*). If the claim became payable after the presentation of a petition to wind up, but before the winding-up order, the claimant will prove for the amount due without interest (*y*). As regards claims which are still contingent when a winding-up order is made or a resolution to wind up is passed, they must be valued as at that date in accordance with the rules for valuation contained in Schedule VI. of the Assurance Companies Act (*z*). If, however, a policy becomes payable during the liquidation, the holder may prove for the full value whether the period for sending in claims has expired or not (*a*).

Conflict of judicial opinion as to proper rule for valuing policies.

The valuation of contingent claims upon life policies current at the date of the liquidation was much discussed at the time of the Albert and European arbitrations, and as at that time there was no statutory rule or other binding authority upon which the arbitrators could act, they had to formulate methods for themselves. James, V.C., took the reinsurance or reinstatement value, that is, the amount which under the then existing circumstances of health and age, a similar office would charge for

(*s*) *Wallberg's Case* (1872), Eur. Arb. Reilly 65; L. T. 50; *Sullivan's Case* (1872), 17 Sol. J. 226.

(*t*) *International Life, M'Iver's Claim* (1870), L. R. 5 Ch. 424.

(*u*) *National Bank's Case* (1873), Eur. Arb. L. T. 92.

(*x*) *Brown and Tylden's Case* (1874), Eur. Arb. 163; 18 Sol. J. 781.

(*y*) *Garlant's Case* (1872), Eur. Arb. Reilly 2; L. T. 4; *Wallberg's Case, supra.*

(*z*) Ass. Comp. Act, 1909, sec. 17; Comp. Act, 1908, sec. 206. Where a company which is solvent is wound up the claimants will be entitled to interest on all claims until the date of payment. In the case of a contingent claim it will be valued as at the date of the winding-up order or resolution, and the claimant will be entitled to the valued amount with interest thereon from the date of the winding-up order or resolution until the date of payment. *Watt's Case* (1872), Alb. Arb. 16 Sol. J. 517.

(*a*) *Northern Counties of England Fire, Macfarlane's Claim* (1880), 17 Ch. D. 337.

taking over the liability (*b*). Other methods suggested were: (1) to take the amount insured less the actuarial value of future premiums upon the tables of mortality; (2) to take the amount of the premiums paid with interest thereon (*c*). The method of valuation adopted by the Life Assurance Companies Act, 1870, and now by the Assurance Companies Act, 1909, was first formulated by Lord Cairns during the Albert arbitration (*d*). It was afterwards disapproved of by Lord Romilly, who preferred the re-insurance or reinstatement value formulated by James, V.C. Lord Romilly considered that Lord Cairns' formula was unfair as being entirely arbitrary and without relation to actual circumstances. But although arbitrary, the method adopted by Lord Cairns and now adopted by statute has the great advantage of depending solely upon an actuarial calculation. An inquiry into the insurability of each life at the commencement of a winding up would be quite impracticable and the Legislature was fully justified in adopting the more rigid rule, even although its application must always result in cases of individual hardship (*dd*).

Method of valuation now defined by Statute.

The sixth schedule of the Assurance Companies Act, 1909, contains separate rules for the valuation of (1) an annuity; (2) a life policy; (3) a fire policy; (4) a periodical payment under an accident policy; (5) an accident policy; (6) a weekly payment under an employers' liability policy; (7) an employers' liability policy; (8) a bond investment policy or certificate.

Valuation of annuity.

An annuity is to be valued according to the tables used by the company which granted such annuity at the time of granting the same, and where such tables cannot be ascertained or adopted to the satisfaction of the Court then according to such rate of interest or table of mortality as the Court may direct (*e*). Annuitants are entitled to prove (1) as regards instalments which fall due before the date of the petition or resolution, for the instalments and

(*b*) *Bell's Case* (1870), L. R. 9 Eq. 706.

(*c*) *Slator's Case* (1871), Alb. Arb. Reilly 71; *Stevenson* v. *Snow* (1761), 3 Burr. 1237; *Warner, Exp.* (1870), W. N. 104, 192, 210; 39 L. J. Ch. 736.

(*d*) *Lancaster's Case* (1871), Alb. Arb. Reilly 76; 16 Sol. J. 103.

(*dd*) This hardship is to a great extent avoided by a scheme of reduction of contracts with or without transfer of the reduced contracts to another office. Such a scheme maintains the principle of the spreading and sharing of risks instead of attempting to fix the pecuniary value of individual risks; and therefore it is not open to the criticism that it is either entirely arbitrary or without relation to actual circumstances. *Vide supra*, p. 54, *et infra*, p. 99.

(*e*) Ass. Comp. Act, 1909, Schedule VI. (A).

interest thereon down to that date; (2) as regards instalments which fall due after the date of the petition but before the winding-up order, for such instalments without interest; (3) as regards instalments falling due after the date of the winding-up order or resolution, for the value of the annuity as at that date (*f*). When the company is solvent the annuitant will also be entitled to interest on the total claim down to the time of payment (*g*).

Valuation of life policy.

The value of a life policy is the difference between the present value of the reversion in the sum assured according to the contingency upon which it is payable, including any bonus or addition thereto made before the commencement of the winding-up, and the present value of the future annual premiums (*h*). In calculating such present values interest is to be assumed at such rate, and the rate of mortality according to such tables, as the Court may direct (*h*). The premium to be calculated is to be such premium as, according to the said rate of interest and rate of mortality, is sufficient to provide for the risk incurred by the office in issuing the policy exclusive of any addition thereto for office expenses or charges (*h*). That is to say, the premium upon which the calculation is to be made is the pure premium, and not the loaded premium, and all extra premiums are to be disregarded, such as an additional sum payable during residence in tropical climates, or, where the policy is a participating policy, that portion of the premium which is attributable to the sharing of profits (*i*). The policy is to be valued as at the date of the winding-up order or resolution to wind up (*k*). Where the policy provides for a surrender value which the assured can claim at any time on giving

(*f*) *Wallberg's Case* (1872), Eur. Arb. Reilly 65; L. T. 50. *Sullivan's Case* (1872); 17 Sol. J. 226.

(*g*) *Watt's Case* (1872), Alb. Arb. 16 Sol. J. 517.

(*h*) Ass. Comp. Act, 1909, Schedule IV. (A).

(*i*) *Lancaster's Case* (1871), Alb. Arb. Reilly 76; 16 Sol. J. 103. It is to be noted that this rule gives the same measure of proof in a winding-up to a with-profit policy holder and a without-profit policy holder; although, if the company were just solvent but earning no profit, the with-profit policy holder could continue paying a higher premium than the without-profit policy holder for the same benefit: and rightly so since the additional premium payable for a right to a share in the profits is of the nature of a trading adventure which must depend on the realisation of profits. It follows that the transition from being just solvent to being just insolvent introduces, by reason of the rules laid down in the Act, a sudden change in the relative rights of with-profit and without-profit policies. This change would generally be avoided, at any rate to a large extent, in a scheme of reduced contracts instead of liquidation. *Vide supra*, p. 54, *et infra*, p. 99.

(*k*) *Wallberg's Case*, *supra*.

the prescribed notice, the assured cannot prove in respect of such surrender value in lieu of proving in respect of the valuation under the schedule unless he has given notice to surrender and the notice has expired before the winding-up order or resolution (*l*).

Premium falling due between dates of petition and winding-up order.

If a policy is valid and subsisting at the date of the petition or resolution to wind up, the right to prove is not affected by the subsequent non-payment of premium, and therefore when the premium falls due before the petition, but the days of grace do not expire until afterwards, non-payment of the premium does not affect the holder's right to prove in the winding-up (*m*). But if a premium has fallen due before the winding-up order, it must be paid to the liquidator before the holder's claim is admitted to valuation (*n*), and when the annual premium is payable in quarterly instalments, the whole premium for the current year must be paid (*o*).

Whether holder can set off claim on policy against debt due by him to the company.

Where a policy has become payable, and the amount payable is a fixed amount or has been ascertained before the commencement of the winding-up, the claimant may set off the amount due to him against any fixed or ascertained debt due by him to the company (*p*). The liquidation of a company does not affect the right of a creditor to set off one liquidated demand against another (*q*). Thus, where the company has advanced money on a life policy which has matured, the claimant may treat his liability as extinguished by the set-off and prove in the winding-up for the balance of the policy moneys over the amount of the loan (*q*). But where the policy has not become payable, or the amount payable is not a fixed amount and has not been ascertained before the commencement of the winding-up, there is no right of set-off (*r*). The assured cannot set off the estimated value of his current policy against a loan upon the policy from the company. He must pay the loan in full and prove for the estimated value (*r*).

(*l*) *British Imperial Insurance* (1878), 47 L. J. Ch. 318; *European Assurance, Gloag's Case* (1873), Eur. Arb. L. T. 82; 17 Sol. J. 534.

(*m*) *Albert Life, Cook's Case* (1870), L. R. 9 Eq. 703.

(*n*) *Wallberg's Case, supra.*

(*o*) *Scott's Case* (1873), Eur. Arb. L. T. 109.

(*p*) *Sovereign Life* v. *Dodd*, [1892] 2 Q. B. 573; *Progress Assurance, Exp. Bates* (1870), 39 L. J. Ch. 496.

(*q*) *Sovereign Life* v. *Dodd, supra.*

(*r*) *Price, Ex p.* (1875), 10 Ch. 648; *Parlby's Case* (1871), Alb. Arb. Reilly 48; *Bourne's Case* (1871), Alb. Arb. Reilly 44; *Gloag's Case, supra.*

Where two companies which had reinsured one another were being wound up and claims became payable after the commencement of the winding-up, it was held that the liquidators had the right to set off the one against the other (*s*). Set off as between insurance companies.

The same rules prevail with regard to the respective rights of secured and unsecured creditors as are in force under the law of bankruptcy (*t*). Secured creditors.

The provision in a policy that the stock and funds shall alone be liable to pay the sum insured does not give the assured any charge upon the stock and funds so as to create a priority over the general creditors of the company, nor have the policy holders any right to have the assets marshalled so that they alone may be paid out of the stock and funds, and the general creditors be paid out of the unlimited liability of members (*u*). The costs of the winding-up should, however, where there is unlimited liability, be paid by the members and not out of the stock and funds (*x*). But the terms of a policy may be such as to create a charge on the company's funds in priority to general creditors (*y*), or certain funds may be set apart in trust for policy holders or policy holders of a particular class. What creates a charge on the company's funds.

Any deposit made under the provisions of the Assurance Companies Act is essentially an insurance fund, and the policy holders have a priority thereon over general creditors (*z*), and in the case of a company transacting life, employers' liability, or bond investment business, and not confining itself to one class of business only, the deposit in respect of any of these three classes of business forms part of a separate insurance fund for the policy holders in the particular class in respect of which it was deposited (*a*), and all receipts in respect of that class of business must be carried to such insurance fund (*a*). Statutory deposit forms a special security for policy holders.

Apart from the provisions of the statute certain of the company's Assurance

(*s*) *Eagle Insurance, In re* (1872), Alb. Arb. 16; Sol. J. 483.

(*t*) Comp. Act, 1908, sec. 207.

(*u*) *International Life, In re* (1876), 2 Ch. D. 476; (1877), 36 L. T. 914; *Professional Life, In re* (1867), L. R. 3 Eq. 668; 3 Ch. 167; *State Fire Insurance, In re* (1863), 1 De G. J. & S. 634; *English and Irish Church Assurance, In re* (1863), 1 Hem. & M. 85; *Evans v. Coventry* (1857), 8 De G. M. & G. 835.

(*x*) *Professional Life, In re* (1867), L. R. 3 Eq. 668; 3 Ch. 167; *Agriculturist Cattle Insurance, In re* (1874), L. R. 10 Ch. 1.

(*y*) *British Imperial Insurance, Farr's Claim* (1878), 47 L. J. Ch. 318; *Athenæum Life, In re* (1859), Johns 633.

(*z*) *Nelson & Co., Ltd., In re* (1907), 24 T. L. R. 74.

(*a*) Ass. Comp. Act, 1909, secs. 2 (4), 3, 31 (e), 32 (d).

and other funds created under provisions of deed of settlement, etc.

stock or funds may be set apart as an assurance fund, reserve fund, or guarantee fund, and be made the special security of the policy holders in accordance with the provisions of the deed of settlement or other instrument regulating the company's affairs (*b*). Where a particular fund is thus set apart it forms a trust fund for the special purposes indicated, and will be so applied in the winding-up. Upon the transfer of one company's business to another the funds of the transferor company will usually constitute a trust fund for the security of the policy holders of the transferor company, but a mere transfer of the funds and undertaking by the transferee company to meet the obligations of the transferor company does not fix the transferred funds with any trust (*c*). Upon a transfer of business a trust fund may be formed to meet claims against the transferor company which have become payable, or which may become payable before a named date. A policy holder, who before his claim became payable had accepted a substituted policy in the transferee company, was held to have no claim against such a fund (*d*), and an annuitant was held not to be entitled to claim out of such a fund the capital value of her annuity (*e*).

Special fund created on transfer of business to satisfy policy holders in transferor company.

Section VIII.—Compromise and Arrangement

Power of liquidator to compromise claims.

The liquidator may, either with the sanction of the Court or of the committee of inspection, or in the case of a voluntary winding-up, with the sanction of an extraordinary resolution of the company, make any compromise or arrangement with creditors of the company, or persons claiming to be creditors, or with contributories or other persons indebted to the company (*f*).

Arrangement between company in voluntary liquidation and its creditors.

Any arrangement entered into between a company about to be or in the course of being wound up voluntarily, and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors (*g*). Any creditor may within

(*b*) *Ruthin Guardians' Case* (1872), Eur. Arb. L. T. 1; *Royal Naval and Military Society's Case* (1872), Eur. Arb. L. T. 47; 17 Sol. J. 246.

(*c*) *Royal Naval and Military Society's Case* (1872), Eur. Arb. L. T. 47; 17 Sol. J. 246; *Jull's Case* (1872), Alb. Arb. 16 Sol. J. 341.

(*d*) *Bowring's Case* (1872), Alb. Arb. 16 Sol. J. 305.

(*e*) *Butler's Case* (1872), Alb. Arb. 16 Sol. J. 399.

(*f*) Comp. Act, 1908, sec. 214.

(*g*) Sec. 191.

three weeks from the completion of the arrangement appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary, or confirm the arrangement (*g*).

Power of Court to sanction a scheme of arrangement between any company and its creditors.

Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them (whether the company is being wound up by the Court, or voluntarily, or is still a going concern), the Court may, on the application in a summary way of the company, or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors, or class of creditors, or of the members of the company, or class of members, as the case may be, to be summoned in such manner as the Court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, or members, or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members as the case may be, and also on the company, or in the case of a company in the course of being wound up on the liquidator and contributories of the company (*h*).

Separate meetings for separate classes of creditors.

Policy holders whose policies have matured at the date of the proposed compromise are a different class of creditors with different interests from policy holders whose claims are still contingent, and separate meetings must be held (*i*).

Scheme of arrangement approved in the Law Guarantee and Accident Company's liquidation.

In the case of the liquidation of the Law Guarantee Trust and Accident Society a scheme under sec. 120 of the Companies Act, 1908, was presented by the liquidator and approved by the Court. The main object of the scheme was to give time for the judicious realisation of the company's assets. The time for the payment of claims was postponed until September 30, 1918. Holders of contingent policies whose claims should not have matured on or before that date were to be entitled to prove in respect of their contingent claims as on that date, but where any contingent claim should mature before that date the holder should be entitled to prove forthwith (*m*).

(*h*) Comp. Act, 1908, sec. 120.

(*i*) *Sovereign Life* v. *Dodd*, [1892] 2 Q. B. 573. *United Provident Insurance*, *In re*, [1910] 2 Ch. 477; [1911] W. N. 40.

(*m*) *Law Guarantee Trust and Acci-*

Section IX.—Proceedings by or against a Company

Common law partnerships and mutual associations.

Proceedings brought by or against a company which is a common law partnership may be brought by or against the partnership in the name of the company (*n*). Proceedings by or against a company which is merely an association of individuals but neither a partnership nor a corporation may be brought by or against one or more of the members as representing the whole of the members (*o*). The persons chosen as representatives ought to be persons who from their position as trustees, directors, or otherwise can reasonably be said to represent the interests of the whole body, and if the deed of settlement makes provision for the appointment of persons in whose name actions must be brought an action in the name of any person or persons not properly appointed may be dismissed (*p*). Companies unincorporated but authorised by letters patent under the Chartered Companies Act may sue and be sued in the name of the two officers of the company registered in that behalf in the enrolment department of the High Court (*q*). The same applies to unincorporated companies which are established or regulated by any act of parliament which provides that representatives duly appointed and registered may sue and be sued for and on behalf of the company (*r*).

Corporations.

Proceedings brought by or against a company which is incorporated whether by charter, act of parliament, or under any of the Companies Acts must be brought by or against the company in its corporate name.

Proceedings by or against friendly societies.

The trustees of a registered friendly society or branch or any other officers authorised by the rules thereof may bring or defend any legal proceedings touching or concerning any property right or claim of the Society. In any legal proceedings under the Friendly Societies Act by a member or person claiming through a member, a registered society or branch may also be sued in the name, as defendant, of any officer or person who receives contributions or issues policies on its behalf. The process will be sufficiently served by personally serving the officer or other person

dent Society, In re (1910), Times Newspaper, July 28, 29.

(*n*) R. S. C. Order XLVIIIA, r. 1.

(o) R. S. C. Order XVI, r. 9.

(*p*) *Davies* v. *Hawkins* (1815), 3 M. & S. 488.

(*q*) 7 Will. IV. and 1 Vict. c. 73, sec. 3.

(*r*) *Steward* v. *Greaves* (1842), 10 M. & W. 711.

sued on behalf of the society or branch, or by leaving a true copy at the registered office of the society or at any place of business of the society or branch within the jurisdiction of the Court in which the proceeding is brought, or if that office or place of business is closed, by posting the copy on the outer door. If the process is served otherwise than by personal service on the persons sued or by leaving a copy at the registered office, then a copy must also be sent in a registered letter addressed to the committee at the registered office of the society or branch and posted six days before any further step or proceeding is taken (*s*).

Proceedings by or against trade unions.

The trustees of any registered trade union or any other officer of such trade union who may be authorised so to do by the rules thereof may bring or defend any legal proceedings touching or concerning the property, right, or claim to property of the trade union. The summons may be served by leaving the same at the registered office of the trade union (*t*).

Friendly societies and trade unions may be sued in registered name

Registered friendly societies or trade unions, although not incorporated, are associations of individuals recognised by law with a capacity for owning property and acting by agents, and may therefore be sued in their registered name as well as in the name of their trustees or other officers (*u*).

or in name of representative members.

A friendly society or trade union, whether registered or unregistered, may, as an association of individuals, be sued in the name of one or more representative members (*u*).

Personal liability of director executing policy.

The directors of a company may, by personally executing a policy, become personally liable thereon. Thus, where in a policy the directors covenanted that the stock and funds of the company should stand charged and be liable to pay the sum assured, it was held that the directors were liable to be sued in their own persons, and were bound to pay so long as the funds proved adequate to meet the claim (*y*).

Service of process on company.

Process against a company registered under the Companies Acts may be served on the company by leaving it at or sending it by post to the registered office of the company (*z*).

(*s*) F. S. Act, 1896, sec. 94.
(*t*) T. U. Act, 1871, sec. 9.
(*u*) *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.
(*y*) *Gurney* v. *Rawlins* (1836), 2 M. & W. 87.
(*z*) Comp. Act, 1908, sec. 116.

Where a company is incorporated by charter or act of parliament express provision may be made for the service of process, but in default of such provision service may be made on the head office or on the secretary of the company (*a*).

Foreign company carrying on business within the jurisdiction.

Process against a foreign insurance company carrying on a business in the United Kingdom may be served by leaving the process with or sending it by post to the person or persons authorised by the company to accept service on its behalf and whose names and addresses are registered with the Registrar of companies in compliance with sec. 274 of the Companies Act, 1908 (*b*). Process against a foreign company which carries on business in the United Kingdom but has not complied with the requirements of the Companies Act, may be served on the principal officer or agent resident in the jurisdiction (*c*).

Not carrying on business within the jurisdiction.

Process against a foreign company not carrying on business within the jurisdiction may, by leave of the Court, be served upon the company out of the jurisdiction when the action is founded on the breach of an agreement to be performed within the jurisdiction (*d*), or where the company is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction (*dd*).

Service on Scottish or Irish company.

Process in England against a Scottish or Irish company cannot be served out of England (*e*), and can only be served in England if such company carries on business through an agency or branch office in England, the service in such a case being on the principal officer or agent resident in the jurisdiction (*f*). No such service, however, can be made where, according to any statutory provision, the proper place for serving the company is in Scotland or Ireland (*g*), and therefore in the case of a company registered under the Companies Acts with its registered office in Scotland, an English process cannot be served at a branch office in England (*h*). Proceedings against the company must necessarily be brought in a Scottish Court.

(*a*) R. S. C. Order IX. r. 8.

(*b*) Comp. Act, 1908, sec. 274 (2).

(*c*) *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft, &c.*, [1902] 1 K. B. 342. As to when a company is deemed to be carrying on business in the United Kingdom, see *ante*, p. 46.

(*d*) R. S. C. Order XI. r. 1 (e).

(*dd*) R. S. C. Order XI. r. 1 (g).

(*e*) *Jones* v. *Scottish Accident* (1886), 17 Q. B. D. 421.

(*f*) *Logan* v. *Bank of Scotland*, [1904] 2 K. B. 495.

(*g*) *Palmer* v. *Caledonian Rail. Co.*, [1892] 1 Q. B. 823.

(*h*) *Watkins* v. *Scottish Imperial* (1889), 23 Q. B. D. 285.

CHAPTER II

Insurable Interest and Illegality

Section I.—Statutes relating to Insurable Interest

In considering the question of insurable interest it is necessary at the outset of the inquiry to distinguish between the interest which the law requires the assured to have in the subject matter of insurance and the interest which is required by the terms of the particular contract under consideration. An interest is required by the terms of the contract itself if the promise of the insurer is merely to indemnify the assured against pecuniary loss arising from the event insured against. If the assured has no interest at the time the event happens it is clear that he cannot recover anything, because he suffers no damage and therefore has no claim to an indemnity. Similarly if he has an interest which is limited to something less than the full value of the subject matter he suffers no greater damage than the value of his interest at the time of the loss, and therefore his claim to an indemnity cannot exceed the value of his interest. But the contract of insurance is not necessarily a contract of indemnity (*a*). The promise of the insurer may be to pay on the happening of the event insured against a certain or ascertainable sum of money irrespective of whether or not the assured has suffered loss, or of the amount of such loss if he has suffered any. The ordinary forms of life (*a*) and accident insurance are examples of this class of contract, and even fire (*b*) and burglary insurances need not necessarily be contracts of strict indemnity. But, whether the terms of the contract require an interest or not, an interest of some kind and to some extent is required by statute in every contract of insurance, and contracts made without the necessary interest are illegal and void, and the

Insurable interest may be required by the terms of the contract or by statute.

(*a*) *Dalby* v. *India and London Life* (1854), 15 C. B. 365.

(*b*) *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870; *London and North Western* v. *Glyn* (1859), 1 El. & El. 652.

parties to the contract cannot waive the illegality (*c*). If the illegality is not pleaded in defence it is the duty of the Court to take cognisance of it and refuse to enforce the contract (*d*). The nature and extent of the interest required by various statutes will be considered in the present chapter. It is the duty of the Court always to lean in favour of insurable interest if possible (*e*), and in the absence of evidence it will be presumed that the assured named in the policy has an insurable interest (*f*).

Wagers at Common Law.

Before the legislature intervened gambling and wagering were not prohibited by English law. A wager as such was not illegal, and could be enforced in a Court of law. Judges sat and solemnly determined questions of the most frivolous character in which the parties had no interest except by reason of their wager (*g*), and although the judges constantly complained of the waste of valuable time which the trying of such cases involved, they had no choice but to hear and determine them with the best patience which they could command. The only wagers upon which they refused to adjudicate were those which, on account of their subject matter, were deemed to be contrary to public policy (*h*), but it was never in England considered to be contrary to public policy to permit the Courts to adjudicate upon a wager merely because it was a wager. The furthest the English Courts ever went in their opposition to wagering contracts as such was to discourage actions upon wagers by refusing to grant facilities in procedure which were granted to other litigants (*i*). The Scottish Courts, on the other hand, have always refused to recognise the validity of wagering contracts and have held that *sponsiones ludicræ*, as they style such contracts, are void by the Common Law of Scotland (*k*).

(*c*) *Royal Exchange Assurance* v. *Sjoforsakrings*, [1902] 2 K. B. 384; *Anctil* v. *Manufacturers' Life*, [1899] A. C. 604; *Spare* v. *Home Mutual* (1883), 15 Fed. Rep. 707.

(*d*) *Gedge* v. *Royal Exchange*, [1900] 2 Q. B. 214.

(*e*) *Stock* v. *Inglis* (1884), Brott, M. R., 12 Q. B. D. 564.

(*f*) *Glasgow Provident* v. *Westminster Fire* (1887), 14 R. 947.

(*g*) *Pope* v. *St. Leger* (1694), Salk. 344; *Good* v. *Elliott* (1790), 3 T. R. 693; *Brown* v. *Leeson* (1792), 2 H. Bl. 43; *Hussey* v. *Crickett* (1811), 3 Camp. 168; *March* v. *Pigot* (1771), 5 Burr. 2803.

(*h*) *Gilbert* v. *Sykes* (1812), 16 East, 150; *Evans* v. *Jones* (1839), 5 M. & W. 77; *Atherfold* v. *Beard* (1788), 2 T. R. 610; *Hartley* v. *Rice* (1808), 10 East, 22; *Henkin* v. *Gerss* (1810), 2 Camp. 408; *Ditchburn* v. *Goldsmith* (1815), 4 Camp. 152; *Roebuck* v. *Hammerton* (1778), Cowp. 737; *Da Costa* v. *Jones* (1778), Cowp. 729; *Allen* v. *Hearne* (1785), 1 T. R. 56.

(*i*) *Jackson* v. *Colegrave* (1695), Carth. 338; *Gilbert* v. *Sykes* (1812), 16 East, 150, 162.

(*k*) *Bruce* v. *Ross* (1787), Morr. Dict. 9523; *Wordsworth* v. *Pettigrew* (1799), Morr. Dict. 9524; *O'Connell* v. *Russell* (1864), 3 Macph. 89.

Policies made without interest at Common Law.

The same principle which the Common Law applied to wagers in the form of wagers was applied to wagers which were cloaked in the guise of policies of marine insurance. If the parties chose to make a wager in the form of a marine policy the Courts enforced the contract. It is true that in some of the earlier cases in Chancery that Court appears to have cancelled policies on its being shown that the assured had no interest (*l*). It has been suggested that those cases could only have been decided as they were on the ground of fraud or some other extrinsic circumstances; but, however that may be, it is clear, from a long series of later decisions, that wager policies were ultimately recognised as legal if both parties intended to enter into a wager (*m*). A mutual intention to enter into a wagering transaction was, however, necessary before a policy made without interest could be supported. If the policy purported on the face of it to be a contract of indemnity, and was in fact made by the assured without interest, the assured could not recover, and the practice of the Court was to assume that all policies which could possibly bear that construction were indemnity policies made on interest. Policies therefore which were intended to be mere wagering contracts had to be so expressed as to show that the promise to pay was not a contract of indemnity but a promise to pay irrespective of interest. For this purpose the clause known as the p.p.i. (policy proof of interest) clause was introduced. This clause was originally employed in perfectly *bonâ fide* insurances for the purpose of eliminating the difficulty of proving the assured's interest or the amount of it, but towards the end of the eighteenth century it became to a very great extent a mere instrument for wagering. The abuse of the p.p.i. policy for this purpose was so extensive that it was felt to be

(*l*) *Martin* v. *Sitwell* (1691), 1 Show, 156; *Goddart* v. *Garret* (1692), 2 Vern. 269; *Le Pypre* v. *Parr* (1716), 2 Vern. 716; *Whittingham* v. *Thornborough* (1690), 2 Vern. 206.

(*m*) *Lucena* v. *Craufurd* (1802), 3 B. & P. 75, 101; (1806), 2 N. R. 269; *Cousins* v. *Nantes* (1811), 3 Taunt. 513; *Assievedo* v. *Cambridge* (1710), 10 Mod. 77; *Harman* v. *Van Hattan* (1716), 2 Vern. 717; *Depaba* v. *Ludlow* (1721), 1 Com. 361; *Dean* v. *Dicker* (1746), 2 Str. 1250; *Dalby* v. *The India and London Life* (1854), 15 C. B. 365; *British Insurance* v. *Magee* (1834), Cooke & Al. 182; *Scott* v. *Roose* (1841), 3 Ir. Eq. R. 170; *Keith* v. *Protection Marine* (1882), 10 L. R. Ir. 51. Mr. Bunyon (Fire Insurance, 3rd Edit. p. 5) stated that a wagering policy of fire insurance would apart from statute be illegal as being contrary to public policy, but although this view has been adopted in America, and by some judges in this country, it is contrary to the weight of authority. *Shilling* v. *Accidental Death* (1857), 2 H. & N. 42; *Good* v. *Elliot* (1790), 3 T. R. 693; *Ruse* v. *Mutual Benefit Life* (1861), 23 N. Y. 516; *Freeman* v. *Fulton Fire* (1862), 38 Barb. (N. Y.) 247.

against the best interests of sound commercial business to permit its continuance, and accordingly in 1746 an Act was passed prohibiting wagering policies on risks connected with British shipping. This was the first prohibition against wager policies (*mm*).

Statute 19 Geo. 2, c. 37.

The Marine Insurance Act, 1746 (19 Geo. 2, c. 37), provided "that no assurance or assurances shall be made by any person or persons, bodies corporate or politic on any ship or ships belonging to his Majesty or any of his subjects or on any goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer: and that every such assurance shall be null and void to all intents and purposes." This was followed in 1788 by the Act of 28 Geo. 3, c. 56, which provided "that from and after the passing of this Act it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy or policies of assurance upon any ship or ships, vessel or vessels, or upon any goods, merchandizes, or effects or other property whatsoever without first inserting or causing to be inserted in such policy or policies of assurance the name or names or the usual stile and firm of dealing of one or more of the persons interested in such assurance; or without instead thereof inserting or causing to be inserted in such policy or policies of assurance the name or names or the usual stile and firm of dealing of the consignor or consignors, consignee or consignees, of the goods, merchandizes, effects or property so to be insured; or the name or names or the usual stile and firm of dealing of the person or persons residing in Great Britain who shall receive the order for and effect such policy or policies of assurance or of the person or persons who shall give the order or direction to the agent or agents immediately employed to negotiate or effect such policy or policies of assurance."

Statute 19 Geo. 2, c. 37, required interest at the date of loss only.

The Act of 19 Geo. 2, c. 37, was construed as requiring interest to be shown at the time of the loss (*n*) except in the case of a "lost

(*mm*) Legislation had already been directed against fraudulent and excessive gambling and betting at games or sports, 16 Car. 2, c. 7; 9 Anne, c. 14; but neither of these statutes affected the validity of wagering policies of insurance.

(*n*) *Powles* v. *Innes* (1843), 11 M. & W. 10; *Barr* v. *Gibson* (1838), 3 M. & W. 390. The assured having interest at the time of the loss could sue notwithstanding that he had subsequently parted with his interest before action brought. *Sparkes* v. *Marshall* (1836), 3 Scott, 172.

or not lost " policy, entered into after a partial loss had occurred in ignorance of such partial loss, in which case it was sufficient to show interest at the time the contract was made (*o*). As a general rule it was not necessary to show interest at the time the contract was made (*p*). It was sufficient if the contract was to pay on interest at the time of the loss. At one time it was apparently thought to be necessary to aver and prove interest from the time of the commencement of the risk down to the time of the loss (*p*), but in practice proof of interest at the time of the loss has always been deemed sufficient, and no doubt for this reason, that the policy being a policy on interest does not attach until interest is acquired, and therefore the acquiring of interest and commencement of the risk are simultaneous. It was never decided whether, if a policy was effected by the assured without any hope or expectation of acquiring interest in the subject, such policy would be void as one made by way of gaming or wagering. Under the Marine Insurance Act, 1906, a policy made without hope or expectation of interest is declared to be void, but there was probably nothing in 19 Geo. 2, c. 37, which made such a policy illegal. In the absence of any " p.p.i. " or " interest or no interest " clause the policy would be deemed to be made on such interest as might appear, and it would not be competent by extrinsic evidence to show that it was other than a policy to pay only on interest. A contract to pay on interest, if any, at the time of the loss could not be open to objection on the ground of gaming or wagering merely because the assured had no hope or expectation of acquiring an interest at the time the contract was made.

Policies excepted from 19 Geo. 2, c. 37, remained subject to the Common Law.

The Act of 19 Geo. 2, c. 37, did not apply to foreign vessels or to merchandise carried therein, nor to British privateers, nor to merchandise carried from Spanish and Portuguese possessions in Europe or America. In cases to which the Act did not apply the policy was valid at Common Law if expressly made irrespective of interest (*q*). But where the policy was not p.p.i., or interest or no interest, it was deemed to be made on interest, and therefore interest at the time of the loss had to be averred and proved as in the case of policies within the statute (*r*).

(*o*) *Sutherland* v. *Pratt* (1843), 11 M. & W. 296.

(*p*) *Rhind* v. *Wilkinson* (1809), 2 Taunt. 237.

(*q*) *Irving* v. *Manning* (1847), 1 H. L. C. 287 ; *Murphy* v. *Bell* (1828), 4 Bing. 567 ; *Lewis* v. *Rucker* (1761), 2 Burr. 1167 ; *Grant* v. *Parkinson* (1781), 3 Doug. 16.

(*r*) *United States Shipping Co.* v. *Empress Assurance*, [1907] 1 K. B. 259.

19 Geo. 2, c. 37, did not require interest to the full amount.

Although contracts of marine insurance have always been construed where possible as contracts of strict indemnity, the statute did not require the contract to be confined to a strict indemnity (*s*). Thus valued policies were permitted under the Act, and the assured thereby might recover more than the actual loss which he had sustained (*t*). So insurances on freight were by custom deemed to be contracts to pay the gross freight in case of loss, and thus the assured who saved the expenses of earning the freight recovered more than an indemnity (*u*). What the statute therefore required was not that the amount which the insurer contracted to pay should be strictly limited to the amount of the assured's interest at the time of the loss, but merely that the assured should have a substantial interest in the subject matter at that time (*v*). The statute could not be evaded by insurance to a substantial amount on a comparatively trifling or illusory interest (*x*).

The provisions of 19 Geo. 2, c. 37, are now superseded by the Marine Insurance Act, 1906.

Marine Insurance Act, 1906, secs. 4, 5, 6, 23

6 Edw. 7, c. 41.

Avoidance of wagering or gaming contracts.

Sec. 4.—(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a*) When the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(*b*) When the policy is made "interest or no interest" or "without further proof of interest than the policy itself" or "without benefit of salvage to the insurer" or subject to any other like term.

Provided that when there is no possibility of salvage a policy may be effected without benefit of salvage to the insurer.

Insurable interest defined.

Sec. 5.—(1) Subject to the provisions of this Act every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure when he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein in consequence of which he may benefit by the safety or due

(*s*) *Kent* v. *Bird* (1777), Cowp. 583.

(*t*) *Page* v. *Fry* (1800), 2 B. & P. 240.

(*u*) *Tasker* v. *Scott* (1815), 6 Taunt. 234; *Thellusson* v. *Fletcher* (1780), Doug. 315.

(*v*) *Lucena* v. *Craufurd* (1802), 3 B. & P. 75, 101; (1806), 2 N. R. 269; *Thellusson* v. *Fletcher* (1780), Doug. 315; *Cousins* v. *Nantes* (1811), 3 Taunt. 513.

(*x*) But see *Powles* v. *Innes* (1843), 11 M. & W. 10.

arrival of insurable property or may be prejudiced by its loss or by damage thereto or by the detention thereof or may incur liability in respect thereof.

When interest must attach.

Sec. 6.—(1) The assured must be interested in the subject matter insured at the time of the loss though he need not be interested when the insurance is effected.

Provided that when the subject matter is insured "lost or not lost" the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss and the insurer was not.

(2) When the assured has no interest at the time of the loss he cannot acquire interest by any act or election after he is aware of the loss.

What policy must specify.

Sec. 23. A marine policy must specify—

(1) The name of the assured or of some person who effects the insurance on his behalf:

(2) The subject matter insured and the risk insured against:

(3) The voyage or period of time or both as the case may be covered by the insurance:

(4) The sum or sums insured:

(5) The name or names of the insurers.

Statute 14 Geo. 3, c. 48.

Until 1774 policies other than on marine risks were still subject to the rules of Common Law, and therefore not void merely on the ground that they were wagers or made without interest. In that year the Act 14 Geo. 3, c. 48, was passed.

Statute 14 Geo. 3, c. 48

Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming; for remedy whereof be it enacted that from and after the passing of this Act no insurance shall be made by any person or persons bodies politic or corporate on the life or lives of any person or persons, or on any other event or events whatsoever wherein the person or persons for whose use, benefit or on whose account such policy or policies shall be made shall have no interest or by way of gaming or wagering: and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

2. It shall not be lawful to make any policy or policies on the life or lives of any person or persons or other event or events without inserting in such policy or policies the person or persons name or names interested therein or for whose use benefit or on whose account such policy is so made or underwrote.

3. In all cases where the assured hath interest in such life or lives event or events no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives or other event or events.

4. Provided always that nothing herein contained shall extend or be construed to extend to insurances bonâ fide made by any person or persons on ships goods or merchandises: but every such insurance shall be as valid and effectual in the law as if this Act had not been made.

14 Geo. 3, c. 48, does not cover insurances on goods.

The above Act, it will be observed, covers all insurances other than those on ships, goods or merchandises, that is other than marine insurances covered by 19 Geo. 2, c. 37, or insurances on chattels. Whatever the real intention of the legislature may have been the exception of insurances on goods or merchandises was construed as extending to insurances on all chattels whether against marine or land risks (*y*), and therefore the passing of this statute still left insurances on chattels against land risks subject only to the common law and accordingly still unfettered by any prohibition against wagering transactions or any stipulation as to the insertion of the names of the assured or other person taking out the policy.

14 Geo. 3, c. 48, applies only to insurances in the ordinary form of a policy.

The Act 14 Geo. 3, c. 48, was not intended to prohibit wagering, but only to prohibit wagering under the cloak of a mercantile document which purported to be a contract of insurance (*z*). Contracts therefore in the form of an ordinary policy of insurance are within the Act, although not strictly contracts of insurance (*a*); but contracts not in the form of a policy are not within the Act, although they may incidentally fulfil some of the objects of a contract of insurance (*b*). An advertisement issued by the proprietors of a medical preparation called "The Carbolic Smoke Ball" contained a promise to pay £100 to any person who might contract influenza after having used the ball. Although the acceptance of this offer created a binding contract it was not a policy of insurance and therefore not subject to the provisions of 14 Geo. 3, c. 48. Lindley, L.J., said, "You have only to look at the advertisement to dismiss the suggestion" (*c*).

14 Geo. 3, c. 48, requires interest at the date of the contract.

The Act of 14 Geo. 3, c. 48, is very differently worded from the Act of 19 Geo. 2, c. 37. Both alike prohibit policies made by way of gaming or wagering, but here the similarity ends. The Marine Act prohibited policies made "interest or no interest or without further proof of interest than the policy," and this was construed as requiring the contract to be a contract to pay on interest subsisting at the date of the loss, and no other interest was

(*y*) *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870;

(*z*) *Paterson* v. *Powell* (1832), 9 Bing. 320; *Roebuck* v. *Hammerton* (1778), Cowp. 737.

(*a*) Ashhurst, J., in *Good* v. *Elliott* (1790), 3 T. R. 693, 703.

(*b*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; Bunyon, Life Insurance, 2nd Ed. p. 13; Bunyon, Fire Insurance, 3rd Ed. p. 7. But the Marine Insurance Act, 19 Geo. 2, c. 37, was held applicable to contracts amounting in substance to an insurance, although not in the form of a policy. *Kent* v. *Bird* (1777), Cowp. 583; *Cook* v. *Field* (1850), 15 Q. B. 460; *Morgan* v. *Pebrer* (1837), 3 Bing. N. C. 457.

(*c*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 261.

required. The Act of 14 Geo. 3, c. 48, enacts that no insurance shall be made on any event wherein the assured "shall have no interest" and "no greater amount shall be recovered than the amount or value of the interest." These words have been construed in relation to a life policy as requiring interest to be shown only at the date of the contract and as limiting the amount recoverable to the amount of that interest without any reference to the interest or amount of interest at the date of the loss (*d*). The Act deals with all contracts of insurance to which it applies on exactly the same footing, and the interest required in the case of insurances on lives is the same as the interest required in all other classes of insurance. It is impossible to give the same words a different construction when applied to fire and other risks from that given to them when applied to life risks (*e*). It is submitted therefore that, whether the risk be life, fire, accident, or any other risk to which the statute applies, the statute is satisfied by showing interest at the date of the contract only and probably the statute will not be satisfied unless the assured had an insurable interest to the extent of the amount claimed at the date of the contract (*g*). An interest acquired afterwards, although before the loss, does not seem to satisfy the express proviso that no contract shall be made unless the assured shall have an interest. If this is a correct inference, as to which, however, there is no definite authority, a life policy effected by a creditor on the life of his debtor would be void if effected before the debt was legally constituted, and a fire policy effected by the prospective purchaser of a house would be void if effected before he had concluded a legal contract to purchase. The hope or prospect of obtaining an interest during the currency of the policy would not be sufficient even although the hope was realised before the loss.

Whether or not interest must be shown at the date of the loss depends in the case of all risks other than marine on the terms of the contract. If the insurers' promise is only to pay an indemnity,

The terms of the contract may require interest at the date of the loss.

(*d*) *Dalby* v. *India and London Life* (1854), 15 C. B. 365.

(*e*) Bunyon suggested that the statute might be construed differently according to each particular class of insurance to which it is applied. Fire Insurance, 3rd Ed. pp. 8, 9.

(*g*) Lord Hardwicke said in the case of a fire policy, "I am of opinion it is necessary the party insured should have an interest at the time of the insuring and at the time the fire happens." This, however, was before the statute, and the decision is referable solely to the principle of indemnity. *Sadlers' Company* v. *Badcock* (1743), 2 Atk. 554.

it follows that interest at the date of the loss must be shown, but not necessarily a continuity of interest between contract and loss (*h*). The rule of marine insurance law to construe the contract if possible as a contract of strict indemnity was one so familiar to the judges that they applied it indiscriminately to all classes of insurance without considering very carefully the peculiar nature of the different contracts with which they were dealing. Thus in 1807 the Court of King's Bench held that a life policy in ordinary form effected by a creditor on the life of his debtor was a contract of indemnity, and that the assured must show interest in the life and consequent loss at the time the life dropped (*i*). This decision was received by the insurance world with a chorus of disapprobation, and the companies did not in practice follow it, but paid in full on such policies even although the debt had been paid off when the debtor died (*k*). Notwithstanding this, the decision stood unchallenged in the Courts for nearly fifty years, and even received judicial approval (*l*). Finally, the question was again contested in *Dalby* v. *The India and London Life* (*m*) and carried to the Exchequer Chamber, where *Godsall and Boldero* (*n*) was overruled.

Dalby v. The India and London Life (1854), 15 C. B. 365

Dalby v. *The India and London Life.*

Wright insured the life of the Duke of Cambridge for £3000 with the Anchor Life. That company, by way of counter insurance, insured the life of the Duke with the India and London Life for £1000. Subsequently Wright purchased an annuity from the Anchor, and in part payment of the price surrendered his policies on the Duke's life. On the death of the Duke the plaintiff as trustee for the Anchor Life sued the India and London Life on their policy. The latter contested their liability on the ground that the policy was void for want of interest. The Court held (1) That no interest would have been necessary before 14 Geo. 3, c. 48. (2) That that statute required interest only at the date of the contract. (3) That the terms of the contract did not require any interest to be shown. The contract was not a contract to indemnify the Anchor, but a contract to pay them a certain sum on the happening of a certain event irrespectively of their interest in the life.

Primâ facie no interest at death is required in life policy.

The ordinary contract of life insurance, therefore, requires no interest at the date of the death. It is sufficient if the statutory

(*h*) 1 Phil. Ins. sec. 85. *Crozier* v. *Phœnix Insurance* (1870), 2 Hann. New Br. 200.

(*i*) *Godsall* v. *Boldero* (1807), 9 East, 72.

(*k*) *Barber* v. *Morris* (1831), 1 M. & Rob. 62.

(*l*) *Henson* v. *Blackwell* (1845), 4 Hare, 434.

(*m*) (1854), 15 C. B. 365.

(*n*) (1807), 9 East, 72.

requirement of interest at the date of the contract is satisfied (*o*). No doubt a contract to indemnify against loss consequent upon the death of an individual may be made, but a life policy taken out on the life of another is not to be construed as a contract of indemnity unless the intention of the parties that it should be so limited is clearly expressed.

Prima facie interest at time of loss is required in insurance on property.

Fire and burglary policies, on the other hand, are essentially different in their nature from life policies, and are to be preferably construed as contracts of strict indemnity (*p*).

Sadlers' Company v. Badcock (1743), 2 Atk. 554

Sadlers' Company v. *Badcock.*

A held a lease of a house for six and a half years unexpired. She insured against fire for a term of seven years in the Hand in Hand Mutual Office, and the company agreed "to pay £400 to her, her executors, administrators, and assigns so often as the house shall be burned within the said term." The house was burned during the term of seven years, but after A's interest in the property had expired. After loss A assigned the policy to the then owner, who sued on the policy; but it was held that he could not recover. Lord Hardwicke construed the policy as a contract to indemnify A against loss to the extent of £400 and not as an absolute promise to pay her £400 in the event of the house being burned down any time within the term of seven years.

Lord Hardwicke's decision in *Sadlers' Company* v. *Badcock* has never been disapproved, and shows how strongly the Courts lean towards the view that a fire policy is a contract of strict indemnity; and therefore, as a general rule, the assured under a fire policy who has parted with his entire interest before the loss cannot recover, and if he has an interest cannot recover more than the value of it. But a fire policy need not necessarily be a contract of indemnity only. All that can be said is that there is a strong presumption that it is and that it will be so construed in the absence of a clear intention to the contrary, but when such intention appears in the policy it is not to be disregarded (*q*).

14 Geo. 3, c. 48, demands no interest at the date of

Dalby v. *The India and London Life* (*r*) is sufficient authority for the proposition that the express words of the statute "shall

(*o*) *Connecticut Mutual Life* v. *Schaefer* (1876), 94 U. S. 457.

(*p*) Brett, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 388. Cockburn, C.J., in *Martineau* v. *Kitching* (1872), 41 L. J. Q. B. 227, 235; *Dalby* v. *The India and London Life* (1854), 15 C. B. 365; *North British and Mercantile* v. *London, Liverpool, and Globe* (1877), 5 Ch. D. 569; *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560; *Lynch* v. *Dalzell* (1729), 4 Bro. P. C. 431; *Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 554; *Ecclesiastical Commissioners* v. *Royal Exchange Assurance* (1895), 11 T. L. R. 476.

(*q*) *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870; *London & North Western* v. *Glyn* (1859), 1 El. & El. 652.

(*r*) (1854), 15 C. B. 365.

the loss provided the policy is effected *bonâ fide* to cover the possibility of interest at that date.

have interest" refer to interest at the date of the policy and at that date only; but the statute also prohibits policies made "by way of gaming and wagering." It is clear that where the assured has an interest which may last during the whole term of the risk, an absolute promise to pay a sum of money not greater than the assured's interest at the time of the contract is not essentially a gaming or wagering policy. This was *Dalby's Case*, as the interest of the Anchor Life would have lasted until the life dropped if the policies issued by them had not been previously surrendered. But a different case is presented where the assured has at the time the contract is made an interest for a definite period only, after which there is no hope or expectation of the interest being continued or renewed. In such a case a contract containing a promise to pay in the event of loss after the cessation of interest might well be deemed a contract *pro tanto* by way of gaming or wagering.

Law v. London Indisputable (1855), 3 Eq. R. 338

Law v. London Indisputable.

X was entitled to certain property in the event of his attaining the age of thirty years. He assigned this contingent interest to his father A, who thereupon effected a policy to provide against the risk of the contingency failing. A made full disclosure of his intention to the company and asked for a policy to cover the period of risk which was then about twenty months. The company advised A to insure for two years as he was not sure about the exact date and this was accordingly done, the policy containing a promise in general terms to pay a certain sum in the event of X dying within two years from the date of the policy, and premiums for the two years were charged and paid accordingly. X attained the age of thirty, but died within the two years. It was held by Vice-Chancellor Page Wood that although A became entitled to the estates he was also entitled to recover on the policy. The Vice-Chancellor held that it was the intention of the parties to effect a policy for two years payable on death within that period, irrespective of the contingency. This contract was made, however, with the *bonâ fide* object of providing against the contingency, and was extended to two years merely on the ground that the exact duration of the contingency risk was not known at the time. The policy was made by one having an interest, and the object of the contract was solely to protect that interest. In the course of his judgment the Vice-Chancellor put the extreme case of a party having an interest in one day of a life insuring for the whole duration of the life, and in argument the case was put of an insurance against accident during a railway journey, and the insurers effecting a counter-insurance upon the whole life. The Vice-Chancellor said that if such cases arose the question would be whether "a fraud upon the statute had been committed, and if any device of that description be found in order to evade the statute it would be very properly left to the jury to say how such a contract should be dealt with."

It seems clear on the authority of the above case that if an interest were created for a short period merely for the purpose of legalising an insurance for a longer period which would otherwise have been illegal for want of interest, such device would not avail the assured: it would be a "fraud upon the statute." Probably there must be some reasonable expectation of the interest being continued to the date when the loss actually occurs in order to legalise the promise to pay, or else the extension of the term beyond the term of the interest must be *bonâ fide* for the purpose of covering some such doubt as to the facts as existed in the above cited case. Where the interest of the assured is limited to a definite period with no hope or expectation of its being continued beyond such period, an insurance to cover a period substantially longer would probably be void *pro tanto*.

Amount of interest required by 14 Geo. 3, c. 48, s. 2.

The second section of 14 Geo. 3, c. 48, provides that no greater sum shall be recovered than the amount or value of the interest of the assured. The express requirement of the statute again refers to the interest at the time of making the contract. The Marine Insurance Act, 1746, contained no provision limiting the amount recoverable to the amount of the interest, and accordingly valued policies, and policies on gross freight, etc., were legal. Under 14 Geo. 3, c. 48, a valued policy would probably be ineffective if the value were challenged by the insurer, since the amount recoverable is limited to the actual value of the interest, and a promise to pay more would be *pro tanto* illegal. In the same way, as the statute apparently requires an interest to be actually subsisting at the date of the contract, so apparently it restricts the assured's right to recover to the extent of the interest which he had at that time. Any accretion of interest during the term of the risk ought to be the subject of a new contract. When, however, the value of the interest as distinguished from the extent has increased, the assured can recover in respect of the increased value.

Application to Ireland.

The Act 14 Geo. 3, c. 48, although it formerly did not apply to Ireland(*u*), was extended to that country by 29 & 30 Vict. c. 42. Mr. Bunyon has pointed out (*x*) that the second section of this last-mentioned Act refers to policies of insurance upon lives only, and that therefore there may be a doubt whether as regards insurances upon "other events" 14 Geo. 3, c. 48, has been extended to Ireland.

(*u*) *British Insurance* v. *Magee* (1834), 1 Cooke & Alcock, 182; *Scott* v. *Roose* (1841), 3 Ir. Eq. R. 170.

(*x*) Bunyon on Fire Insurance, 3rd Ed. p. 10.

The first section of 29 & 30 Vict. c. 42 is, however, the principal enacting section, and it provides in general terms that "the provisions of the said recited Act shall extend to Ireland." It would be contrary to all rules of construction to hold that this general enactment is in any way limited by the terms of the second section, which merely makes provision for the time when the Act shall commence. The Marine Insurance Act, 1746, was never extended to Ireland(*y*), but the Marine Insurance Act, 1906, applies to Ireland as well as to Great Britain.

The Gaming Act, 8 & 9 Vict. c. 109.

The Act 14 Geo. 3, c. 48, left untouched insurances on goods against land risks. These, although made without interest, were enforceable until 1845. In that year the Gaming Act was passed, and for the first time all contracts made by way of gaming or wagering were declared void irrespective of their form or subject matter. It provided that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void." This Act applies to Ireland but not to Scotland. Its application to Scotland was unnecessary by reason of the rule of the Scots Common Law that all wagering contracts are void.

What contracts are rendered void by the Gaming Act.

The Gaming Act avoids all contracts which in substance are wagers made without any kind of interest in the subject matter other than the interest which the wager creates (*z*). Insurance policies, therefore, are clearly within the Act if made without any interest or concern in the subject matter. It is doubtful, however, whether the Gaming Act requires any insurable interest in the strict sense in which an insurable interest is required by 19 Geo. 2, c. 37, or 14 Geo. 3, c. 48. The Act merely prohibits gaming and wagering, and there is no reference in it to insurances or insurable interest. Nothing is more clear on the authorities than the rule that an expectation of future benefit does not create an insurable interest within the meaning of the insurance Acts: but if the expectation is more likely to be realised than defeated a contract to insure against its loss can hardly be deemed a contract by way of gaming or wagering. It is submitted that the absence of insurable interest in the strict sense does not necessarily import the element of gaming so as to avoid the contract under the Gaming Act. But however this may be, it is clear that the Gaming Act does not require the interest to subsist at any particular time, and

(*y*) *Keith* v. *Protection Marine* (1882), 10 L. R. Ir. 51.

(*z*) *Grizewood* v. *Blane* (1851), 11 C. B. 538; *Gieve, In re*, [1899] 1 Q. B. 794; *Rourke* v. *Short* (1856), 5 El. & Bl. 904.

therefore an insurance made with an expectation of interest would not be void in the event of interest being acquired before the loss (*a*), nor would an insurance made on an actually subsisting interest at the time of the contract be void by reason of want of interest at the time of the loss (*b*). So too, interest to the full amount is clearly not required by the Gaming Act if the assured beyond his limited interest has some concern in the safety of the whole property (*c*).

Section II.—Nature and Extent of Insurable Interest required

What is an insurable interest.

Neither of the statutes 19 Geo. 2, c. 37, and 14 Geo. 3, c. 48, defines the insurable interest which the assured is required to have in the subject matter of the insurance, and the first statutory definition appears in the Marine Insurance Act, 1906, in relation to marine risks (*cc*).

The Marine Insurance Act, 1906, does not attempt to formulate any exhaustive definition of insurable interest, and it would be practically impossible to do so since insurable risks are so varied in their nature, and different considerations must apply to different classes of risks. If this is so in the case of marine insurance it applies with much greater force to any attempt to give a definition of insurable interest which would be applicable to all classes of risks which are known to the insurer. Section 5, subsection (2), of the Marine Insurance Act, 1906, states in succinct form the broad principles which have been laid down by the Courts as a guide to the solution of the question whether or not in any particular case there is an insurable interest. It is declaratory of the case law relating to marine policies, but these cases have been applied, so far as applicable, to other risks, and the definition in the Marine Insurance Act, 1906, may be taken *mutatis mutandis* as a good working definition of insurable interest in all insurance risks, and in particular in risks relating to property.

General definition of insurable interest.

A good broad definition of insurable interest applicable to all risks under the Act of 14 Geo. 3, c. 48, would be as follows : Where

(*a*) *Rhind* v. *Wilkinson* (1809), 2 Taunt. 237, unless there was a misrepresentation that there was in fact interest at the time the insurance was effected. *Howard* v. *Lancashire Insurance* (1885), 11 Can. S. C. 92.

(*b*) *Dalby* v. *India and London Life* (1854), 15 C. B. 365.

(*c*) *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870 ; *London and North Western* v. *Glyn* (1859), 1 El. & El. 652.

(*cc*) Section 5 ; *ante*, p. 108.

the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate result, involve the assured in the loss or diminution of any right recognised by law or in any legal liability there is an insurable interest to the extent of the possible loss or liability.

A mere moral claim affords no insurable interest.

The right necessary to afford an insurable interest must be a right which the law recognises as valid and subsisting. It may be a right either in law or equity ; but a mere moral claim affords no insurable interest, as in the eye of the law it is as nothing (*d*). Thus a contract which is void (*e*) or a promise made without good consideration (*f*) affords no interest, however likely it may be that the promisor will fulfil his promise as a moral obligation. The interest of the promisee in such a case is nothing more than a bare expectation.

A bare expectation of future benefit is not an insurable interest.

One of the main principles laid down by the Courts is that the mere hope or expectation of a future benefit is not sufficient to constitute an insurable interest in an event which if it happened would prevent such hope or expectation being realised. This principle was much discussed in the naval prize cases about the beginning of the nineteenth century. The captors of lawful prize became entitled to the proceeds either under the Naval Prize Acts or by a subsequent grant from the Crown, and the captors on making a capture insured the captured vessel against maritime risks until she should be brought into port. In so far as the captors had a vested right under the Prize Acts, it was held that they could insure the vessel (*g*), but in cases where they had no such right, but only an expectation of a grant from the Crown, it was held that they had no insurable interest (*h*). In one case Lord Mansfield said that where the expectation amounted to a moral certainty which had never been known to be defeated, there was a sufficient interest (*i*). But this dictum was disapproved of by Lord Eldon (*k*) and Lord Ellenborough (*l*). Chief Justice Tindal (*m*) said that if admitted it certainly could not be

(*d*) *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224 ; *Hebdon* v. *West* (1863), 3 B. & S. 579.

(*e*) *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224.

(*f*) *Hebdon* v. *West* (1863), 3 B. & S 579.

(*g*) *Le Cras* v. *Hughes* (1782), Park Ins. 568, 3 Dougl. 81.

(*h*) *Routh* v. *Thompson* (1809), 11 East, 428 ; *Devaux* v. *Steele* (1840), 8 Scott, 637.

(*i*) *Le Cras* v. *Hughes* (1782), Park Ins. 568, 3 Dougl. 81.

(*k*) *Lucena* v. *Craufurd* (1806), 2 N. R. 269 323.

(*l*) *Routh* v. *Thompson* (1809), 11 East, 428.

(*m*) *Devaux* v. *Steele* (1840), 8 Scott, 637.

extended beyond cases where the expectation had never been known to fail. The rule that expectation alone does not give an interest is equally applicable to all classes of insurance, to which the Act 14 Geo. 3, c. 48, applies. A person who has no interest in a house, but the hope of possessing it in the future, has no insurable interest which would entitle him to insure the property against fire and similar risks (*n*). It has been suggested that an expectation may be insured if specifically described (*o*); but there appears to be no definite authority on this point. The event insured against in such a case would be the failure of the expectation owing to certain specified causes or generally owing to any cause. Thus a man might effect an insurance against the chance of his father disinheriting him, or against the diminution of his succession owing to loss by fire of his father's property. It is submitted that such contracts would be contracts made without insurable interest. The assured has undoubtedly, in one sense, a very substantial interest in the event insured against, but he does not stand to lose any legal right nor to suffer any legal liability, and the policy of the law appears to have been to prohibit the insurance of mere visionary or speculative interests (*p*). The objection taken to insurance of interest based on an expectation is not that the interest was not sufficiently described, but that the interest was not insurable.

A right, although contingent or defeasible, creates an insurable interest.

Although a bare expectation of acquiring a right is not an insurable interest, a right may be sufficient to create an insurable interest, notwithstanding that it is contingent upon the happening of some future event, or that the chance of it ever coming into possession is extremely remote (*q*). An interest is none the less insurable because it is liable to defeasance on the happening of a future event (*r*). Thus a right to property under a contract or title which is not void but voidable gives an insurable interest in the property until the contract or title is set aside (*s*).

(*n*) *Clark* v. *Dwelling House Insurance* (1889), 81 Me. 373; *Trott* v. *Woolwich Mutual* (1891), 83 Me. 362.

(*o*) Lord Ellenborough in *Routh* v. *Thompson* (1809), 11 East, 428; Phillips' Insur. 176, 183.

(*p*) *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224; *Knox* v. *Wood* (1808), 1 Camp. 544.

(*q*) *Stirling* v. *Vaughan* (1809), 11 East, 619; *Chaplin* v. *Hicks* (1911), 27 T. L. R. 458.

(*r*) Phillips' Insur. 176; *Lucena* v. *Craufurd* (1806), 2 N. R. 269.

(*s*) *Frierson* v. *Brenham* (1850), 5 La Ann. 540; *Pettigrew* v. *The Grand River Farmer's Mutual* (1877), 28 U. C. (C. P.) 70. And the Canadian Courts have doubted whether in a case where the assured's title has never been challenged or disputed by any claimant to the property the insurers

Contract unenforceable under Sale of Goods Act

In one case the Court held that a merchant who contracted orally to purchase two cargoes of oil to arrive had not an insurable interest within 19 Geo. 2, c. 37, since the Statute of Frauds required a contract for the sale of goods over the value of £10 to be in writing (*t*). This decision, however, was probably on the ground that the 17th section of the statute rendered the contract void and not merely voidable. That section enacted that no contract for the sale of any goods . . . for the price of £10 sterling or upwards " shall be allowed to be good " unless . . . some note or memorandum in writing be made, signed by the parties to be charged. This section of the statute is now superseded by section 4 of the Sale of Goods Act, 1893, which provides that the contract " shall not be enforceable by action " unless the section is complied with. An oral contract for the sale of goods over the value of £10 is therefore not void. It operates to pass the property (*u*), and although it cannot be proved by the purchaser in an action against the vendor in England, the title which it gives is good as against third parties, and might even be enforced against the vendor in another country (*x*). This undoubtedly affords a good insurable interest to the purchaser.

or Statute of Frauds.

The same principle applies to contracts falling within the 4th section of the Statute of Frauds (*y*), which enacts that " no action shall be brought . . . upon any contract or sale of lands, tenements, or hereditaments or any interest in or concerning them ; or upon any agreement which is not to be performed within the space of one year from the making thereof . . . unless some memorandum or note thereof shall be in writing and signed by the party to be charged." In American States, where the Statute of Frauds has been adopted, a purchaser of land who could not enforce his contract by reason of the statute, has been held to have a good insurable interest in the buildings (*z*). The same principle would apply to all other rights which subsist in land, but cannot be enforced by action in this country.

can set up the title of a stranger as a defence to an action on their contract. *Stevenson* v. *London and Lancashire Fire* (1866), 26 U. C. (Q. B.) 148, 152 ; *Shaw* v. *Phœnix* (1869), 20 U. C. (C. P.) 170, 181.

(*t*) *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224 ; see *Patrick* v. *Eames* (1813), 3 Camp. 442 ; *Miller* v. *Warre* (1824), 1 Car. & P. 237 ; *Waters* v. *Towers* (1853), 8 Ex. 401.

(*u*) *Taylor* v. *G. E. Ry. Co.*, [1901] 1 Q. B. 774.

(*x*) *Leroux* v. *Brown* (1852), 12 C. B. 801.

(*y*) *Hebdon* v. *West* (1863), 3 B. & S. 579.

(*z*) *Wainer* v. *Milford Mutual Fire* (1891), 153 Mass. 335 ; *Dupuy* v. *Delaware Mutual* (1894), 63 Fed. Rep. 680 ; *Amsinck* v. *American Insurance* (1880), 129 Mass. 185.

Action barred by Statutes of Limitation.

A right where the remedy is barred by the Statutes of Limitation, but where the right still subsists, would afford an insurable interest (*a*). The Statutes of Limitation which bar the remedy, but not the right, are 21 Jac. 1, c. 16, s. 3, relating to rights founded on simple contract where the remedy is barred after six years, and 3 & 4 Wm. 4, c. 42, relating to rights founded on contracts under seal where the remedy is barred after twenty years. The Statutes 3 & 4 Wm. 4, c. 27, and 37 & 38 Vict. c. 57, relating to rights to recover land or rent, bar the right as well as the remedy after twelve years.

Legal liability creates an insurable interest in the event which may give rise to such liability.

The chance of incurring legal liability in consequence of the happening of an event gives an interest just as much as the chance of losing a right. Thus all insurers have an insurable interest which entitles them to reinsure or effect a counter-insurance on the subject matter of the original insurance (*b*). Wherever an individual has entered into a legal obligation to indemnify another in respect of loss to property (*c*), or where the law places such obligation upon him (*d*), he is in the position of an insurer, and has an insurable interest in the property to the extent of his possible liability. A contractual obligation to insure gives the obligor an insurable interest (*e*). And where the occurrence of any event might directly involve legal liability, the person on whom such liability would fall may insure against the happening of such event (*f*).

As a general rule of law the nature of the assured's interest need not be specified.

The general rule of law is that one who effects an insurance against the happening of an event need not, in the absence of specific inquiry, disclose the nature of his interest in that event (*g*). Thus one who insures the life of another need not disclose whether he is interested in the life as a creditor or a dependent (*h*). When property is insured the assured need not state whether his title be legal or equitable (*i*). A purchaser

(*a*) *Rawls* v. *American Mutual* (1863), 27 N. Y. 282.

(*b*) *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. 36.

(*c*) *Germania Fire* v. *Thompson* (1877), 95 U. S. 547.

(*d*) *Crowley* v. *Cohen* (1832), 3 B. Ad. 478.

(*e*) *Heckman* v. *Isaac* (1862), 6 L. T. 383.

(*f*) *Boehm* v. *Bell* (1799), 8 T. R. 154.

(*g*) *Inglis* v. *Stock* (1885), 10 A. C. 263, 270, 274; *Mackenzie* v. *Whitworth* (1875), L. R. 10 Ex. 142; *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *Russell* v. *Union* (1806), 1 Wash. 409; *Bartlet* v. *Goodwin* (1816), 13 Mass. 267; *Cross* v. *National Fire* (1892), 132 N. Y. 133; *Carruthers* v. *Sheddon* (1815), 6 Taunt. 14.

(*h*) *M'Cormick* v. *Ferrier* (1832), Hayes & J. 12.

(*i*) *Inglis* v. *Stock* (1885), 10 A. C. 263, 270, 274; *Aetna Fire* v. *Tyler* (1836), 16 Wend. 385; *Dohn* v. *Farmers' Joint Stock* (1871), 5 Lans. 275.

who has a valid contract may insure as owner although the legal title or property has not passed to him (*i*). A trustee need not disclose that he is a bare trustee without beneficial interest and may insure simply as owner to the full value (*k*). A tenant who effects insurance in respect of his liability to repair need not disclose that his interest is not that of an owner (*l*). A mortgagee may effect insurance on the property which he holds as security without disclosing that his interest is only that of a mortgagee (*m*). In America, Mr. Justice Story expressed an opinion that the interest of a mortgagee was an interest of such a special nature that it ought to be disclosed (*n*), and this is supported by other authority in America (*o*). In some of the later cases, however, this opinion is not approved or followed, and on general principle these later cases probably represent the sounder view (*p*). Unless there are special circumstances which could affect the risk, the mere fact that the assured is mortgagee and not owner does not seem to call for disclosure. Where the assured was mortgagor and had sold his equity of redemption, and his only interest in the preservation of the property was in respect of his personal liability for the mortgage debt, the Court held that this interest need not be specified or disclosed (*q*). On the same principle, one who effects insurance on goods need not specify his interest, even although it be only that of a carrier or other bailee in respect of his lien (*r*) or liability to the owner for loss (*s*).

In some cases a description of the interest is necessary in order to define the risk.

In some cases, where the interest of the assured depends upon the preservation of property and is not a right, legal or equitable, in the property itself, but arises incidentally from the ownership of the property or from some contract in relation to the property, it is deemed not to be a sufficient description of the risk to insure

(*i*) *Inglis* v. *Stock* (1885), 10 A. C. 263, 270, 274; *Aetna Fire* v. *Tyler* (1886), 16 Wend. 385; *Dohn* v. *Farmers' Joint Stock* (1871), 5 Lans. 275.

(*k*) *Lucena* v. *Craufurd* (1806), 2 N. R. 269, 324; *Insurance Co.* v. *Chase* (1866), 5 Wall. 509; *Oakman* v. *Dorchester Mutual* (1867), 98 Mass. 57.

(*l*) *Lawrence* v. *St. Mark's Fire* (1865), 43 Barb. 479.

(*m*) *King* v. *State Mutual* (1850), 61 Mass. 1.

(*n*) *Carpenter* v. *The Providence Washington* (1842), 16 Pet. 495, 505.

(*o*) *Columbian Insurance* v. *Lawrence* (1829), 2 Pet. 25; *Kernochan* v. *New York Bowery* (1858), 17 N. Y. 428, 439.

(*p*) *Franklin Fire* v. *Coates* (1859), 14 Md. 285; *King* v. *State Mutual* (1850), 61 Mass. 1.

(*q*) *Cone* v. *Niagara Fire* (1875), 60 N. Y. 619.

(*r*) *Godin* v. *London Assurance* (1758), 1 Burr. 490; *Carruthers* v. *Sheddon* (1815), 6 Taunt. 14; *Pittsburgh Storage* v. *Scottish Union* (1895), 168 Pa. 522.

(*s*) *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *Western* v. *Home Insurance* (1891), 145 Pa. 346.

simply against the loss of the property (*t*). The risk must be more particularly described, and in so describing the risk the assured must necessarily specify the nature of his interest in the property.

On profits from sale of property.

If the assured desires insurance in respect of the profits which he expects to arise from the purchase and resale of property he must insure *eo nomine* on profits (*u*). An insurance simply on the property will not cover the risk of loss of profit (*u*). If properly specified he may insure on profits even although the property itself is not his and is not at his risk (*x*) ; but if he has no legal or equitable title to the property he must have some legally subsisting contract in relation to it (*y*). Thus a merchant may insure on the profits expectant on the purchase and resale of goods if the goods are already his (*z*), or if he has entered into a legally subsisting contract for their purchase (*y*). He need not have contracted to resell them. He can estimate his probable profits on a resale and have the profits valued in the policy, or, in default of valuation, he can recover on the basis of the market price at the time and place when but for the loss or damage to the goods he could have resold them. In England it has been held in marine cases, and the principle seems equally applicable to all insurances on profits, that the assured cannot recover on a valued policy on profits unless he can show that some profit would have been earned if the goods had not been lost (*a*). In America the contrary has been decided, and it is presumed *de jure* on a valued policy that the profits as valued would have been earned (*b*).

On rent or hire.

Besides profits expected to be earned from the purchase and resale of goods the assured may be insured against the loss of other profits or benefits which may accrue from his particular relationship to the goods, but the risk must be properly described and incidentally the nature of his interest (*c*). Thus he may be insured against loss of the profits to be derived from the

(*t*) *Palmer* v. *Prait* (1824), 2 Bing. 185.

(*u*) *Eyre* v. *Glover* (1812), 16 East, 218 ; *Grant* v. *Parkinson* (1781), 3 Doug. 16 ; *Lucena* v. *Craufurd* (1806), 2 N. R. 269, 315 ; *Anderson* v. *Morice* (1875), L. R. 10 C. P. 609, 622, 624 ; *Wright* v. *Pole* (1834), 1 Ad. & E. 621.

(*x*) *M'Swiney* v. *Royal Exchange* (1850), 14 Q. B. 634 ; *Halhead* v. *Young* (1856), 6 El. & Bl. 312.

(*y*) *M'Swiney* v. *Royal Exchange* (1850), 14 Q. B. 634 ; *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224 ; *Knox* v. *Wood* (1808), 1 Camp. 544.

(*z*) *Barclay* v. *Cousins* (1802), 2 East, 544 ; *Devaux* v. *J'Anson* (1839), 5 Bing. N. C. 519.

(*a*) *Hodgson* v. *Glover* (1805), 6 East, 316 ; *Barclay* v. *Cousins* (1802), 2 East, 544.

(*b*) *Petapsco Insurance* v. *Coulter* (1830), 3 Pet. 222.

(*c*) *Hunter* v. *Prinsep* (1808), 10 East, 378.

hiring or letting of property. The ordinary marine insurance of the shipowner's or charterer's freight is of this kind (*d*). A landlord may insure his rent which he may lose through the destruction of his premises, but he could not recover such loss on a simple insurance on the premises (*e*).

On agent's commission.

An agent for the sale of goods or other property can insure his expected commission on the transaction, but he must insure *eo nomine* (*f*).

On business profits.

A man may also insure the profits which he expects from some undertaking or adventure or from the carrying on of a business (*g*); but in all such cases he must show that the matter was not merely a visionary project, but that he had actually entered upon it by incurring trouble or expense or making contracts in relation thereto (*h*), and he must also define the nature of the risk as an insurance on profits (*e*). In an American case an agent of an insurance company was remunerated by a certain percentage of the gross receipts and net profits of the company's fire insurance business. He insured "on interest in profits under contract with the X Insurance Company" against loss caused by the company's fire losses exceeding a certain total. It was held that he had an insurable interest and that the risk was sufficiently described (*i*).

On shares and dividends.

Analogous to the insurance of the profits from a business or undertaking is the insurance by a shareholder of the shares which he holds in a company. The English Courts have adopted the view that a shareholder as such has no insurable interest in the corporate property, or, at any rate, cannot insure simply on the property, but must specify his interest and define the risk as an insurance on his shares or dividends (*k*). In other words, he must insure not the property but the capital which he has staked on the adventure and the profits which he expects to derive from the investment. The Court of Appeal in Ontario expressed some doubt as to whether

(*d*) In the insurance of freight the assured must show that he had a definite contract. *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; *Forbes* v. *Aspinall* (1811), 13 East, 323; *Curling* v. *Long* (1797), 1 B. & P. 634, 636.

(*e*) *Wright* v. *Pole* (1834), 1 Ad. & E. 621; *Menzies* v. *North British Insurance* (1847), 9 D. 694.

(*f*) *Flint* v. *Le Mesurier* (1796), Park, 563.

(*g*) *Puller* v. *Glover* (1810), 12 East, 124; *Puller* v. *Staniforth* (1809), 11 East, 232; *Barclay* v. *Cousins* (1802), 2 East, 544.

(*h*) *Buchanan* v. *Faber* (1894), 4 Com. Cas. 223.

(*i*) *Hayes* v. *Milford Mutual Fire* (1898), 170 Mass. 492.

(*k*) *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139; *Paterson* v. *Harris* (1861), 1 B. & S. 354, 355.

a shareholder might not insure the company's property, but held that in any case he could not, having insured as owner and then sold the property to the company and become a shareholder, recover on his original policy upon his interest as shareholder (*l*). The American Courts have, on the contrary, held that a shareholder may insure the property of the company without specifying his interest (*m*). The Court of Appeal in New York held that a shareholder in a shipping company who insured simply on a ship the property of the company could recover the loss which he suffered by reason of the decreased value of his shares arising from the loss of the ship (*n*). An earlier case in Ohio (*o*), which has been cited as authority for the proposition that a shareholder could not insure simply on the company's property, is distinguished on the ground that the conditions in the policy required the assured to have "an unencumbered fee" simple in the property insured and that the policy was void for breach of this condition (*p*). The American decisions, however, are hardly consistent with the principle long adhered to in the English Courts that insurance on profits must be made *eo nomine*. When a shareholder insures he may insure against loss or diminution of his shares from any cause or he may insure from loss or diminution caused by the destruction of the company's property by fire or by some other specified risk. The shareholder may insure his capital and dividends or the dividends only.

In some cases the nature of the assured's interest is a material fact which ought to be disclosed.

In some cases it may be necessary to disclose the nature of the assured's interest on the ground that it is a material fact which might have influenced the insurer in determining whether or not he should accept the risk at the rate agreed. It was on this ground that Story, J., thought the interest of a mortgagee was a special interest which ought to be disclosed. When the interest of the assured is that of an insurer on a reinsurance, it is a question for the jury to say whether the fact that the contract was one of reinsurance was material to the risk and ought to have been disclosed. Apart from a finding of fact that in the particular circumstances it

(*l*) *A. G. Peuchen Co.* v. *City Mutual Fire* (1891), 18 Ont. A. R. 446.

(*m*) *Riggs* v. *Commercial Mutual* (1890), 125 N. Y. 7; *Mannheim Insurance* v. *Hollander* (1901), 112 Fed. Rep. 549; *Seaman* v. *Enterprise Fire and Marine* (1884), 21 Fed. Rep. 778; *Warren* v. *The Davenport Fire* (1871), 31 Iowa, 464.

(*n*) *Riggs* v. *Commercial Mutual* (1890), 125 N. Y. 7.

(*o*) *Phillips* v. *Knox County Ins.* (1870), 20 Ohio, 174.

(*p*) *Warren* v. *The Davenport Fire* (1871), 31 Iowa, 464.

was material the assured on a reinsurance is not bound to disclose his interest (*q*).

The conditions of the policy may require the nature of the interest to be specified.

The terms of the proposal or policy may require the assured to have an interest of a particular kind or to specify his interest, and any such condition must be complied with as part of the contract between the parties. The ordinary form of fire policy provides that " the interest of the insured if other than that of absolute owner of the property must be stated." This clause has not been much discussed in the Courts in this country. In America it has been held that " absolute owner " does not necessarily imply that the assured must have the legal title vested in him. If he has an equitable title, or is sole beneficial owner of the property, it is sufficient (*r*). If, on the other hand, he holds the legal title as trustee he is " absolute owner," notwithstanding that others may have an equitable or beneficial right to the property (*s*). Unless the conditions expressly provide that the property must be unincumbered or that incumbrances must be disclosed it is not necessary to disclose incumbrances on the property. The assured is " sole and unconditional owner," notwithstanding that he has mortgaged his property or that there is a lien upon it (*t*). The sole and unconditional ownership clause does not apply where a limited interest is expressly specified, or, if it applies, is a warranty merely of sole and unconditional ownership of the interest specified (*y*). It has been frequently held in America that the sole and unconditional ownership clause may be waived if the agent who accepts the proposal is a general agent of the company and has knowledge of the actual interest of the assured (*z*).

Absolute ownership clause.

Goods in trust or on commission to be insured as such.

The ordinary conditions of a fire policy provide that the policy shall not extend to cover goods held in trust or on commission unless expressly insured as such (*a*). It was suggested in *London and*

(*q*) *Mackenzie* v. *Whitworth* (1875), L. R. 10 Ex. 142 ; *New York Bowery* v. *Fire* (1837), 17 Wend. 359.

(*r*) *Hartford Fire* v. *Keating* (1898), 86 Md. 130 ; *White* v. *Home Insurance* (1870), 14 Low. Can. Jur. 301 ; *American Basket Co.* v. *Farmville* (1878), 3 Hughes, 251.

(*s*) *Gill* v. *Canada Fire and Marine* (1882), 1 Ont. 341.

(*t*) *Hanover Fire* v. *Bohn* (1898), 48 Neb. 743.

(*y*) *Hanover Fire* v. *Bohn* (1898), 48 Neb. 743 ; *Traders' Insurance* v. *Pacaud* (1894), 150 Ill. 245.

(*z*) *Cross* v. *National Fire* (1892), 132 N. Y. 133 ; *Hartford Fire* v. *Keating* (1898), 86 Md. 130 ; *Carpenter* v. *German American* (1892), 135 N. Y. 298 ; *Brooks* v. *Erie Fire* (1902), 76 App. Div. N. Y. 275 ; *Dupuy* v. *Delaware Insurance* (1894), 63 Fed. Rep. 680 ; *Welsh* v. *London Assurance* (1892), 151 Pa. 607.

(*a*) *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870 ; *London and N. W. Ry.* v. *Glyn* (1859), 1 El. & El. 652 ; *Day* v. *Charter* (1862), 51 Me. 91.

North-Western Railway v. *Glyn* (*b*) that this condition is only applicable to an insurance beyond the interest of the assured, and therefore if there was no absolute owner clause in the policy a bailee who insured simply "on goods" could recover in respect of his own personal loss, notwithstanding the trust clause. The words "goods held in trust or on commission" are not to be read in a strictly legal, but rather in an ordinary commercial sense (*c*). A bailee, such as wharfinger or carrier or mercantile agent, holds goods "in trust" for the owner (*d*). In the case of a miller who received grain from his various customers and shot it into bulk under a contract to redeliver when demanded an equivalent quantity of grain or at the option of the miller the then market price, subject to a charge for storage if the demand should not be made within a certain time, it was held that the miller could not be considered as a "trustee" as the whole property passed to him as money would to a banker who gave a deposit receipt (*c*). In order to constitute "trust or on commission" there must be a right in the owner to the restoration of the actual property (*c*). If the case had been that the assured was bound to hold the entire bulk of the wheat to be redelivered to the customers in the same proportion as their contributions, that might have been a case of goods held in trust; but, as it was, the customer had no right either to the specific wheat or a share of the bulk, and therefore the miller who had insured simply "on wheat, etc.," in his mill could recover, notwithstanding the "in trust or on commission clause."

Nature of interest may change during the risk.

If the insurance is not upon a specified interest, and if there is no condition to the contrary, the fact that the nature of the assured's interest changes during the risk does not affect the validity of the contract (*e*). Where an owner, who had mortgaged his premises, insured, and subsequently his equity of redemption was sold under an execution and he was in possession as tenant to the mortgagee at the time of the loss, it was held that he could recover, notwithstanding the change in the nature of his interest (*f*). If, however, the contract is a mere indemnity of the assured personally, a

(*b*) (1859), 1 El. & El. 652.

(*c*) *South Australian Insurance* v. *Randell* (1869), L. R. 3 P. C. 101.

(*d*) *Pittsburgh Storage* v. *Scottish Union* (1895), 168 Pa. 522; *Roberts* v. *Firemen's Insurance* (1894), 165 Pa. 55; *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870.

(*e*) *Martin* v. *Fishing Co.* (1838), 37 Mass. 389; *Stetson* v. *Massachusetts Mutual* (1808), 4 Mass. 330.

(*f*) *Strong* v. *Manufacturers* (1830), 27 Mass. 40.

diminution in the value of his interest diminishes accordingly the amount which he can recover, and if he insures upon a specified interest he can only recover in respect of that interest.

Policy may prohibit change of interest.

But change of interest may be prohibited by the conditions of the policy. This is so impliedly when the policy requires the nature of the interest to be stated, in which case the insurance is an insurance on the interest disclosed and on that interest only.

Condition prohibiting sale or transfer of the property insured.

In insurances on property the ordinary form of policy contains a condition to the effect that the insurance ceases to be in force "as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given to and accepted by the company and the subsistence of the insurance in favour of such other person be declared by a memorandum endorsed hereon by or on behalf of the company." This clause must be construed as referring not necessarily to a transfer of the absolute property in land or goods, but to a transfer of any interest which the assured may have therein. If the assured is insured specifically in respect of more than one interest in certain property, the passing of one interest does not avoid the policy as to those that remain (*g*). Where, however, a mortgagor was expressly insured as such and afterwards sold the equity of redemption, it was held that although he retained an insurable interest in respect of his liability for the mortgage debt the passing of the equity of redemption was a breach of the condition against transfer (*h*). Where the assured is insured expressly in respect of a limited interest, the passing of the interests of others in the property would not avoid the policy under such a clause. If the insurance was effected by a warehouseman expressly on goods in trust or on commission, the passing of the property in the goods would not affect the validity of his insurance. Where the insured sold half of his interest as purchaser of land under an executory contract, it was held that the policy was valid as to the half of the interest retained (*i*). But where A, B, and C insured property as co-partners and A afterwards transferred his interest to B and C, it was held that the policy was avoided under the sale or transfer clause (*k*). Where the condition was against "sale or conveyance,"

(*g*) *Germania Fire* v. *Thompson* (1877), 95 U. S. 547.

(*h*) *Springfield* v. *Allen* (1871), 43 N. Y. 389.

(*i*) *Manley* v. *The Insurance Co. of North America* (1869), 1 Lans. 20.

(*k*) *Tillon* v. *Kingston Mutual* (1851), 5 N. Y. 405. See *Forbes and*

it was held that it applied to a voluntary sale only, and that a compulsory sale on execution did not avoid the policy (*l*). Where the assured insured as warehouseman, and the policy was declared to be void "if any change takes place in the possession of the subject matter of the insurance," it was held that a constructive change of possession by the delivery of the warehouse receipt, did not avoid the policy (*m*). Where transfer without the company's consent by indorsement of the policy is prohibited, it is not sufficient to obtain an indorsement "payable in case of loss to B." Such an indorsement is not a consent to a transfer of the property to B, but merely a substitution of B as payee (*n*).

Section III.—Insurable Interest in Property

Not confined to absolute legal owner.

Insurable interest in property is not confined to the absolute legal ownership. Generally any person who is so situated that he will suffer loss as the proximate result of damage to or destruction of the property has an insurable interest in it. But there must be some direct relationship to the property itself, for otherwise the interest is too remote and therefore not insurable. In *Lucena* v. *Craufurd* Lord Eldon said, "I am unable to point out what is an interest unless it be a right in the property or a right derivable out of some contract about the property," and if we add to this, "or some legal liability to make good the loss," we get a substantially accurate definition of insurable interest in property.

Trustees, Executors, and Beneficiaries.

The trustee who holds the legal property and his beneficiaries (*o*) who have the equitable title can each insure (*p*). The trustee as legal owner has an interest to the full value, and can therefore insure in his own name without mentioning the beneficiaries, even although he has no beneficial interest in the trust (*q*). An executor or administrator may insure the whole estate of the deceased (*r*). An executor's interest commences whenever he has

Co. v. *Border Counties Fire* (1873), 11 M. 278.

(*l*) *Strong* v. *Manufacturers* (1830), 27 Mass. 40.

(*m*) *California Insurance* v. *Union Compress* (1889), 133 U. S. 387.

(*n*) *Bates* v. *Equitable Insurance* (1869), 10 Wall. 33.

(*o*) *Hill* v. *Secretan* (1798), 1 B. & P. 315; *Butler* v. *Standard Fire* (1879), 4 Ont. App. 391; *Pettigrew* v. *The Grand River Farmers' Mutual* (1877), 28 U. C. (C. P.) 70.

(*p*) *Houghton* v. *Gribble* (1810), 17 Ves. Jur. 251, 253; *Yallop, Ex parte* (1808), 15 Ves. 60, 67.

(*q*) *Lucena* v. *Craufurd* (1806), 2 N. R. 269, 324; *Insurance Co.* v. *Chase* (1866), 5 Wall. 509, 513; *Oakman* v. *Dorchester Mutual* (1867), 98 Mass. 57; *Rhind* v. *Wilkinson* (1810), 2 Taunt. 237; *London and North Western* v. *Glyn* (1859), 1 El. & El. 652, 663.

(*r*) *Herkimer* v. *Rice* (1863), 27 N. Y. 163, 179; *Parry* v. *Ashley* (1829), 3 Sim. 97.

accepted the office and before his title has been legally completed by probate (*s*), and an executor *de son tort* has an insurable interest because he has made himself responsible for the distribution of assets (*t*). A trustee in bankruptcy (*u*), an assignee for creditors under a trust deed, and a receiver appointed by the Court (*x*) have an insurable interest in the estate in their hands, but the debtor also retains an insurable interest to the full value since he has an interest in the preservation of the property which is to be applied in satisfying his debts (*y*).

Legal title but no trust except an obligation to convey.

It is open to some doubt whether a bare legal title either to land or goods gives the holder of the title an insurable interest. It has been frequently said that the legal title alone is sufficient to confer an insurable interest to the full value (*z*). This is no doubt so where the holder of the title is in the proper sense a trustee holding the property for the benefit of the beneficiaries, because if a trustee insures and recovers the full value he is bound to account to his beneficiaries; but in the case of a vendor before completion, or a mortgagee, although he holds the legal title he is not in the proper sense a trustee, and if he insures and recovers the full value he can *primâ facie* retain it for his own benefit (*a*). The distinction between the insurable interest of the legal owner who is a trustee and the insurable interest of the legal owner who is merely under an obligation to convey has never been carefully considered in this country; but, on the other hand, the dicta to the effect that the legal owner as such has an interest to the full value have stood so long unchallenged that they would probably now be followed as establishing the law (*b*).

Possession without further interest.

The mere possession of property is probably sufficient to give an insurable interest to the person in possession (*c*). Even if it

(*s*) *Stirling* v. *Vaughan* (1809), 11 East, 619, 629.

(*t*) *Hamilton, In re* (1900), 102 Fed. Rep. 683; *Gill* v. *Canada and Fire Marine* (1882), 1 Ont. Rep. 341.

(*u*) *Lingley* v. *Queen Insurance* (1868), 1 Hann. (N. Br.) 280.

(*x*) *Thompson* v. *Phœnix* (1889), 136 U. S. 287.

(*y*) *Marks* v. *Hamilton* (1852), 7 Ex. 323.

(*z*) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380; *Ebsworth* v. *Alliance Marine* (1873), L. R. 8 C. P. 596; *Lucena* v. *Craufurd* (1806), 2 N. R. 269; *Inglis* v. *Stock* (1885), 10 A. C. 263; *Insurance Co.* v. *Updegraff* (1853), 21 Pa. 513.

(*a*) *Rayner* v. *Preston* (1881), 18 Ch. D. 1.

(*b*) But see *Bank N.S.W.* v. *N. B. and Merc.* (1881), 2 N. S. W. (Law) 239.

(*c*) *Stirling* v. *Vaughan* (1809), 11 East, 619, 629; *Lucena* v. *Craufurd* (1806), 2 N. R. 269, 323; *Dobson* v. *Sotheby* (1827), 1 Moo. & Mal. 90, 93. In America the master of a vessel was held to have no interest. *Barker* v. *Marine* (1821), 2 Mason, 369; and see *Routh* v. *Thompson* (1809), 11 East, 428, 434; *Boehm* v. *Bell* (1799), 8 T. R. 154.

is a wrongful possession as against the true owner, such as the possession of a trespasser, it is a right recognised by law and available against all the world except those who can show a better title (*d*).

A person in possession of property may sue a third person who has negligently damaged or destroyed it, and may recover from him the full amount of damage up to the total value of the property (*e*) and from this it would seem to follow that the person in possession of property has on that ground alone an insurable interest to the full value (*f*). Mr. Bunyon took this view (*g*) ; but the authorities are not at all clear on the point, and it is arguable that a person in possession may have only a limited insurable interest corresponding to the market value of his interest in the property as against the owner or to his responsibility to the owner for accidental damage to or loss of the property (*h*). But even if possession is not by itself sufficient to give an insurable interest up to the full value, possession by the assured is *primâ facie* proof of ownership, and therefore proof of possession only is sufficient in the first instance, to establish an insurable interest to the full value (*i*).

Mere use and enjoyment.

Where the assured has not even possession but a mere revocable licence to use and enjoy the property jointly with the owner, it is doubtful whether he has any interest at all. In *Goulstone* v. *Royal* (*k*), Pollock, C.B., at *nisi prius* held that a husband had an insurable interest and could recover the full value of house property and household furniture which were settled to his wife's separate use, but of which both spouses enjoyed the actual use and occupation. In America it has been held that where by the law of the state the husband has a legal right to the joint use and occupation of his wife's

(*d*) In America a trespasser upon property belonging to the State who had erected a house thereon without any shadow of title or licence was held to have no insurable interest. *Sweeney* v. *Franklin Fire* (1853), 20 Pa. 337 ; and in Canada a person against whom judgment for delivery up of possession had been obtained in an action for ejectment was held to have no insurable interest. *Sherboneau* v. *Beaver Mutual* (1870), 30 U. C. Q. B. 472 ; *Lingley* v. *Queen Insurance* (1868), 1 Hann. (N. Br.) 280.

(*e*) *The Winkfield*, [1902] P. 42.

(*f*) *Marks* v. *Hamilton* (1852), 7 Ex. 323.

(*g*) Bunyon on Fire Insurance, 3rd Ed. p. 20.

(*h*) Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 398–401.

(*i*) *Lingley* v. *Queen Insurance* (1868), 1 Hann. (New Br.) 280 ; *Stevenson* v. *London and Lancashire Fire* (1866), 26 U. C. Q. B. 148 ; *The Mayor of New York* v. *The Brooklyn Fire* (1864), 41 Barb. 231.

(*k*) (1858), 1 F. & F. 276.

property (*l*) or has a vested interest in it as tenant by the curtesy (*m*) he has an insurable interest; but where by the law of the state he has no right but merely occupies jointly with his wife at her pleasure, he has no insurable interest (*n*).

Vendor and Purchaser.

Persons who as purchasers have entered into a legal contract for the purchase of property may have an insurable interest even although the legal property or title has not passed to them. The loss of, or damage to, the property may extinguish or diminish the value of their contractual right, and their insurable interest is commensurate with the loss which they may thus suffer. The contract must be valid and subsisting in order to give the purchaser an interest; but he has an interest none the less by reason that the contract is unenforceable or voidable. In like manner the vendor has an interest so long as he is in such a position that loss or damage to the property would result in loss to him. The vendor and purchaser may in certain circumstances each have a concurrent interest enabling each to insure and recover the full value (*o*). Thus, if the risk has passed to the purchaser but the vendor is unpaid with a lien for the purchase money, the purchaser has an interest to the full value in respect of his risk and liability to pay the full price for the property which may become valueless, and the vendor has an interest to the full value in respect of his lien because the loss of the property means the loss of his security and the purchaser may be insolvent. How far the insurers who have paid on either interest may mitigate or extinguish their loss by subrogation to the rights of the assured is another matter, which will be considered hereafter. In considering the insurable interest of vendor and purchaser under a contract for sale, it will be more convenient to consider separately the interest in relation to real property and then the interest in relation to personal chattels or goods.

Contracts to purchase real property.

A valid contract for the sale of real property passes the risk immediately to the purchaser unless the contract is expressed otherwise (*p*). The title or property does not pass until there

(*l*) *Webster* v. *Dwelling House Ins.* (1895), 53 Ohio, 558; *Merrett* v. *Farmers' Insurance* (1875), 42 Iowa 11.

(*m*) *Harris* v. *York Mutual* (1865), 50 Pa. 341; *Caldwell* v. *Stadacona Fire and Life* (1883), 11 Can. S. C. 212.

(*n*) *Tyree* v. *Insurance Co.* (1904), 55 W. Va. 63; *Clark* v. *Dwelling House Insurance* (1889), 81 Me. 373; *Trott* v. *Woolwich Mutual* (1891), 83 Me. 362.

(*o*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355.

(*p*) *Paine* v. *Mellor* (1801), 6 Ves. 349; *Poole* v. *Adams* (1864), 10 L. T. 287.

is a formal conveyance by deed, but any loss or damage arising between contract and completion falls upon the purchaser, and he must take a conveyance of the damaged property and pay the full contract price. The passing of the risk gives the purchaser an insurable interest, and he may at once insure for the full value (*q*). The contract may be voidable or such that either party may resist a claim for specific performance, but the purchaser's interest is not thereby affected so long as the contract in fact subsists (*r*). The insurers cannot rely on the fact that the vendor might have refused to perform the contract (*s*). The sale may be subject to a contingency (*t*) or to the performance of certain conditions by the purchaser, but the purchaser has an interest notwithstanding. In an American case the vendor had agreed to sell and convey on a certain date if the purchaser had paid the purchase money by certain fixed instalments. The purchaser insured; the payment of the instalments was in arrear, but the vendor had taken no steps to cancel the contract and the purchaser was held to have an insurable interest (*u*). The vendor has an insurable interest so long as the purchase money is unpaid, and he has a lien for the whole or part thereof (*x*). Even if the purchase money is paid and the purchaser is in possession the vendor has probably an interest merely on the ground that the legal title has not passed (*y*). But if the insurance was a contract of personal indemnity the assured would be bound to set off the price received against the claim, and consequently might recover nothing (*z*). If the property has been conveyed and the vendor has been paid, the vendor has clearly no further interest and cannot recover on an indemnity insurance, even

(*q*) *White* v. *Home Insurance* (1870), 14 Lr. C. Jur. 301; *Milligan* v. *Equitable* (1857), 16 U. C. Q. B. 314.

(*r*) *Wainer* v. *Milford Mutual* (1891), 153 Mass. 335; *Dupuy* v. *Delaware* (1894), 63 Fed. Rep. 680; *Ætna Fire* v. *Tyler* (1836), 16 Wend. 385; *M'Givney* v. *Phœnix Fire* (1828), 1 Wend. 85; *Carpenter* v. *The German American* (1892), 135 N. Y. 298; *Brooks* v. *Erie Fire* (1902), 76 App. Div. N. Y. 276.

(*s*) *Columbian Insurance* v. *Lawrence* (1828), 2 Pet. 25; *Dupuy* v. *Delaware* (1894), 63 Fed. Rep. 680.

(*t*) *Gilbert* v. *Insurance* (1840), 23 Wend. 43.

(*u*) *Gilman* v. *Dwelling House* (1889), 81 Me. 488.

(*x*) *Collingridge* v. *Royal Exchange* (1877), 3 Q. B. D. 173; *Keefer* v. *Phœnix Insurance* (1898), 26 Ont. A. R. 277; *Ottawa Agricultural Insurance* v. *Sheridan* (1879), 5 Can. S. C. 157.

(*y*) Brett, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380; *Insurance Co.* v. *Updegraff* (1853), 21 Pa. 513; *Keefer* v. *The Phœnix* (1900), 31 Can. S. C. 144. But see contra *Bank of N. S. W.* v. *North British and Mercantile* (1881), 2 N. S. W. (Law), 239; and see *supra*, p. 130.

(*z*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380.

although the insurance was effected before the sale (*a*). Where the owner of a house contracted with a house-breaker who agreed to pull it down and take the material for a certain sum it was held, notwithstanding such contract, that the owner had an interest to the full value of the premises and was entitled to recover on his policy the whole damage by fire (*b*).

Contracts to purchase goods.

Buyer's interest.

Immediately a valid contract for the sale of goods has been effected the buyer has an interest in respect of the profits which he may make on a resale. Profits, however, must be insured *eo nomine* and a purely executory contract for sale probably gives him no interest on which he can insure simply on goods (*c*). If neither property nor risk has passed to him, if he has not possession, and if he has not paid the price or any part of it, the only loss which can fall upon the buyer is the loss of profit on the transaction. If the goods are lost or damaged, he is not bound to pay the price, and the loss falls upon the seller and not upon the buyer. Unless otherwise agreed, the risk passes to the seller when the property in the goods passes to him, and if both property and risk have passed, the buyer has undoubtedly an insurable interest to the full value, because loss or damage falls upon him and he is liable to pay the full price notwithstanding (*d*). But by the terms of the contract the property may pass without the risk, or the risk may pass without the property. If the property alone passes without the risk the buyer has probably an insurable interest by reason of the legal title alone (*e*). The passing of the risk before the passing of the property gives the buyer an insurable interest because he becomes liable to suffer on account of the loss of or damage to the goods, notwithstanding that he has no actual property in them (*f*). Where either the property or the risk has passed the insurers cannot call upon the buyer who has insured to exercise a possible

(*a*) *Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 554; *The Ecclesiastical Commissioners* v. *The Royal Exchange Ass.* (1895), 11 T. L. R. 476.

(*b*) *Ardill* v. *Citizens Insurance* (1893), 20 Ont. A. R. 605.

(*c*) *Anderson* v. *Morice* (1874), L. R. 10 C. P. 58, 609; (1876), 1 A. C. 713; *Warder* v. *Horton* (1812), 4 Binn. 529; *Box* v. *Provincial Insurance* (1868), 15 Grant, Ch. App. 337; but see *Bohn Manufacturing Co.* v. *Sawyer* (1897), 169 Mass. 477.

(*d*) *Fragano* v. *Long* (1825), 4 B. & C. 219; *Colonial Insurance* v. *Adelaide* (1886), 12 A. C. 128.

(*e*) *Inglis* v. *Stock* (1885), 10 A. C. 263; *Colonial Insurance* v. *Adelaide* (1886), 12 A. C. 128.

(*f*) *Rider* v. *Ocean Insurance* (1838), 37 Mass. 259; *Inglis* v. *Stock* (1885), 10 A. C. 263; (1884), 12 Q. B. D. 564; *Neale* v. *Reid* (1823), 1 B. & C. 657; *Castle* v. *Playford* (1872), L. R. 7 Ex. 98; *Joyce* v. *Swann* (1864), 17 C. B. N. S. 84, 104; *Anderson* v. *Morice* (1876), 1 A. C. 713.

option to be released from his contract, *e.g.* to reject defective goods or a short delivery, so that the insurers may avoid liability(*g*). Payment or part payment will also give the buyer an insurable interest even if neither property nor risk has passed and for this reason that the seller may become insolvent, and if so the buyer might not be able to recover the money he has paid in the event of the goods being lost or damaged (*h*).

Seller's interest.

The seller of goods in like manner retains an insurable interest so long as he is in a position to suffer loss by their destruction or deterioration in value (*i*). So long as the risk remains with him he has an interest whether the property has passed or not (*k*), and his interest is for the full value of the goods, and not merely for the purchase price, where the actual value exceeds the latter (*l*). And even when risk and property have passed the seller has an interest so long as he retains possession. If he is unpaid in whole or in part he has an interest in respect of his lien for the purchase money (*m*). If he has been paid he has such interest as arises from bare possession (*mm*). When possession, risk, and property have all passed to the buyer the unpaid seller has no longer an insurable interest merely because the destruction of the goods may affect the solvency of the buyer, and thereby lessen the seller's chance of payment in full (*n*).

Hire-purchase agreement.

In America, where the purchaser of furniture under a hire-purchase agreement was not bound by the agreement to pay any further instalments in case of loss the purchaser was held to have an interest to the amount only of the instalments paid (*o*) ; but where the whole risk was on the purchaser he could recover the full value, notwithstanding that the property or title remained with the seller (*o*).

Stoppage *in transitu*.

When the seller delivers the goods to a common carrier whether by land or sea for delivery to the buyer, the carrier takes possession as agent for the buyer, but the seller retains the right

(*g*) Lord Blackburn in *Inglis* v. *Stock* (1885), 10 A. C. 263, 274 ; *Colonial Insurance* v. *Adelaide* (1886), 12 A. C. 128.

(*h*) *Cumberland Bone Co.* v. *Andes Insurance* (1874), 64 Me. 466.

(*i*) *Boston Ice Co.* v. *The Royal* (1866), 94 Mass. 381.

(*k*) *Reed* v. *Cole* (1764), 3 Burr. 1512.

(*l*) *Stuart* v. *Columbia* (1823), 2 Cranch, 442.

(*m*) *London and North Western* v. *Glyn* (1859), 1 El. & El. 652. As to when the goods are deemed to be *in transitu*, see *Kendall* v. *Marshall Stevens* (1883), 11 Q. B. D. 356, 365.

(*mm*) *Vide supra*, p. 130.

(*n*) *Tabbut* v. *American Ins.* (1904), 185 Mass. 419.

(*o*) *Ryan* v. *Agricultural* (1905), 188 Mass. 11 ; *Reed* v. *Williamsburg City Fire* (1883), 74 Me. 537.

to stop *in transitu* in the event of the buyer's insolvency (*p*). Stoppage *in transitu* has the effect of a resumption of possession by the seller so that, as long as the goods are in the hands of the carrier, the seller has probably an insurable interest whether he has in fact exercised the right or not (*q*). As stoppage *in transitu* does not cancel the contract it does not necessarily determine the buyer's interest (*q*). He has the same interest after the stoppage as if the goods had remained in the possession of the seller. The buyer's interest may be determined by stoppage *in transitu* because the passing of the property and risk may have depended on delivery (*r*); but, on the other hand, the buyer's insurable interest is not necessarily affected by stoppage *in transitu* because the property and risk may have passed to him independently of delivery.

Limited estate in real property.

Primâ facie the owner of a limited estate in buildings has only an insurable interest to an amount sufficient to compensate him for the loss of his own estate. Thus a life tenant has only an interest equal to the value of his life interest (*s*). He is not a trustee of the property for the remainderman and entitled as such to insure and recover the full value (*t*). A partner in a firm who insures the real property of the partnership has only an interest equal to the value of his beneficial share in the property (*u*). A joint tenant or tenant in common or a remainderman has similarly an interest limited to the value of his estate (*w*). How far the proprietor of a limited estate may insure beyond his own interest, either on his own behalf or on behalf of others interested, is another question, and will be separately considered (*x*).

Landlord and tenant.

The lessee of premises has an insurable interest in them on one or more grounds. The mere fact of possession may give him an

(*p*) *Kyner* v. *Suwercropp* (1807), 1 Camp. 107; Parsons, Ins. 232; Arnould, Ins. 7th ed. s. 285, p. 346; Phillips, Ins. 197.

(*q*) *Clay* v. *Harrison* (1829), 10 B. & C. 99.

(*r*) *Mollison* v. *Victoria* (1883), 2 N. Z. (S. C.) 177.

(*s*) Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 401; *Beekman* v. *Fulton Insurance* (1901), 66 N. Y. App. Div. 72.

(*t*) See, however, contra, *Welsh* v. *London Assurance* (1892), 151 Pa. 607; *Caldwell* v. *Stadacona Fire and Life* (1883), 11 Can. S. C. 212.

(*u*) *Converse* v. *Citizens' Mutual* (1852), 64 Mass. 37; but see *Clement* v. *British American Assurance* (1886), 141 Mass. 298; *Forbes & Co.* v. *Border Counties Fire* (1873), 11 M. 278.

(*w*) Mr. Bunyon (Fire Insurance, 3rd Ed. p. 22) was of a contrary opinion, but he only cited a case of marine insurance, *Page* v. *Fry* (1800), 2 B. & P. 240. This is not really an authority for the proposition he makes. The case only decided that under 19 Geo. 2, c. 37, a person with a limited interest such as that of a joint owner of goods could insure beyond his interest in his own name and on his own account.

(*x*) *Infra*, pp. 144, 145.

interest to the full value (*xx*). But, even assuming that possession alone is not sufficient, the tenant's right of occupation under the lease gives him an interest in the premises which is capable of valuation (*y*). If he is liable to pay rent during the remainder of the term, notwithstanding the destruction of the premises, his interest in respect of his right of occupation will be much greater than it would be if under the lease the liability for rent ceased. In England the tenant, apart from express stipulation, remains liable for rent, notwithstanding the accidental demolition of the premises (*z*). In Scotland the tenant may abandon the lease and avoid further liability for rent if the fire has done such damage as to render the premises for a substantial time practically useless for the purpose for which he took them (*a*). If the tenant is not liable for rent his interest in respect of his right of occupation is comparatively small and the measure of it would probably be the difference between the rent he was previously paying and the rent which he would have to pay for similar premises elsewhere, calculated for the remainder of the term, and the cost of removal. He cannot recover for loss of business profits consequent upon the destruction of the premises unless he has specifically insured on such profits (*b*). A tenant may also have an insurable interest by reason of his liability under the lease (*c*). If he has covenanted to repair he has an interest to the extent to which he may become liable on the covenant (*f*), and if he has covenanted to insure he has an interest, because if he does not insure he will be liable for the loss as damages for breach of his covenant (*g*). Where the lessees of a colliery, having covenanted to keep the premises in repair and to insure, insured "as lessees" on colliery plant "this to insure all their working interest," it was held that they had an interest to the full value and that the risk was sufficiently described (*h*). Probably

(*xx*) *Vide supra*, p. 130; *Schaeffer* v. *Anchor Mutual* (1901), 113 Iowa, 652; *Simpson* v. *Scottish Union* (1863), 1 H. & M. 618, 628.

(*y*) Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 400.

(*z*) *Marshall* v. *Schofield* (1882), 47 L. T. N. S. 406.

(*a*) *Duff* v. *Fleming* (1870), 8 M. 769; *Allan* v. *Markland* (1882), 10 R. 383.

(*b*) *Wright* v. *Pole* (1834), 1 Ad. & E. 621; *Menzies* v. *North British Insurance* (1847), 9 D. 694.

(*c*) Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 400.

(*f*) *Oliver* v. *Greene* (1807), 3 Mass. 133; *Berry* v. *American Central* (1892), 132 N. Y. 49; *Joyce* v. *Swann* (1864), 17 C. B. N. S. 84, 104.

(*g*) *Heckman* v. *Isaac* (1862), 6 L. T. 383; *Bartlet* v. *Goodwin* (1816), 13 Mass. 267; *Lawrence* v. *St. Mark's Fire* (1865), 43 Barb. 479.

(*h*) *Imperial Fire* v. *Murray* (1873), 73 Pa. 13.

a lessee liable on a covenant to repair could insure generally on the property without specifying his interest unless the conditions of the policy expressly required the interest to be stated. The insurable interest of the landlord is not diminished by the fact that the premises are not in his possession and are let for a term of years. If he is absolute proprietor in fee simple he can insure and recover the full value notwithstanding the lease or any covenants to repair or insure by which the lessee may be bound (*i*). The landlord is not necessarily protected by the covenants of his tenant who may be insolvent. The only benefit which the insurers can obtain from the lease is the right of subrogation to the landlord's rights against the tenant (*k*).

Consignee of goods.

A person to whom goods are consigned as agent for the owner has no insurable interest in them if he is merely a bare consignee (*l*). A bare consignee is a consignee to whom the goods have been forwarded but who has not yet obtained possession, and who has neither the legal title to the goods nor any prospective lien for advances already made. If the consignee has obtained the legal title to the goods by indorsement to him of the documents of title or by indorsement to bearer, he has probably an interest to the full value (*m*). If he has made advances to the owner and is to hold the goods as security for repayment he has an interest to the extent of his advances even although he has not yet obtained either the legal title or possession (*n*). And where the owner being indebted to A consigned goods to C with instructions to pay the proceeds to A, it was held that A had an insurable interest (*o*). If the consignee has obtained possession, that alone may be sufficient to give him an interest to the full value irrespective of legal title or lien. Although a bare consignee has no interest to insure on the goods themselves he may insure specifically on his commission or other profits (*p*) which he expects to make, as agent for sale or

(*i*) *Hobbs* v. *Hannam* (1811), 3 Camp. 93.

(*k*) Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 406.

(*l*) *Seagrave* v. *Union Marine* (1866), L. R. 1 C. P. 305; *Lucena* v. *Craufurd* (1806), 2 N. R. 269, 306, 307.

(*m*) *Ebsworth* v. *Alliance Marine* (1873), L. R. 8 C. P. 596; *Sutherland* v. *Pratt* (1843), 11 M. & W. 296.

(*n*) *Carruthers* v. *Sheddon* (1815), 6 Taunt. 14; *Wolff* v. *Horncastle* (1798), 1 B. & P. 316 *Robertson* v. *Hamilton* (1811), 14 East, 522; *Parker* v. *Beasley* (1814), 2 M. & S. 423; *Russell* v. *Union* (1806), 1 Wash. C. C. 409; *Ebsworth* v. *Alliance Marine* (1873), L. R. 8 C. P. 596; *Aldrich* v. *The Equitable Safety* (1846), 1 Wood. & Min. 272.

(*o*) *Hill* v. *Secretan* (1798), 1 B. & P. 315.

(*p*) *Lucena* v. *Craufurd* (1806), 2 N. R. 269, 315; *Flint* v. *Le Mesurier* (1796), Park. 563; *Putnam* v. *Mercantile Marine* (1843), 46 Mas. 386.

otherwise, provided that he has been in fact employed for this purpose and has not merely an expectation of employment (*q*). On the same principle any person who has a contract to render service in connexion with insurable property, whether goods or realty, may insure on his expected profits or benefits (*r*).

Bailee of goods.

Probably possession is sufficient to give a bailee an insurable interest to the full value of the goods held by him (*s*). But assuming that possession alone is not sufficient he has clearly an insurable interest to the extent of his lien (*t*) and to the extent of his liability to the owner (*u*).

Mortgagor and mortgagee.

The mortgagor of real property has an insurable interest to the full value, notwithstanding the mortgage. He may be hopelessly insolvent and have no prospect of ever redeeming the security, but so long as he has the equity of redemption the loss of the property means a reduction of his assets to the full value, and therefore he has interest to that extent (*x*).

Even if the mortgagor has sold his equity of redemption he has by reason of his personal covenant an interest to the extent of the debt charged upon the property because the loss of the property destroys the possibility of the debt being satisfied out of the property (*y*). On the same principle, where an estate was mortgaged to A to secure a promissory note and A assigned the mortgage to B and indorsed the note to him, it was held that A still retained an insurable interest in the property by reason of his liability on the indorsement (*z*).

The fact that the transfer of the property is *ex facie* absolute makes no difference to the mortgagor's interest if in substance the transaction is a mortgage and not a sale (*a*).

(*q*) *Buchanan* v. *Faber* (1894), 4 Com. Cas. 223.

(*r*) *King* v. *Glover* (1806), 2 N. R. 206; *Cross* v. *National* (1892), 132 N. Y. 133; *Traders' Insurance* v. *Pacaud* (1894), 150 Ill. 245; *Robinson* v. *N. Y. Co.* (1805), 2 Caine, 357.

(*s*) *Vide supra*, p. 130; *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870; *London & North Western* v. *Glynn* (1859), 1 El. & El. 652; *Roberts* v. *Firemen's Insurance* (1894), 165 Pa. 55; *Western Insurance* v. *Home Ins.* (1891), 145 Pa. 346; *Fire Insurance* v. *Merchants* (1886), 66 Md. 339.

(*t*) *Pittsburgh Storage Co.* v. *Insurance Co.* (1895), 168 Pa. 522.

(*u*) *Stephens* v. *The Australasian* (1872), L. R. 8 C. P. 18; *Hill* v. *Scott*, [1895] 2 Q. B. 713; *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *California Insurance* v. *Union Compress* (1889), 133 U. S. 387; *Savage* v. *Corn Exchange* (1867), 36 N. Y. 655.

(*x*) *Smith* v. *Lascelles* (1788), 2 T. R. 187; *Smith* v. *The Royal* (1867), 27 U. C. Q. B. 54; *Insurance Co.* v. *Stinson* (1880), 103 U. S. 25.

(*y*) *Hanover Fire* v. *Bohn* (1896), 48 Neb. 743; *Springfield* v. *Allen* (1871), 43 N. Y. 389; *Pettigrew* v. *The Grand River Farmers' Mutual* (1877), 28 U. C. C. P. 70, 74.

(*z*) *Williams* v. *Roger Williams Insurance* (1871), 107 Mass. 377.

(*a*) *Alston* v. *Campbell* (1779), 4 Brs. P. C. 476; *Hibbert* v. *Carter*

Mortgagees, legal and equitable, have an interest to the amount of the debt secured on the property (*b*), and if a mortgagee has covenanted to insure then he has an interest to the full amount in respect of that liability. If he is a first mortgagee, and holds the legal title to the property, he probably has, by reason of the legal title, an insurable interest to the full amount (*c*). A mortgagee has no insurable interest in the rents and profits of the mortgaged property unless he is in possession (*d*).

The interest of a mortgagee is the possible loss which he as an individual may suffer from destruction of or damage to the property insured, and where there are several successive mortgagees they may, in the aggregate, recover more than sufficient to reinstate the premises. Thus, in *Westminster Fire v. Glasgow Provident* (*e*), the premises and site before the fire were sufficient to satisfy all the incumbrancers who were insured in different offices to the amount of their several debts. On a fire occurring the offices who insured the prior incumbrancers paid them an amount sufficient to reinstate the premises. The incumbrancers did not reinstate, but retained the insurance money, and the site was no longer of sufficient value to satisfy the remainder of their debt. It was held in the House of Lords on appeal from the Court of Session in Scotland that the postponed incumbrancers had an insurable interest and could recover the amount of their debt. In this case the total of the insurance moneys paid, although more than sufficient to reinstate the premises, was not more than the difference between the market value of the site and premises before the fire and their market value after the fire, and therefore the companies were not, in fact, called upon to pay more than the actual damage which they might have had to pay on a policy issued to an absolute owner where there was no clause entitling them to reinstate in lieu of paying damage. A sole mortgagee would equally have been entitled to recover the difference of the value of the site and premises before and after

(1787), 1 T. R. 745; *Hutchison* v. *Wright* (1858), 25 Beav. 444.

(*b*) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *Carpenter* v. *Providence Washington* (1842), 16 Pet. 495; *Smith* v. *Columbia Insurance* (1851), 17 Pa. 253; *Westminster Fire* v. *Glasgow Provident* (1888), 13 A. C. 699; *Waters* v. *Monarch* (1856), 5 El. & Bl. 870; *Page* v. *Fry* (1800), 2 B. & P. 240; *Burton* v. *Gore District Mutual Fire* (1865), 12 Grant, Ch. App. 156; *Glover* v. *Black* (1763), 1 Wm. Bl. 396.

(*c*) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *Ebsworth* v. *Alliance Marine* (1873), L. R. 8 C. P. 596.

(*d*) *Westminster Fire* v. *Glasgow Provident* (1888), 13 A. C. 699.

(*e*) (1888), 13 A. C. 699.

the loss. A sole mortgagee could never recover more than such difference in value, but successive mortgagees might possibly in the aggregate recover more (*f*). If, for instance, the value of the site and premises before loss was not sufficient to satisfy both the prior and postponed mortgagees, postponed mortgagees would probably still have an insurable interest to the amount of their debt, because if prior mortgagees were paid off their security would then be available. By the fire they would lose their contingent security, and would therefore on general principle be entitled to recover the amount of their debt from the insurers, notwithstanding that the prior mortgagees had already been paid the full amount of the damage.

The insurance of a mortgagee's interest is not a mere guarantee of his debt, but an insurance of his security, and he is entitled to have his security maintained undiminished in value by reason of fire or other risks insured against so that there may be no chance of his suffering loss in the event of his having recourse to his security. Thus it was held in America that a mortgagee who insured as such on the mortgaged property could recover up to the full amount of his debt notwithstanding that after the fire the damaged premises were still of sufficient value to satisfy his debt (*g*). The mortgagee was entitled to say "My security, although sufficient, is diminished and I have insured against such diminution" (*g*). This appears to be undoubtedly sound because property is always liable to great diminution in market value, and the mortgagee is entitled to have his ample margin maintained as a safeguard against the risk of possible depreciation.

A mortgagee of real property cannot insure and recover on the mortgagor's interest as well as his own unless the mortgagor is expressly named in the policy as a person for whose benefit the insurance is made. If, however, the mortgagee has the legal title, or if he has covenanted with the mortgagor to insure, he has an interest to the full amount, and apart from the effect of express conditions an insurance simply on the property would entitle him to recover the full amount on his own interest. But where a mortgagee who had covenanted to insure insured in his own name "as mortgagee against all loss or damage not exceeding

(*f*) *Glasgow Provident* v. *Westminister Fire* (1887), 14 R. 947, 964.

(*g*) *Excelsior Fire* v. *The Royal* (1873), 55 N. Y. 343; *Kernochan* v. *New York Bowery* (1858), 17 N. Y. 428, 441. Contra *Mathewson* v. *Western Assurance* (1859), 10 Low. Can. R. 8.

$6000 as shall happen by fire to the property insured," it was held by the Supreme Court of New York that the terms of the contract whereby the assured was insured "as mortgagee" limited the insurance to an insurance of the mortgagee's security, and that he was not insured in respect of his liability on the covenant to insure (*h*).

Where both mortgagor and mortgagee are named in the policy, it is a question of construction whether the insurance is on behalf of one only or of both. The distinction may be important, not only because no more can be recovered than the amount of the interest of the person or persons on whose behalf the insurance is made, but because the insurers may have a defence against one which would not be available against the other. Thus, where a mortgagee has insured, if he insured on his own behalf only, he could not recover on the policy after repayment of the debt and reconveyance of the property, but if he insured on behalf of both he could still recover on behalf of the mortgagor. Where A, a mortgagee, effected an insurance on the mortgaged property "owned by B and now insured to cover a mortgage on the said property," it was held that the mortgagee insured on his own behalf alone and that the mortgagor could take no benefit (*i*). Where the mortgagor insures, and the loss is made payable to the mortgagee, this alone does not import an insurance on behalf of the mortgagee (*k*). The mortgagee may be only payee of the insurance moneys otherwise payable to the mortgagor, and on an action by the mortgagee all defences which would be available to the insurer in an action by the mortgagor would be available against the mortgagee (*k*). Thus, if the mortgagor had broken the condition against assignment of the property the mortgagee could not recover (*l*). On the other hand, the mortgagee, on such a policy, could recover as payee, notwithstanding that the mortgage debt had been discharged and that he had ceased to have any insurable interest (*m*). But in a mortgagor's policy made "payable to the mortgagee in case of loss," the other terms and conditions of the contract may show that the insurance was on behalf of the mortgagee and was

(*h*) *Kernochan* v. *New York Bowery* (1858), 17 N. Y 428.

(*i*) *Smith* v. *Columbian Insurance* (1851), 17 Pa. 253.

(*k*) *Carpenter* v. *Providence Washington* (1842), 16 Pet. 495.

(*l*) *Grosvenor* v. *Atlantic Fire* (1858), 17 N. Y. 391.

(*m*) *Cone* v. *Niagara Fire* (1875), 60 N. Y. 619.

in fact such that he could sue and recover on it on his own interest as principal and not merely in the mortgagor's interest as payee (*n*).

When chattels or goods are mortgaged by a bill of sale the legal property passes, and the mortgagee has probably an insurable interest to the full value; so also when the mortgage is by transfer of a document of title such as a bill of lading or a warehouseman's receipt (*o*). If chattels or goods are pledged or pawned the general property or title remains in the pledgor, but the pledgee has an insurable interest to the amount of his debt, and probably also in respect of his possession to the full value. Equitable charges upon personal property which are valid as between grantor and grantee probably give an insurable interest to the amount of the debt although the charge is void as against other creditors (*p*). The mortgagor or pledgor of goods retains an insurable interest to the full value so long as he has the right to redeem (*q*).

Creditor in debtor's property.

Although a creditor who holds his debtor's property in security has an interest in it to the extent at least of the amount charged, a creditor has no insurable interest in his debtor's property merely as such on the ground that the loss of it diminishes his chance of obtaining ultimate satisfaction of his debt (*r*). The interest is too remote and too uncertain to make it insurable. The creditor must have a right to have his debt satisfied directly from the proceeds of the debtor's property before he is in a position to insure it (*s*). Any legal or equitable lien or right to proceed *in rem* gives the creditor an interest (*t*). Where the creditor has got judgment and the property has been seized in execution the creditor has an interest (*u*), but the judgment alone does not give

(*n*) *Springfield* v. *Allen* (1871), 43 N. Y. 389; *Hanover Fire* v. *Bohn* (1896), 48 Neb. 743.

(*o*) *Sutherland* v. *Pratt* (1843), 11 M. & W. 296; *Wilson* v. *Citizens Insurance* (1875), 19 Lr. Can. Jur. 175; *Sewell* v. *Burdick* (1884), 10 A. C. 74; *Todd* v. *Liverpool Globe Insurance* (1868), 18 U. C. (C. P.) 192.

(*p*) *Clarke* v. *Scottish Imperial* (1879), 4 Can. S. C. 192; *Davies* v. *Home Insurance* (1866), 3 U. C. Err. & App. 269; *Wilson* v. *Martin* (1856), 11 Ex. 684; *Johnson* v. *Union Fire* (1884), 10 Vict. L. R. 154; *Carruthers* v. *Sheddon* (1816), 6 Taunt. 14.

(*q*) *Heald* v. *Builders Insurance* (1872), 111 Mass. 38; *Parsons* v. *Queen Insurance* (1878), 29 U. C. C. P. 188.

(*r*) *Buchanan* v. *Ocean* (1826), 6 Cowan 318; *Vancouver National Bank* v. *Land Union* (1907), 153 Fed. Rep. 440; *Moran Galloway & Co.* v. *Uzielli*, [1905] 2 K. B. 555; *Mollison* v. *Victoria* (1883), 2 N. Z. S. C. 177; *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139.

(*s*) *Stainbank* v. *Fenning* (1851), 11 C. B. 51; *Stainbank* v. *Shepard* (1853), 13 C. B. 418; *Heald* v. *Builders Insurance* (1872), 111 Mass. 38.

(*t*) *Briggs* v. *Merchant Traders* (1849), 13 Q. B. 167; *Franklin Fire* v. *Coates* (1859), 14 Md. 285; *Moran Galloway & Co.* v. *Uzielli*, [1905] 2 K. B. 555.

(*u*) *Donnell* v. *Donnell* (1894), 86 Me. 518; *International Trust* v. *Boardman* (1889), 149 Mass. 158.

him an interest in all the debtor's property (*x*). In America it has been suggested that, where the whole of the debtor's property is not sufficient, or barely sufficient, to satisfy the judgment creditor, he has an insurable interest (*y*), and it has been there held that the creditor of an insolvent deceased has an insurable interest in the insolvent estate because the creditor's right is no longer merely *in personam* but *in rem* against the deceased's estate (*z*).

Contractor.

Where a contractor undertakes work and his right to payment is dependent upon completion he has an insurable interest in the subject matter whether it be in his possession or not because the destruction of the subject matter prevents him from earning the contract price. He has an insurable interest to the extent of the value of the work and materials expended and on his expected profits which, however, must be specifically insured. In general where the contract is to supply a chattel or complete certain work for a price payable on completion the contractor cannot recover any part of the contract price until completion (*a*), but the terms of the contract may be such as to entitle the contractor to a *quantum meruit* at any time for the work which he has done (*b*) and which accident prevents him from completing, and in such cases he would have no insurable interest except on expected profits for future work. A printer who undertakes to print an edition of a book is by the custom of the trade not entitled to any remuneration until the whole edition contracted for has been completed (*c*). A contractor will also have an insurable interest upon property to the full extent of his charges for work done if he has a lien upon the property for such charges (*d*). A contractor in respect of a chattel may have an insurable interest as a bailee apart from his insurable interest as contractor.

To what extent can the owner of

It is often a difficult matter to determine to what extent and in what manner a person who has got a limited interest in property

(*x*) *Grevemeyer* v. *Southern Mutual Fire* (1869), 62 Pa. 340; *Light* v. *Countryman's Mutual Fire* (1895), 169 Pa. 310.

(*y*) *Rohrbach* v. *Germania Fire* (1875), 62 N. Y. 47.

(*z*) *Herkimer* v. *Rice* (1863), 27 N. Y. 163, 173; *Rohrbach* v. *Germania Fire* (1875), 62 N. Y. 47; *Creed* v. *Sun Fire* (1893), 101 Ala. 522.

(*a*) *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673; *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; *Sinclair* v. *Bowles* (1829), 9 B. & C. 92; *Cook* v. *Jennings* (1797), 7 T. R. 381; *Metcalfe* v. *Britannia Iron Works* (1877), 2 Q. B. D. 423.

(*b*) *Menetone* v. *Athawes* (1764), 3 Burr. 1592; *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404.

(*c*) *Gillet* v. *Mawman* (1808), 1 Taunt. 137, 140; *Adlard* v. *Booth* (1835), 7 C. & P. 108.

(*d*) *Insurance Co.* v. *Stinson* (1880), 103 U. S. 25.

may insure it for and recover a greater sum than the actual money value of his own interest. Very different considerations apply to the case of insurance on real property and to that of insurance on personal chattels or goods, and these therefore will be considered separately.

a limited interest insure beyond the value of his interest.

In the case of buildings the statute 14 Geo. 3, c. 48, applies, and this in terms prohibits the assured (1) from recovering more than the amount or value of his interest, (2) from recovering on behalf of any person whose name is not inserted in the policy. This in effect restricts the possibility of insurance on buildings to a contract to pay on the interest of the person or persons named as the assured in the policy. A policy containing a contract to pay in respect of other interests would be to that extent void. It is therefore necessary in each case to consider what the amount or value of the assured's own insurable interest really is, and if it is less than the full value an intention to insure for the full value will not avail him because it is to the extent of the excess an insurance against the statute and therefore void (*f*).

On real property

The insurable interest, however, of a person insuring property is, as we have seen, not necessarily limited to the actuarial value of his interest as a marketable asset (*g*). Possession or legal title alone may give him an insurable interest to the full value of the property, and if any direct loss or legal liability may fall upon him as the result of the damage to or destruction of the property, he has an insurable interest to the amount of such possible loss or liability. But even where the assured's interest in the property would not otherwise be sufficient to entitle him to insure for the full value the statute 14 Geo. 3, c. 78, imposes upon every person who insures house property a statutory liability which apparently justifies him in insuring to the full value no matter how small his insurable interest apart from this liability would have been. This statute enacts that where houses or other buildings are insured and a loss arises the company insuring shall, on the request of any person interested therein, cause the insurance money to be applied in reinstatement instead of paying it to

(*f*) See, however, Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 406; *Johnson* v. *New Zealand Co.* (1884), 10 Vict. L. R. 154; *Howes* v. *Dominion Fire* (1883), 8 Ont. A. R. 644; *Welsh* v. *London Assurance* (1892), 151 Pa. 607; *Keefer* v. *Phœnix* (1898), 29 Ont. R. 394; *Caldwell* v. *Stadacona Fire and Life* (1883), 11 Can. S. C. 212.

(*g*) *Simpson* v. *Scottish Union* (1863), 1 H. & M. 618, 628; Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 400.

the assured. The assured who has a limited interest is thus placed in this position. If he insures only to such amount as would if payment were made in cash give him an indemnity in respect of the value of his interest at stake he will not in fact obtain an indemnity if other persons interested require the insurance money to be applied in partial reinstatement. He can only secure a certain indemnity by insuring to the full value of the property and therefore, in a sense, has an insurable interest to that amount (*h*). If reinstatement is claimed by the company or insisted upon by some third party interested, the company will be liable to reinstate up to the full amount of the insurance. On the other hand, if the company elects to pay in cash and no demand has been made by any third party for reinstatement, the company might probably decline to pay more than the value of the assured's insurable interest calculated independently of the peculiar interest given by the statute. It is still a matter of considerable doubt whether the Act of 14 Geo. 3, c. 78, has any application to insurances on premises outside the area of the Bills of Mortality in London (*i*).

On goods.

Insurance on personal chattels or goods rests on quite a different footing as regards the right of the limited owner to insure and recover on interests other than his own. The statute 14 Geo. 3, c. 48, does not apply, and therefore the amount insurable is not limited by statute to the amount or value of the assured's interest and further as there is no obligation to insert in the policy the name or names of all persons on whose behalf the insurance is made the nominal assured can insure not only on his own behalf but on behalf of other persons interested.

Insurance beyond interest on assured's own behalf.

The right of the nominal assured to insure on his own behalf beyond his own limited interest and the right to insure on behalf and for the benefit of other persons must be distinguished. Firstly, as regards the legality of an insurance by the nominal assured on his own behalf only but beyond his interest; this was very fully discussed in relation to a marine policy in the following case.

Ebsworth v. Alliance Marine (1873), L. R. 8 C. P. 596

Ebsworth v. *Alliance Marine.*

The plaintiffs were merchants in London to whom cotton had been consigned by the owners in India for sale in England. The consignors had drawn

(*h*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355, 356. The right of the insurers to reduce their ultimate liability by subrogation is considered elsewhere.

(*i*] See *infra*, p. 696.

on the plaintiffs for £3000, and discounted the bills to the N. Bank to whom they had indorsed the bills of lading. The plaintiffs had accepted the bills for payment against the shipping documents and would have received the bills of lading indorsed to them on payment of their acceptances. The plaintiffs declared the shipment under an open policy which they had previously effected in their own names "and in the name or names of all and every person or persons to whom the same doth may or shall appertain in part or in all" "on cotton from Bombay to London by ship or ships." The cotton was totally lost. The plaintiffs sued on the policy averring interest in themselves only. The action was tried before Keating, J., who gave judgment for them for the whole value of the cotton. On motion to enter judgment for the defendants the Court of Common Pleas was equally divided, Bovill, C.J., and Denman, J., being of opinion that the judgment should stand, and Keating and Brett, JJ., being of opinion that the plaintiffs were only entitled to recover the amount of their acceptance. Bovill, C.J., and Denman, J., took the view that a consignee who had any insurable interest in the goods consigned to him could recover the full value if on the construction of the contract of insurance the insurers had agreed to pay to him the full value in case of loss, and not merely to indemnify him in respect of his individual interest. Keating and Brett, JJ., took the view that a consignee who had only a limited interest in the goods could not on his own behalf recover more than the amount of his individual interest because a contract to pay in excess of his interest would be *pro tanto* void as a gaming or wagering policy.

Now the case of insurance upon goods against land risks stands very much on the same footing in this respect as a marine insurance did under 19 Geo. 2, c. 37. The Gaming Act, 1845, is the only Act which applies, and if an insurance in excess of interest would be void under 19 Geo. 2, c. 37 as a policy made by way of gaming or wagering, it would be equally void as a gaming contract under the Gaming Act, 1845. The decisions in *Waters* v. *Monarch Life* (*n*) and *London & North Western* v. *Glyn* (*o*) are probably sufficient authority for the proposition that a bailee being in possession of the goods of others may on his own behalf insure them to the full value, notwithstanding that his liability is limited to the consequences of his own negligence, and that his lien or other beneficial interest in the goods is of comparatively small value (*p*). A bailee is responsible to the owner for due diligence in the custody of the goods and it may be of considerable advantage to him to be able, in the event of loss, to hand over the full value to the owner, and so to avoid any possible question of his own negligence. He is thus intimately concerned in the safety of the whole goods and

(*n*) (1856), 5 El. & Bl. 870.
(*o*) (1859), 1 El. & El. 652.
(*p*) *Baxter* v. *Hertford Fire* (1882), 11 Biss. 306; *De Forest* v. *Fulton Fire* (1828), 1 Hall (N. Y.) 94; *Fire Insurance* v. *Merchants* (1886), 66 Md. 339.

not merely in the preservation of his own individual interest, and even if possession alone does not give an insurable interest in the strict sense to the full value, yet the interest of any bailee is no doubt sufficient to prevent an insurance to the full amount from falling into the category of gaming contracts (*q*). The contract is not made by the bailee with a view to speculating on the interests of others, but with a view to placing himself in an advantageous position with relation to the owner. Probably a consignee may be said to insure for somewhat similar reasons, although his motive for insurance is not so strong, because he has not any responsibility in respect of the custody. The decision of Bovill, C.J., and Denman, J., in *Ebsworth* v. *Alliance Marine* may thus be supported on the ground that a consignee as agent for the owner is so intimately concerned in the safety of the whole goods beyond his individual interest that the contract in excess of that interest is not necessarily a contract by way of gaming (*r*). But where a person with a limited interest has no concern in the safety of the goods beyond his own interest it is difficult to escape from the conclusion that an insurance on the whole for his sole benefit must be to the extent of the excess a mere wager and therefore illegal (*s*). Whether or not a person with a limited interest has insured beyond his own interest and liability is a question of fact to be determined on a construction of the policy and the surrounding circumstances (*t*).

Waters v. Monarch Life (1856), 5 El. & Bl. 870

Waters v. *Monarch Life.*

The assured was a warehouseman and therefore not an insurer of the goods in his possession, but merely responsible to the owners for due diligence in their custody. He effected a floating policy on goods in his warehouse, "£400 on goods in trust or on commission," and the insurers promised to "make good to the assured all such damage and loss as shall happen by fire to the property hereinbefore mentioned." The Court of Queen's Bench held

(*q*) *Boehm* v. *Bell* (1799), 8 T. R. 154; *Robertson* v. *Hamilton* (1811), 14 East, 522; *Roberts* v. *Fireman's Ins.* (1894), 165 Pa. 55; *Western Assurance* v. *Home Insurance* (1891), 145 Pa. 346.

(*r*) On this ground also *Page* v. *Fry* (1800), 2 B. & P. 240, may be supported. There H. & H., merchants, had bought a cargo through their agents, and the cargo was invoiced to and paid for by H. & H. H. & H. had agreed with another house to take the cargo for their joint account. The cargo was insured on account of H. & H., and they were held entitled to recover the whole alleging interest in themselves only.

(*s*) It would be valid and enforceable to the extent of the actual interest, notwithstanding the illegality as to the rest: Crompton, J., in *Rourke* v. *Short* (1856), 5 El. & Bl. 904, 912.

(*t*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 398; *Waters* v. *Monarch Life* (1856), 5 El. & Bl. 870; *Irving* v. *Richardson* (1831), 2 B. & Ad. 193.

he was entitled to recover the full value of his customer's goods notwithstanding that he was not liable to them to make good the loss.

London & North Western v. Glyn (1859), 1 El. & El. 652

London & North Western v. Glyn.

The assured were common carriers, and therefore in general insurers of the goods carried by them, but liability for the loss in question did not in fact fall upon them, as the goods were over the value of £10 and had not been declared. They insured "on goods their own and in trust as carriers" situated in their warehouse. The insurers covenanted to make good "to the assured all damage and loss which the assured shall suffer by fire on the property herein particularised." The insurance was therefore much more in the nature of a strict personal indemnity than it was in *Waters* v. *Monarch Life* (*u*). The Court of Queen's Bench, however, held that on the construction of the policy the intention was to cover the interest both of the assured and the owners, and therefore that the assured were entitled to recover, in case of loss, the full value both of their own goods and of those held by them as bailee. Crompton, J., said, "Who are the assured, and what is their loss? I answer first that the assured are the plaintiffs, both as trustees and as carriers; second, the loss is the loss of trust property, that is to say, as property in which the plaintiffs are beneficially interested to the extent of their lien and as to the residue of which they are trustees for the true owners."

Insurance, therefore, by a bailee on "goods in trust" seems to rebut the presumption that the contract is to indemnify the assured in respect only of his own interest, and these words, standing alone, indicate an intention that the assured shall be treated as if he were a trustee, and therefore entitled to recover the full value for the benefit of his beneficiaries (*x*). The words, however, may be so qualified as to restrict the insurance on the goods to a personal indemnity to the bailee.

North British Insurance v. Moffat (1871), L. R. 7 C P. 25

North British Insurance v. *Moffat.*

Merchants insured on "merchandise the assured's own in trust or on commission for which they are responsible," situated in certain bonded warehouses. Tea had been deposited in one of the bonded warehouses by the importer, and the assured had purchased the tea and resold it. At the time of the loss they held the delivery warrants indorsed in blank, this being for the convenience of the purchaser in order to obtain a clearance on his behalf. The Court of Common Pleas held that they could not recover. The property and risk in the tea had passed to the purchaser and the assured were not responsible for the loss and had only insured in respect of their responsibility.

The above decision ought, perhaps, to be supported rather on the ground that the goods in question were not goods to which

(*u*) (1856), 5 El. & Bl. 870.

(*x*) *Hough* v. *People's Fire* (1872), 36 Md. 398; *Home Insurance* v. *Baltimore Warehouse Co.* (1876), 93 U. S. 527; *De Forest* v. *Fulton Fire* (1828), 1 Hall. (N. Y.) 94; *Fire Insurance* v. *Merchants* (1886), 66 Md. 339; *Robbins* v. *Fireman's Fund* (1879), 16 Blatchf. 122.

the policy applied, since all responsibility of the insurer had ceased. If the goods had been in the possession of the insurers as bailees they would have been responsible for them to the extent of due diligence, and the goods would therefore have been within the description. Whether in such a case their right to recover would have been limited to the extent of their liability is open to question. If a person with a limited interest in goods insures simply "on goods" without any words to indicate that it is his intention to insure beyond his own interest or liability he cannot recover more, because the contract will be deemed to be one of personal indemnity, even although the promise is in form a promise to make good the loss or damage to the goods.

Insurance of goods on behalf of others than the nominal assured.

Although a person with a limited interest in goods not in his possession and with respect to which he has no concern or responsibility beyond his own interest cannot insure them to the full value on his own behalf, he may do so on behalf of others interested, and the names of the persons on whose behalf the insurance is made need not be inserted in the policy nor disclosed to the insurers (*y*). Such insurances are constantly effected on marine risks where the insurance is commonly in the names of the brokers "as well in their own name as for and in the name or names of all and every other person to whom the subject matter of this policy does may or shall appertain in part or in all." Such a form would be equally effective in the case of insurance on goods on land, and the insurance might be effected not only in the name of a limited owner but in the name of one who had no interest in the goods at all. The question as to how far a policy on goods is available for the benefit of persons not named therein is generally stated as being a question of intention at the time the insurance is made. But a secret intention in the mind of the person nominally insured is not in itself sufficient to permit him or the others interested to recover on their behalf. First, the policy itself must contain some such clause as above to indicate that the contract is something more than a contract of mere personal indemnity on the interest of the person named (*a*). Second, the persons for whose

(*y*) *Glasgow Assurance* v. *Symondson* (1911), Com. Cas. 109.

(*a*) Otherwise the contract would be deemed to be in the interest of the person named only. If, too, the nominal assured had no authority to insure on behalf of others, those others could not ratify unless the contract was expressed to be made on behalf of a principal. *Keighley Maxsted* v. *Durant*, [1901] A. C. 240.

benefit the insurance is made must be in existence and ascertainable at the time the contract is made (*b*). Third, there must be an intention to insure on their behalf (*c*). Fourth, they must have authorised or have subsequently ratified the contract (*d*).

It is immaterial that the insurance was originally effected without the knowledge of the person subsequently ratifying it (*e*). In marine insurance ratification after knowledge of a loss is a good ratification of the contract made without the principal's authority; but in a fire case it was held that the rule is anomalous and peculiar to marine insurance, and that in the case of risks other than marine, the contract must be ratified before loss (*ee*).

Any concealment, misrepresentation, or fraud by the nominal assured in connexion with the effecting of the insurance would avoid the policy, but after the insurance was effected a breach of condition by the nominal assured would not necessarily avoid the contract with the principal who had complied with the conditions, and, conversely, a breach by the principal would not avoid the policy in so far as the nominal assured intended to insure his own interest. But where an agent insured in his own name and for all others interested, and intended the insurance to be for the benefit of his principal only, and the principal was unable to recover because his own act had caused the loss, it was held that the agent who had in fact a limited interest could not avail himself of the insurance to recover on that interest because he had not intended to insure it (*f*). Where a policy on goods is effected by a nominal assured for the benefit of others interested, action in respect of their interest may be brought either by the nominal assured or the persons in fact interested (*g*). But the plaintiff must allege in his claim the persons for whose benefit the insurance was in fact made (*h*).

(*b*) The insurance cannot be made on behalf of any unknown person who may in the future acquire an interest. *Watson* v. *Swann* (1862), 11 C. B. N. S. 756; *Ebsworth* v. *Alliance Marine* (1873), L. R. 8 C. P. 596.

(*c*) *Boston Fruit Co.* v. *British Foreign Marine*, [1906] A. C. 336.

(*d*) *Routh* v. *Thompson* (1811), 13 East, 274; *Williams* v. *North China Insurance* (1876), 1 C. P. D. 757.

(*e*) *Routh* v. *Thompson* (1811), 13 East, 274; *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; *Williams* v. *North China Insurance* (1876), 1 C. P. D. 757.

(*ee*) *Grover* v. *Mathews* (1910), 26 T. L. R. 411.

(*f*) *Conway* v. *Gray* (1809), 10 East, 536.

(*g*) *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; *Sutherland* v. *Pratt* (1843), 12 M. & W. 16; *Fire Assurance* v. *Merchants* (1886), 66 Md. 339.

(*h*) *Cohen* v. *Hannam* (1813), 5 Taunt. 101; *Bell* v. *Ansley* (1812), 16 East, 141.

Section IV.—Insurable Interest in Lives

Effect of Life Assurance Act, 1774.

Insurances on lives are within the statute 14 Geo. 3, c. 48, and therefore a claimant on a life policy must show (1) that the person on whose behalf it was made had an interest in the life, (2) that the policy is expressed as having been made on behalf of the person or persons on whose behalf it was in fact made, and (3) that the amount claimed is no greater than the amount of such person's interest.

Interest must be shown to have subsisted at the date on which the contract was made but since the contract is not in its nature a contract of indemnity no interest need be shown at death even although the insurance is avowedly made for the purpose of protecting the assured against loss consequent upon the death (*k*). How far an insurance made upon interest which is limited to a definite period would be valid in excess of that period has already been considered (*l*).

The statute applies and the same interest is required to be shown in the case of insurance against death in an accident policy as in an ordinary life policy (*m*). An endowment assurance policy is also within the statute (*n*).

Interest cannot be dispensed with by consent of the parties, and accordingly an "incontestable" "honour" or "p.p.i." policy does not preclude the insurers from pleading in defence that the contract was void for want of interest (*o*).

Interest presumed in certain cases.

In three cases of life insurance insurable interest is presumed and no proof of pecuniary interest is necessary. These are, (1) insurance by an individual on his own life (*p*), (2) insurance by a man on the life of his wife (*q*), (3) insurance by a woman on the life of her husband (*r*). In these cases the interest of the assured is one much higher than a pecuniary interest and is not capable of pecuniary valuation, and therefore there is no limit

(*k*) *Dalby* v. *India and London Life* (1854), 15 C. B. 365; *Law* v. *London Indisputable* (1855), 1 K. & J. 223; *Connecticut Mutual Life* v. *Schaefer* (1876), 94 U. S. 457.

(*l*) *Supra*, p. 114.

(*m*) *Shilling* v. *Accidental Death* (1858), 1 F. & F. 116.

(*n*) *Brophy* v. *North American Life* (1902), 32 Can. S. C. 261.

(*o*) *Anctil* v. *Manufacturers Life*, [1899] A. C. 604; but see *Turnbull* v. *Scottish Provident* (1876), 34 S. L. R. 146. *Vide infra*, p. 793, as to the right of the assured to demand repayment of premiums on policies effected without interest.

(*p*) *Wainwright* v. *Bland* (1835), 1 Mood. & Rob. 481.

(*q*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805; *Wight* v. *Brown* (1849), 11 D. 459.

(*r*) *Reed* v. *Royal Exchange* (1795), 2 Peake Add. Cas. 70; Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 11.

upon the amount which may be insured or upon the number of policies which may be effected (*s*).

Wainwright v. Bland (1835), 1 Mood. & Rob. 48

Wainwright v. *Bland.*

The policy sued upon was in form an insurance for £3000 by a lady upon her own life for her own benefit for a period of two years. She had no property of any kind except a pension of £10 per annum. The jury found that the policy was not in fact the lady's own policy, and therefore the question as to the lady's interest in her own life proved to be immaterial, but it was contended by the defendants that even if the insurance was in fact an insurance made by the lady on her own behalf her representatives could not recover unless they could show that she had some particular interest in the continuance of her life for the two years for which the policy was effected. Lord Abinger ruled against the defendants on this point, "It is contended for the defendants that a person effecting an insurance upon his own life for a limited time is bound to show that he had some particular interest in the continuation of life up to that period; although it is admitted that this would not be so in the case of an insurance for the whole term of life; but I am not aware of this distinction having been ever taken, and it does not appear to me there is any force in it. If a party has an interest in his whole life, surely he must have an interest in every part of it."

Reed v. Royal Exchange (1795), 2 Peake Add. Cas. 70

Reed v. *Royal Exchange.*

This was an action by a woman upon a policy effected by her on her husband's life. Upon the plaintiff's counsel offering to prove that there was a pecuniary interest, in that her husband was entitled to a life interest to a large amount, Lord Kenyon said that no evidence was necessary, since every wife had as such an interest in her husband's life.

Griffiths v. Fleming, [1909] 1 K. B. 805

Griffiths v. *Fleming.*

Upon two separate applications signed by a man and his wife respectively, a company issued a policy to the man and wife jointly as grantees, and by the policy undertook to pay £500 to the survivor of the grantees upon the death of such of them as should first die. The annual premium was £21, and of the first premium the wife paid £10 and the husband the remainder. Shortly after the policy was issued the wife died. The company denied liability on the ground that the husband had no insurable interest in the life of his wife. The claimant alleged that he had interest, and gave evidence of domestic services rendered by his wife, and of having had to provide hired service in lieu thereof. He further alleged that the policy contained two insurances which were valid under section 11 of the Married Women's Property Act, 1882, one by the wife on her own life for the husband's benefit and the other by the husband on his own life for the wife's benefit. Pickford, J., held that the husband had an insurable interest in the wife's life by reason of the household services rendered. On appeal the majority of the Court held that the applica-

(*s*) *M'Farlane* v. *Royal London Accidental Death* (1857), 2 H. & N. (1886), 2 T. L. R. 755; *Shilling* v. 42.

tions made by the husband and wife respectively were proposals for insurance each on his or her own life for the benefit of the other within the meaning of section 11 of the Married Women's Property Act, 1882, and that if the policy did not give proper effect to the proposals it could have been rectified, and if the husband had taken out administration to his wife he could have brought his action under the section and no question of insurable interest would have arisen. Upon the question of insurable interest the whole Court were of opinion that a husband has without proof of pecuniary interest an insurable interest in the life of his wife, just as much as a man has an interest in his own life and a wife has an interest in her husband's life. Differing from Pickford, J., they thought it would have been difficult to support the case on the ground of pecuniary interest if that had been necessary. The decision in *Barnes* v. *London, Edinburgh and Glasgow Life* (*ss*) was open to considerable doubt. Pecuniary interest was as a rule necessary to give a man an interest in the life which he insured, but the case of insurance on the assured's own life or on the life of the wife or husband of the assured was not within the mischief at which the statute was aimed. The statute was to prevent "a mischievous kind of gaming," and a man was not likely to gamble on his own life or on the life of his wife, or a woman on the life of her husband. In these cases there was an interest much higher than a mere pecuniary interest, and therefore the law permitted insurance to any amount irrespective of pecuniary interest.

Pecuniary interest must be proved except in cases where interest is presumed.

Where a life insurance is effected on the life of some person other than the assured and not being his or her wife or husband a pecuniary interest must be shown, and the assured cannot recover more than the value of the pecuniary interest at the time the contract was made (*t*). If he insures in more than one company his total right to recover is limited to the amount of interest which he had at the date of insurance. If he recovers from one company he can only recover from another the balance if any necessary to complete a sum equivalent to his insurable interest at the time the policy in that other was effected (*u*).

Pecuniary interest must be definite and capable of legal valuation.

The pecuniary interest which it is necessary to prove in order to establish an insurable interest must be definite (*x*). It must be capable of valuation (*y*) and of such nature that the law will take cognisance of it (*z*). The assured must show that he will or may lose some legal right (*a*) or be placed under the burden of some legal liability (*b*) in consequence of the death of the person whose life is insured. A mere expectancy or hope of future

(*ss*) [1892] 1 Q. B. 864.
(*t*) *Dalby* v. *India and London Life* (1854), 15 C. B. 365.
(*u*) *Hebdon* v. *West* (1863), 3 B. & S. 579; *Simcock* v. *Scottish Imperial* (1902), 10 S. L. T 286
(*x*) *Halford* v. *Kymer* (1830), 10 B. & C. 724.
(*y*) *Simcock* v. *Scottish Imperial* (1902), 10 S. L. T. 286.
(*z*) *Hebdon* v. *West* (1863), 3 B. & S. 579.
(*a*) *Hebdon* v. *West* (1863), 3 B. & S. 579.
(*b*) *Tidswell* v. *Ankerstein* (1792), Peake, 151.

pecuniary benefit from the prolongation of the life insured (*c*), or mere moral obligations or duties owed by the person whose life is insured to the assured (*d*) is not sufficient to sustain an insurable interest. If the death of the life insured will involve the assured in any liability it is no answer for the insurers to show that he will also derive some compensating benefit from the same event since the insurance is not a contract of indemnity and the insurers cannot set off the assured's gain against his loss (*e*).

Hebdon v. West (1863), 3 B. & S. 579

Hebdon v. *West.*

A became indebted to a bank of which B was the senior and managing partner. B agreed orally with A that the latter should be employed in the bank for a period of seven years at a salary of £600, and that the debt against him would not be enforced in B's lifetime. A accordingly insured B's life. It was held that A had an interest under the agreement to the extent of seven years' salary, notwithstanding that the oral agreement was not enforceable by reason of the Statute of Frauds. It was held that A had no interest in respect of the promise of B not to enforce the debt due to the bank. Such a promise was of no legal value and the mere expectation of pecuniary advantage from the continuance of B's life, however reasonable, did not create an insurable interest.

Simcock v. Scottish Imperial (1902), 10 S. L. T. 286

Simcock v. *Scottish Imperial.*

A pork butcher employed as his shop foreman a man whom he had known for twenty-three years, who was skilled in his trade, and in whom he had great personal confidence. He was engaged on the usual terms at a weekly salary of from 36 to 40 shillings. The employer insured his foreman's life first for £250 in the Provident Life, and afterward for £250 in the Scottish Imperial. On the death of the foreman the Provident Life paid £250 on their policy. The Scottish Imperial declined to pay on the ground of want of insurable interest. In an action upon their policy the Court held that although the foreman's services were very valuable to his employer the expectation of future services did not constitute an insurable interest. The utmost limit of insurable interest was the value of one week's services. The policy in the Provident Life covered any possible interest in the life at the time when the policy sued on was issued and the value of such interest had been paid. The claim therefore failed as being contrary to the statute.

Tidswell v. Ankerstein (1792), Peake, 151

Tidswell v. *Ankerstein.*

A bequeathed an annuity to certain beneficiaries, and named B as the executor of his will; B was held to have an insurable interest in the life of A his testator, because an insurance would enable him to pay the annuity to the beneficiaries without the risk of incurring a devastavit if the testator's estate was not sufficient to pay the testator's creditors and provide for the annuity.

(*c*) *Hebdon* v. *West* (1863), 3 B. & S. 579; *Simcock* v. *Scottish Imperial* (1902), 10 S. L. T. 286; *Turnbull* v. *Scottish Provident* (1876), 34 S. L. R. 146.

(*d*) *Hebdon* v. *West* (1863), 3 B. & S. 579.

(*e*) *Branford* v. *Saunders* (1877), 25 W. R. 650.

Branford v. Saunders (1877), 25 W. R. 650

Branford v. *Saunders.* A and B were entitled to certain property for their joint lives and the life of the survivor with a joint power of appointment and ultimate remainder to A in fee. They jointly mortgaged the property for £750, and as collateral security jointly executed a bond for £600. A insured B's life for £600, and on B's death it was held by the Exchequer Division that although A would become entitled to the whole property he would also become severally liable to pay the whole £600, and in respect of that liability he had an insurable interest to the extent of £300.

Right to property expectant or contingent on the life of another.

A person who has a vested interest in possession or contingency dependent on the life of another may insure such life (*f*), but if there is no vested interest, but a mere *spes successionis*, the expectant heir cannot insure the life on which his succession depends (*g*). An expectant heir who has raised money on his expectancy and has covenanted to convey the estate or repay a loan on the death of the person from whom he expects benefit has an interest in the life arising out of his liability on the covenant and may accordingly insure to cover such liability.

Cook v. Field (1850), 15 Q. B. 460

Cook v. *Field.* A, who expected that an estate would be bequeathed to him by S, covenanted with B in consideration of £2000, that on the death of S he would convey to him the estate if he succeeded to it, and if he did not would repay him £2000. S died, but did not bequeath the estate to A. On action by B against A on the covenant to repay £2000 it was contended that the contract between A and B was an insurance and was void under the statute for want of interest in the life of S. The Court of Queen's Bench held that the contract was not an insurance within the statute, but even if it had been they were of opinion that B had an insurable interest in the life of S.

On the question of insurable interest the above decision seems very doubtful. A's expectancy would not give him an insurable interest and B was merely an assignee of the expectancy. The death of S involved B in the loss of no vested interest nor in any liability, and therefore an insurance by B with independent insurers on the life of S would probably have been void (*h*). But

(*f*) *Parsons* v. *Bignold* (1843), 13 Sim. 518; *Henson* v. *Blackwell* (1845), 4 Hare, 434; *Everett* v. *Desborough* (1829), 5 Bing. 503; *Swete* v. *Fairlie* (1833), 6 C. & P. 1.

(*g*) *Halford* v. *Kymer* (1830), 10 B. & C. 724.

(*h*) Mr. Bunyon (Life Insurance, 2nd Ed. p. 18) thought the decision might be supported on the analogy of the rules of equity relating to the right to perpetuate testimony. A next of kin or heir apparent of a lunatic in possession could not file a bill to perpetuate testimony, as his interest was a bare expectancy, but if such person had entered into any contract with respect to his expectancy the contract gave him a sufficient interest. *Dursley* v. *Fitzhardinge* (1801), 6 Ves. 251. This, however, although supporting the

probably A had an insurable interest in the life of S by reason of his liability to B which arose on his covenant on the death of S and he could have insured and assigned the policy to B in security for the fulfilment of his contractual obligation.

Indirect interest.

There is some difference of opinion as to whether a person who is pecuniarily interested in the success of some business or adventure may insure the life of a person who manages or controls the business and upon whose personal ability success or failure may depend. The cases above cited would seem to support the view that such an interest is too vague and not sufficiently capable of valuation to support a life policy. It has been held in America that a partner has no insurable interest in the life of his co-partner in business except in so far as he may be indebted to him or to the firm,(*k*) and that a firm has no interest in the lives of the individual partners (*l*). But on the other hand there is a decision to the effect that a person who has advanced funds to conduct the business of a company may have an insurable interest in the life of the manager and promoter (*m*).

Manager of business.

Partner.

A creditor has an insurable interest in the life of his debtor (*n*). On the debtor's death he loses his right of action against the debtor and this loss is sufficient to support the insurance even although the debtor's estate is solvent and there is abundant prospect of the debt being ultimately paid in full. The amount insurable has never been definitely decided in this country. It is clear that the creditor has an interest at least to the amount of the debt and interest due thereon at the time of insurance (*o*), but an insurance limited to this amount would not fully protect him because the future interest and cost of insurance up to the time of the debtor's death are not provided for. In America this question has been carefully considered and the Supreme Court of Pennsylvania (*p*) has decided that the creditor has an interest to

Creditor in life of debtor.

Extent of interest.

American rule.

view that a vendor of an expectancy would have an interest in respect of his liability, does not seem to give any support to the view that the purchaser would have any interest.

(*k*) *Powell* v. *Dewey* (1898), 123 N. C. 103; *Connecticut Mutual Life* v. *Luchs* (1882), 108 U. S. 498.

(*l*) *Cheeves* v. *Anders* (1894), 87 Tex. 287.

(*m*) *Mechanicks National Bank* v. *Comins* (1903), 72 N. H. 12.

(*n*) *Von Lindenau* v. *Desborough* (1828), 3 C. & P. 353; *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232; *Rawlins* v. *Desborough* (1840), 2 Mood. & R. 328; *Hebdon* v. *West* (1863), 3 B. & S. 579; *Godsall* v. *Boldero* (1807), 9 East, 72; *Dalby* v. *The India and London Life* (1854), 15 C. B. 365.

(*o*) *Cammock* v. *Lewis* (1872), 15 Wall. 643.

(*p*) *Ulrich* v. *Reinochl* (1891), 143 Pa. 238; *Schaffer* v. *Spangler* (1891), 144 Pa. 223; *Equitable Life* v. *Hazlewood* (1889), 75 Tex. 338.

insure to an amount sufficient to cover the debt, premiums and interest for a period equivalent to the debtor's expectancy of life calculated according to the tables of mortality. If the debtor dies before the end of the period of expectancy the creditor will recover more than his possible loss, and if, on the other hand, the debtor survives the period the creditor may recover less than his loss, but the Court thought that it would be opening the door to speculative insurance to permit insurance to an unlimited amount on the ground that no definite limit could be placed on the duration of the debtor's life, and if the line had to be drawn somewhere the period of the debtor's expectancy of life appeared to afford the only logical basis for arriving at the quantum.

Joint debtors.

If a creditor has several joint debtors he may insure the life of any one for the whole debt, notwithstanding that each of the others is fully able to satisfy his claim (*q*).

Statute-barred debt.

It is no objection to a creditor's interest that the debt cannot be recovered by reason of the Statute of Frauds affording a possible defence to an action (*r*). And similarly debts to which the Statutes of Limitation (*s*) or the Infants' Relief Act (*t*) may be pleaded in defence afford a good insurable interest because in all such cases the debt continues to subsist as a legal right although it cannot be directly enforced by action.

Discharge in bankruptcy.

In America it has been held that a discharge in bankruptcy although affording a personal defence to the debtor does not extinguish the debt, and that therefore the insurable interest of the creditor survives the discharge (*u*); but in English law a discharge in an English Court extinguishes the debt for all purposes if the debt was contracted in England, and therefore the insurable interest of the creditor would cease (*x*). If, however, the debt was contracted in another country the discharge in an English Court might not bar the remedy abroad, and consequently the insurable interest of the creditor might be held to survive the discharge (*y*).

Debts of honour.

Where no debt subsists in law a mere moral claim will not

(*q*) *Morrell* v. *Trenton Mutual Life* (1852), 64 Mass. 282; *Hebdon* v. *West* (1863), 3 B. & S. 579.

(*r*) *Hebdon* v. *West* (1863), 3 B. & S. 579; *Wainer* v. *Milford Mutual Fire* (1891), 153 Mass. 335; *Dupuy* v. *Delaware* (1894), 63 Fed. Rep. 680.

(*s*) *Rawls* v. *American Mutual* (1863), 27 N. Y. 282.

(*t*) *Dwyer* v. *Edie* (1788), 2 Park 914.

(*u*) *Ferguson* v. *Massachussetts Mutual Life* (1884), 32 Hun. 306, 312; *Manhattan Life* v. *Hennessy* (1900), 99 Fed. Rep. 64.

(*x*) *Heather* v. *Webb* (1876), 2 C. P. D. 1; *Ellis* v. *M'Henry* (1871), L. R. 6 C. P. 228.

(*y*) *Ellis* v. *M'Henry* (1871), L. R. 6 C. P. 228.

support an insurance. Thus a gambling debt (*z*), which is not only unenforceable but absolutely void or a promise given without good consideration (*a*), affords no interest. A creditor has no interest in the life of his debtor's wife, even although he looks to her to provide payment of his debt (*b*).

Relationship other than that of husband or wife constitutes no insurable interest.

Relationship other than that of husband and wife does not in itself constitute an insurable interest. Unless there is some pecuniary interest a parent has no insurable interest in the life of a child nor a child in the life of its parent, and *à fortiori* no interest arises from the mere fact of more remote relationships (*c*).

Interest in the life of a child or parent or other relative has been claimed (1) on the ground of liability for funeral expenses, (2) on the ground that there has been expenditure upon the maintenance or education of the person whose life is insured, (3) on the ground that the person whose life is insured was rendering valuable domestic services to the assured, and that the death of such person would necessitate the payment of a hired servant, (4) on the ground that the person whose life is insured contributed to a common fund for support of the whole family. These several claims to insurable interest will be considered separately.

Funeral expenses.

Unless the duty of burying a relation is one which can be legally enforced it is clear that the mere moral obligation to do what is right and proper does not create an insurable interest. A man is legally bound to bury his child which dies while still a member of his household. If he does not do so the guardians may order the burial and recover the cost from the parent if able to pay (*d*). This legal liability on the parent creates a good insurable interest in the life of a child to the extent of reasonable funeral expenses (*e*). But apparently a man has no legal obligation to bury any relative other than his wife or child, and therefore he has on this ground no insurable interest in the life of a parent, grandparent, grandchild, uncle or aunt, brother or sister (*f*).

Insurance for in friendly

Under the Friendly Societies Act, 1896, the insuring of money

(*z*) *Dwyer* v. *Edie* (1788), 2 Park 914.
(*a*) *Hebdon* v. *West* (1863), 3 B. & S. 579.
(*b*) *Hinton* v. *Mutual Reserve* (1904), 135 N. C. 394.
(*c*) *Halford* v. *Kymer* (1830), 10 B. & C. 724; *Attorney-General* v. *Murray*, [1903] 2 K. B. 64; *Harse* v. *Pearl Life*, [1903] 2 K. B. 92.
(*d*) *Reg.* v. *Vann* (1851), 5 Cox C. C. 379.
(*e*) *Webber* v. *Life Insurance* (1895), 172 Pa. 111.
(*f*) *Harse* v. *Pearl Life*, [1903] 2 K. B. 92; *Shilling* v. *Accidental Death* (1858), 1 F. & F. 116; *Howard* v. *Refuge* (1886), 54 L. T. 644.

society or industrial insurance company.

to be paid for the funeral expenses of the husband, wife, or child of a member or as respects persons of the Jewish persuasion for the payment of a sum of money during the period of confined mourning is regarded as among the legitimate objects of a friendly society, whether registered or unregistered, and such insurances are in effect authorised by the Act (*g*). For long many friendly societies and industrial assurance companies (that is, companies granting policies on any one life for less than £20) have been in the habit of making large numbers of insurances for funeral expenses, not only of children but of parents, grandchildren, and other relatives of members. Many of these were undoubtedly illegal and might at any time have been repudiated by the insurers; while, on the other hand, the insurers were exposed to a claim for return of premiums on policies upon which *de facto* they had run the risk if it was their practice to pay notwithstanding the illegality. To remedy this state of matters the Assurance Companies Act, 1909, provides (1) that among the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister; (2) that policies effected before the passing of the Act by any such society or company for the *bonâ fide* purpose of defraying the reasonable funeral expenses of any person shall not be deemed void for want of insurable interest or because the name of the person for whose benefit it was effected was not inserted in the policy; (3) that if any illegal insurance is effected after the passing of the Act by any such society or company then there shall be deemed to be a default in complying with the requirements of the Act and the society or company and its officers shall be liable to penalties (*h*). It will be observed that the above provisions of the Assurance Companies Act, 1909, do not apply to friendly societies which are not also collecting societies. The law of insurable interest applicable to non-collecting friendly societies is therefore as before.

Money expended in maintenance and education.

The fact that a parent or other person *in loco parentis* has expended and will continue to expend money upon the maintenance and education of a child and that there is a reasonable expectation of such expenditure being repaid in the future by

(*g*) F. S. Act, 1896, sec. 8. See *Brown* v. *Freeman* (1851), 4 De G. & Sm. 444.

(*h*) Ass. Comp. Act, 1909, sec. 36 (1), (2), (3).

support and comfort from the child when the parent is old does not constitute a sufficiently definite pecuniary interest in the child's life so as to establish an insurable interest (*i*). Where a stranger received and maintained a child upon the death-bed request of its mother such stranger was held by a Divisional Court to have an insurable interest by reason of the expectation that the child would subsequently reimburse the expenditure by services rendered (*k*); but this case can hardly be supported upon principle, and has been doubted in the Court of Appeal (*l*). Maintenance of an aged person gives no insurable interest in that person's life, unless there is a legal obligation to repay the money spent in his support (*m*), and even then if the obligation was created merely for the purpose of showing an insurable interest without any reasonable probability of the debtor being able to pay, the Court would probably consider the technical legal liability a fraud upon the Statute and insufficient to support an insurance (*n*).

Domestic services.

The fact that a child or other relative was rendering valuable domestic service to the assured and that the loss of that service would entail the employment of hired labour in lieu thereof does not create an insurable interest (*o*). Pickford, J., held that it was the domestic services of a wife which gave an insurable interest to the husband, but the Court of Appeal declined to support his decision on that ground, and it appears to be untenable (*p*).

Child contributing to support family.

A parent may possibly have a legal claim to the earnings of a child under 16 years of age (*q*), and, if so, he may have some insurable interest on that ground (*r*), but his insurable interest cannot exceed the value of the term of service for which the child was definitely engaged by some employer, because beyond such term his interest was a mere expectancy. Where the child is engaged on a weekly or monthly service the insurable interest must therefore be extremely small.

(*i*) *Halford* v. *Kymer* (1830), 10 B. & C. 724; *Worthington* v. *Curtis* (1875), 1 Ch. D. 419, 423; *Prudential Insurance* v. *Jenkins* (1896), 15 Ind. App. 297, 57 Am. S. R. 228.

(*k*) *Barnes* v. *London, Edinburgh, and Glasgow Life*, [1892] 1 Q. B. 864.

(*l*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805.

(*m*) *Shilling* v. *Accidental Death* (1858), 1 F. & F. 116; see *Reserve Mutual* v. *Kane* (1876), 81 Pa. 154.

(*n*) See *Seigrist* v. *Schmoltz* (1886), 113 Pa. 326.

(*o*) *Harse* v. *Pearl Life*, [1903] 2 K. B. 92.

(*p*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805.

(*q*) Eversley's Domestic Relations, 3rd Ed. pp. 552, 577.

(*r*) *Wakeman* v. *Metropolitan Life* (1899), 30 Ont. R. 705.

Halford v. Kymer (1830), 10 B. & C. 724

Halford v. *Kymer.*

A boy who was approaching majority was entitled under a marriage settlement to a sum of £8000 on attaining the age of twenty-one. His father effected a policy on his son's life for two years for £5000 to provide against the contingency of the son dying under age. The son attained his majority but died six months afterwards, and one month before the expiration of the policy. The son by his will left all his property to his father. The father sued on the policy, but it was held that he could not recover, and that neither the expectation that the son would reimburse his father the expenses of maintenance and education, nor the obligation of the son to maintain his father in old age created a sufficient insurable interest.

Shilling v. Accidental Death (1858), 1 F. & F. 116

Shilling v. *Accidental Death.*

A son was held to have no insurable interest in the life of his father who was a pauper, but who lived with the son and was supported by him under compulsion from the guardians.

Harse v. Pearl Life, [1903] 2 K. B. 92

Harse v. *Pearl Life.*

A son insured the life of his mother who lived with and was supported by him, and performed in his house the domestic duties of a housekeeper. The son was held to have no insurable interest in his mother's life either in respect of the loss of her services or the moral duty to incur the cost of funeral expenses in the event of her death.

Barnes v. London, Edinburgh, and Glasgow Life, [1892] 1 Q. B. 864

Barnes v. *London, Edinburgh, and Glasgow Life.*

A woman spent money on the maintenance and education of her step-sister, a child of ten, having promised the child's mother that she would do so. The Court held that there was an insurable interest and that on the death of the child the woman could recover on the insurance policy to the extent of her disbursements whether made before or after the date on which the policy was effected. Coleridge, C.J., said, "I agree that the insurable interest must be a pecuniary interest, and that the interest must be in existence at the time the policy is effected; that is perfectly clear upon the authorities. Is there such a pecuniary insurable interest here? I think there is. The expenses to which the plaintiff undertook to put herself for the maintenance of the child were, as I have said, not expenses which she was bound to incur; and in my judgment the plaintiff undoubtedly had an insurable interest on the child's life so far as to secure the repayment of the expenses incurred by her. I cannot find anything has been said in any case to a contrary effect. Taking the ordinary course of business as the guide to determine the law, I should have thought that it was matter of common knowledge that obligations of this sort were obligations the repayment of which was habitually secured in this way;" and A. L. Smith, J., said, "This decision does not touch on the cases in which it has been held that a father has no insurable interest in the life of his son. There is an obligation in law on a father to maintain his son; there is no such obligation here, but an undertaking to incur expense."

American decisions relating to insurable interest among relatives.

There are numerous decisions in America relating to insurable interest as among relatives. The settled rule appears to be that if there is a *de facto* state of dependence the dependent has an insurable interest in the life of the person who supports him even although he has no legal claim to be supported (*s*), but where a person is independent he has no insurable interest in the lives of relatives on the ground that he might in the future have a legal or moral claim to be supported by them (*t*). Thus, where there is actual dependence, and a reasonable expectation of the benefit continuing, a granddaughter is held to have an interest in the life of her grandfather (*u*), and an adopted daughter in the life of a stranger who adopted her (*x*), and a woman in the life of her brother (*y*). But where there is no actual dependence or immediate pecuniary benefit the American Courts hold that a child has no interest in the life of a parent (*z*) or a parent in the life of a child (*a*), and *à fortiori* in the case of remoter relationship (*b*). Where a child contributes his earnings to the joint support of the household some of the American Courts have held that the parent has an insurable interest (*c*). A wife has an insurable interest in the life of her husband in respect of her maintenance (*d*), and there are decisions to the effect that a woman cohabiting with and supported by a man who is not her husband has an insurable interest in his life (*e*), but this must be very doubtful, at any rate if the parties knew there was no legal marriage, because the immorality of the relationship would render the interest illegal. It has been held that a woman has an insurable interest in the life of her affianced husband (*f*), and this seems to be undoubtedly sound, since by his death she loses the benefit of a contract which the law recognises as one of pecuniary value. In America a husband is held to have an insurable interest in the life of his wife on the ground that her

(*s*) *Warnock* v. *Davies* (1881), 104 U. S. 775, 779; *Insurance Co.* v. *Bailey* (1871), 13 Wall. 616, 619.

(*t*) *Life Insurance Clearing Co.* v. *O'Neill* (1901), 106 Fed. Rep. 800.

(*u*) *Breese* v. *Metropolitan* (1899), 37 Hun. App. 152.

(*x*) *Carpenter* v. *U. S. Life* (1894), 161 Pa. 9.

(*y*) *Lord* v. *Dall* (1815), 12 Mass. 118.

(*z*) *Continental Life* v. *Volger* (1883), 89 Ind. 572; *Life Insurance Clearing Co.* v. *O'Neill* (1901), 106 Fed. Rep. 800.

(*a*) *Guardian Ins.* v. *Hogan* (1875), 80 Ill. 35.

(*b*) *United Brethren Mutual Aid* v. *M'Donald* (1888), 122 Pa. 324; *Burton* v. *Connecticut Mutual Life* (1889), 119 Ind. 207

(*c*) *Loomis* v. *Eagle Life and Health* (1856), 72 Mass. 396; *Mitchell* v. *Union Life* (1858), 45 Me. 104.

(*d*) *Connecticut Mutual Life* v. *Schaefer* (1876), 94 U. S. 457; *Life Insurance Clearing Co.* v. *O'Neill* (1901), 106 Fed. Rep. 800; *Holmes* v. *Gilman* (1893), 138 N. Y. 369.

(*e*) *Opitz* v. *Karel* (1903), 118 Wis. 527.

(*f*) *Chisholm* v. *National Capito Life* (1873), 52 Mo. 213.

death would deprive him of valuable domestic services (*g*). In the case of a wife an interest in her husband's life is presumed without any evidence of actual dependence or support (*h*), but in the case of all other relationships the plaintiff averring interest must prove that there was in fact a pecuniary benefit (*i*).

Child farming; insurance on life of child under 7 illegal.

Under the Children Act, 1908, a person who undertakes for reward the nursing and maintenance of one or more children under the age of 7 years apart from their parents or having no parents is required to comply with the provisions of the Act with regard to notice and other matters, and such person is deemed to have no interest in the life of the child, and if any such person directly or indirectly insures or attempts to insure the life of such child he is guilty of an offence under the Act; and if any company, society, or person knowingly issues or procures or attempts to procure to be issued any policy of insurance upon the life of such child such company, society, or person is guilty of an offence under the Act (*k*).

Question on whose behalf a policy is made.

The Statute 14 Geo. 3, c. 48, requires that the person on whose behalf the policy is made shall have an interest. It is not sufficient to show that the person whose name appears in the policy as the assured has an interest. If it were so, nothing would be easier than to evade the Act by taking out a "gambling" policy in the name of the assured himself as a policy issued to him. The policy, however, is not in itself conclusive evidence that the insurance was made for the use or benefit or on account of the person named therein as the assured. The policy may appear on the face of it to be made by the life himself for his own benefit, and action may be brought in the name of the personal representatives of the life; but the Court will go behind the policy and if satisfied that the insurance was made in reality on behalf of one who has no interest in the life will declare the policy void under the statute (*l*). The person "for whose use or benefit or on whose

(*g*) *Charter Oak Life* v. *Brant* (1871), 47 Mo. 419; *Currier* v. *Continental* (1885), 57 Vt. 496.

(*h*) *Connecticut Mutual Life* v. *Schaefer* (1876), 94 U. S. 457.

(*i*) *Barton* v. *Connecticut Mutual Life* (1889), 119 Ind. 207; *Lewis* v. *Phœnix* (1872), 39 Conn. 100; *Guardian Mutual Life* v. *Hogan* (1875), 80 Ill. 35.

(*k*) 8 Ed. 7, c. 67, secs. 1, 7.

(*l*) *Wainwright* v. *Bland* (1835), 1 Mood. & Rob. 481; *Shilling* v. *Accidental Death* (1857), 2 H. & N. 42; *Worthington* v. *Curtis* (1875), 1 Ch. D. 419; *Harse* v. *Pearl Life*, [1903] 2 K. B. 92; *M'Farlane* v. *Royal London* (1886), 2 T. L. R. 755; *Holt* v. *English and Scottish Law* (1899), The Times Newspaper, Aug. 5; *Downing* v. *Marine and General* (1899), The Times Newspaper, Aug. 7; *Warnock* v. *Davis* (1881), 104 U. S. 775; *Brophy* v. *North America Life* (1902), 32 Can. S. C. 261; *Hinton* v. *Mutual Reserve* (1904), 135 Nor. Car. 314.

account " a life policy is effected is the person who in fact is the principal in the transaction.

Wainwright v. Bland (1835), 1 Mood. & Rob. 481; (1836), 1 M. & W. 32

Wainwright v. *Bland.*

A policy was effected in the name of a lady on her own life. The circumstances were suspicious, and the claim of the plaintiff who sued as the lady's personal representative was resisted on the ground that the policy was in fact the policy of the plaintiff who had no interest in the life. At the trial Lord Abinger, C.B., in his address to the jury, said, "The question in this case is who was the party really and truly effecting the insurance? Was it the policy of Miss Abercromby? or was it substantially the policy of Wainwright, the plaintiff, he using her name for purposes of his own? If you think it was the policy of Miss Abercromby effected by her for her own benefit her representative is entitled to put it in force, and it would be no answer to say that she had no funds of her own to pay premiums. Wainwright might lend her the money for that purpose and the policy still continue her own. But, on the other hand, if, looking at all the strange facts which have been proved before you, you come to the conclusion that the policy was in reality effected by Wainwright, that he merely used her name himself finding the money and meaning (by way of assignment or by bequest, or in some other way) to have the benefit of it himself: then I am of opinion that such a transaction would be a fraudulent evasion of the statute 14 Geo. 3, c. 48, and that your verdict should be for the defendants." A verdict for the defendants was returned, and on a motion for a new trial it was argued that where a policy was, on the face of it, an insurance by the life for her own benefit, and where the representatives of the life sued, the defendants could not set up as a defence an intention that a third person should have the benefit. The motion was refused on another ground, and the Court expressed some doubt as to the law.

Shilling v. Accidental Death (1857), 2 H. & N. 42; 1 F. & F. 116; 27 L. J. Ex. 16

Shilling v. *Accidental Death.*

This case was first argued on demurrer to the defendant's plea that the policy which purported to be a policy by J. S. on his own life "was in truth and in fact made and effected by one T. S. in the name and on the pretended behalf of J. S.; but for the use, benefit, and on account and behalf of the said T. S. himself, and not for the use, benefit, or on account of the said J. S.; and the said T. S. had not any interest in the life of the said J. S." In support of the demurrer it was argued that parol evidence was not admissible to show that the contract was other than appeared on the policy, or that it was in fact for the benefit of another. It was held, however, that the evidence was admissible and that the plea was good.

Upon the trial of the case before a jury the evidence established that the policy was taken in the name of a man seventy-seven years old, who was a pauper supported by his son, and that the son had been heard to say that he would insure the old man for £200 as he was a burden to him, and that the proposal was partly in the son's writing, although signed by the father, and that the father twelve days after the policy was issued signed a will bequeathing it to his son. The jury found a verdict for the plaintiff, but in a motion for a new trial the verdict was set aside as being against the weight of evidence, and a new trial was ordered.

Payment of premiums not conclusive.

Primâ facie the person who ultimately bears the cost of the premium is the person on whose behalf the policy was effected, but evidence that another pays the premium is not conclusive to show that a policy was effected on behalf of the person providing the premium, even although such person does in fact obtain the benefit of the policy (*m*).

Mere beneficiaries need not show interest.

The words in the Act, "for whose use benefit or on whose account," are not to be construed too widely. They do not include all persons who are ultimately intended to benefit by the insurance by receiving the whole or part of the insurance monies although in one sense the policy may be said to have been made for their benefit. The principal object of life insurance is to insure that a man whenever he may die shall have a certain sum to dispose of at his death, and an insurance effected with this intention is within the meaning of the statute effected for his own benefit, and on his own account, and not for the benefit or account of those to whom he may intend to bequeath the property which he has thus secured. And if the object of an insurance by or on behalf of a man on his own life is to secure to himself property which he may dispose of at his decease he may effect his object either by taking a policy payable to his representatives and making bequests by will or by assigning the policy to the person or persons whom he wishes to benefit by it after his death, or by taking the policy payable to such person or persons. In none of these cases is it necessary to show that the ultimate beneficiaries had any interest in the life of the assured (*o*).

Name of the real assured must be inserted in the policy.

It is important to remember that not only must a life policy be made on behalf of some person who has an interest, but that person must be named in the policy as the person for whose benefit it is made. Thus, if a policy was effected by a debtor in his own name but solely for the benefit of the creditor the policy would be void if the creditor's name was not inserted therein (*p*).

(*m*) *Shilling* v. *Accidental Death* (1857), 1 F. & F. 116; *Wainwright* v. *Bland* (1835), 1 Mood. & Rob. 481.

(*o*) *Shilling* v. *Accidental Death* (1857), 2 H. & N. 42; *M'Farlane* v. *Royal London* (1886), 2 T. L. R. 755; *Brewster* v. *National Life* (1892), 8 T. L. R. 648; *North American Life* v. *Craigen* (1886), 13 Can. S. C. 278; *Scott* v. *Roose* (1841), 3 Ir. Eq. R. 170; *Fidelity Mutual* v. *Jeffords* (1901), 107 Fed. Rep. 402; *Freeman* v. *National Benefit* (1886), 42 Hun. 252; *Ingersoll* v. *Knights of Golden Rule* (1891), 47 Fed. Rep. 272; *Olmsted* v. *Keyes* (1881), 85 N. Y. 593; *Rawls* v. *American Mutual* (1863), 27 N. Y. 282; *Aetna Life Insurance* v. *France* (1876), 94 U. S. 561; *N. Y. Mutual* v. *Armstrong* (1885), 117 U. S. 591.

(*p*) *Evans* v. *Bignold* (1869), L. R. 4 Q. B. 622; *Humphry* v. *Arabin*

Evans v. Bignold (1839), L. R. 4 Q. B. 622

Evans v. *Bignold.*

A's wife was entitled under a will to £200 on attaining majority. The trustees of the will agreed to advance £200 to A on his obtaining a surety for repayment in the event of the wife dying under twenty-one. B promised to become surety on condition that an insurance was effected. A accordingly effected an insurance on the life of his wife for £200 taking the policy in her name alone. The Court of Queen's Bench held that even although the object of the policy was ultimately to benefit the wife the husband was primarily interested until the wife attained majority, and it was in fact made on his behalf, and as his name was not inserted therein it was void under 14 Geo. 3, c. 48.

And must be described as such.

And not only must the person on whose behalf the policy is made be named in the policy, but he must be named as the person on whose behalf it is made (*q*).

Hodson v. Observer Life (1857), 8 El. & Bl. 40

Hodson v. *Observer Life.*

The policy recited that A alleging himself to be interested in the life of B was desirous and had proposed to effect an insurance upon the life of B, and the insurers covenanted to pay £1500 to A on the death of B. On the death of B an action on the policy was commenced by A. He did not allege interest in himself, but stated in his declaration that the policy was in fact made for the benefit of B. On demurrer the Court of Queen's Bench held that the declaration was bad because if the insurance was made on behalf of the life it should have been so stated in the policy, and it was not sufficient that the name of the person interested and on whose behalf the insurance was made was named in the policy in another capacity, that is, B ought to have been named in the policy not only as the life but as the assured.

There is no objection, however, to an insurance being effected by a trustee on behalf of the person interested if it is so expressed in the policy.

Collett v. Morrison (1851), 9 Hare, 162

Collett v. *Morrison.*

A proposal was expressed to be made by "A by her trustee B on the life of A." The policy was in fact issued in the name of B as the assured on the life of A, but the Court, on the ground of mistake, rectified the policy so as to correspond with the proposal and acceptance, and held that the policy so rectified was valid as it was expressed to be made on behalf of the life who was the person interested.

If the name of the person for whose benefit the insurance is effected is inserted as such in the application the omission of the

(1836), Lloyd & G. (Temp. Plunket) 318, 325. But if the policy was in fact the debtor's policy, made on his own behalf, and merely assigned to the creditor for the purpose of giving him security, it is unnecessary to insert in the policy any other name than that of the debtor. *Downs* v. *Green* (1844), 12 M. & W. 481; *M'Farlane* v. *Royal London* (1886), 2 T. L. R. 755.

(*q*) *Hodson* v. *Observer Life* (1857), 8 El. & Bl. 40; *Dowker* v. *Canada Life* (1865), 24 U. C. Q. B. 591.

name in the policy is not fatal if the application is incorporated into the policy by reference (*r*).

Assignment to persons without interest not illegal.

Although the object of the statute is to prevent speculation, it applies only to the contract of insurance between the insurer and the assured, and it does not apply to contracts whereby the policy may subsequently be assigned or otherwise dealt with between the assured and third parties. If the policy is valid in its inception, that is to say if it was in fact obtained on behalf of the nominal assured having interest, it cannot afterwards be invalidated by assignment to a person who has no interest, but who takes it merely as a speculation (*s*). In America there has been some difference of judicial opinion as to the validity of an assignment to a person without interest (*t*). It has been held in the Supreme Court and in some of the States that as it is illegal for a person without interest to insure a life, it is equally illegal for such person to take an assignment of a life policy by way of purchase, since the same moral objection applies to both transactions, viz. that a person without any interest in the life of another acquires by contract a strong interest in his death (*u*). Recent decisions in the Federal Courts are in conflict upon this point (*x*), but the latest decision of the Circuit Court of Appeals follows the earlier decisions in holding that an assignment of a life policy to an assignee without interest in the life is void (*y*). In a case decided in the Supreme Court of Canada an assignment to a purchaser without interest was held to be valid even although the assignment was made before the assured had paid a single premium or even received delivery of his policy (*a*). He had applied for a policy on his own life, and his proposal had been accepted, and the policy forwarded to the company's local agent for delivery against payment of the first premium. The assured, however, found that he was unable to pay the premium and asked the agent to get the policy assigned for him, which he did, and the policy was assigned

(*r*) *Wakeman* v. *Metropolitan Life* (1899), 30 Ont. R. 705.

(*s*) *Ashley* v. *Ashley* (1829), 3 Sim. 149; *M'Farlane* v. *Royal London* (1886), 2 T. L. R. 755.

(*t*) *Gordon* v. *Ware National Bank* (1904), 132 Fed. Rep. 444.

(*u*) *Warnock* v. *Davies* (1881), 104 U. S. 775; *Carpenter* v. *U. S. Life* (1894), 161 Pa. 9; *Franklin Fire* v. *Hazzard* (1872), 41 Ind. 116, and cases cited in *Gordon* v. *Ware National Bank* (1904), 132 Fed. Rep. 444.

(*x*) *Gordon* v. *Ware National Bank* (1904), 132 Fed. Rep. 444; *Chamberlain* v. *Butler* (1901), 61 Neb. 730; *Mechanicks National Bank* v. *Comins* (1903), 72 N. H. 12.

(*y*) *Russell* v. *Grigsby* (1909), 168 Fed. Rep. 577; *Mutual Life* v. *Lane* (1907), 151 Fed. Rep. 276.

(*a*) *Vezina* v. *New York Life* (1881), 6 Can. S. C. 30.

to a purchaser who had no interest in the life of the assured. The Court held that as the contract was originally made *bonâ fide* by the assured without any intention to assign it the subsequent dealing with it could not invalidate it, and the assignment was not in itself unlawful. In an American case the assured had allowed a policy on his own life to lapse, and subsequently by arrangement with the company it was renewed and assigned to a purchaser (*b*). The Court held that the assignee could not recover, and although the ground of the decision, viz. that no assignment to a speculative purchaser is valid, cannot be approved the decision itself is probably right, because the renewal of the policy for the benefit of the assignee was in reality a fresh contract of insurance between the insurers and the assignee, and would in England have been void under 14 Geo. 3, c. 48.

Section V.—Illegal Insurances

Illegality.

If the interest of the insured is tainted with illegality he cannot recover on his policy. The law will not admit the validity of an insurance which assists or encourages the assured in the commission of unlawful acts (*bb*).

Insurance on property unlawfully employed.

If the subject matter of the insurance is property which is being used by the assured with his knowledge and assent (*c*), in the furtherance of an unlawful object, an insurance upon such property will be void. Thus, under the old navigation laws a ship could not be validly insured if bound upon a voyage prohibited by law (*d*). Similarly an insurance upon a ship is invalid if with the owner's knowledge she sails in a condition prohibited by the Merchant Shipping Act; for instance, with a deck cargo of timber

(*b*) *Carpenter* v. *U. S. Life* (1894), 161 Pa. 9.

(*bb*) *Amicable Society* v. *Bolland* (1830), 4 Bligh N.S. 194. The cases of *Jacques* v. *Golightly* (1777), 2 Wm. Bl. 1073 (lottery tickets); *Roebuck* v. *Hammerton* (1778), Cowp. 737 (wagering on sex); *Paterson* v. *Powell* (1832), 9 Bing. 320 (speculation on rise or fall of shares) usually cited as instances of insurance on illegal interest, were really insurances without interest.

(*c*) *Carstairs* v. *Allnutt* (1813), 3 Camp. 497; *Metcalfe* v. *Parry* (1814), 4 Camp. 123; *Cunard* v. *Hyde* (1858), E. B. & E. 670; *Wilson* v. *Rankin* (1865) L. R. 1 Q. B. 162; *Dudgeon* v. *Pembroke* (1874), L. R. 9 Q. B. 581.

(*d*) *Ingham* v. *Agnew* (1812), 15 East, 517; *Toulmin* v. *Anderson* (1808), 1 Taunt. 227; *Camden* v. *Anderson* (1798), 1 B. & P. 272; *Johnston* v. *Sutton* (1779), 1 Dougl. 254; *Gray* v. *Lloyd* (1811), 4 Taunt. 136; *Gibson* v. *Service* (1814), 5 Taunt. 433; *Cowie* v. *Barber* (1814), 4 Camp. 100; *Chalmers* v. *Bell* (1804), 3 B. & P. 604; *Lubbock* v. *Potts* (1806), 7 East, 449; *Parkin* v. *Dick* (1809), 11 East, 502.

in cases where that is prohibited (*e*), or with passengers where that is prohibited (*f*).

Application of marine cases to other risks.

The same principle would undoubtedly apply to insurances on property against fire and other risks on land. An insurance on a house used with the assured's consent for illegal or immoral purposes, such as a house of ill fame, a betting place, or an unlicensed drinking house, would probably be void (*g*). In Canada an insurance on furniture in a house of ill fame was held to be void (*h*). In America there are conflicting decisions as to the legality of an insurance upon stock or furniture in premises used for an unlawful purpose (*k*). An occasional violation of the law might not avoid the insurance, as where the insurance was upon a stock of drugs and liquors, and the assured was proved on some occasions to have made illegal sales (*l*), or where the premises were licensed at the time the policy was issued, but remained for a short time unlicensed after the licence had expired (*m*). An insurance on a building constructed in violation of the building regulations in the Public Health, Building and Local Government Acts would probably be void, but there is practically no authority in this country on the question of illegal fire risks, and the analogy of the marine insurance cases might not be followed very strictly. Thus, in *Gouldstone* v. *The Royal* (*n*), an insolvent insured his household linen and china which he had fraudulently concealed from his creditors. Pollock, C.B., directed the jury that he would be entitled to recover on the policy notwithstanding the fraud. The question of illegality, however, does not appear to have been pressed, the defendants relying on the claim itself being fraudulent, and the jury so found.

Trading with the enemy.

All trading with the enemy in time of war is illegal by the common law, being against public policy, and any insurance on

(*e*) *Cunard* v. *Hyde* (1859), 2 E. & E. 1; *Cunard* v. *Hyde* (1858), E. B. & E. 670; *Wilson* v. *Rankin* (1865), L. R. 1 Q. B. 162.

(*f*) *Dudgeon* v. *Pembroke* (1874), L. R. 9 Q. B. 581. Every breach of statutory duty on the part of the shipowner does not avoid the insurance. The illegality must go to the root of the enterprise and not be merely collateral to its proseeution. *Redmond* v. *Smith* (1844), 7 Man. & G. 457.

(*g*) Cf. *Pearce* v. *Brooks* (1866), L. R. 1 Exch. 213; *Upfill* v. *Wright*, [1911] 1 K. B. 506.

(*h*) *Brunean* v. *Laliberte* (1902), Rap. Jud. Que. 19 C. S. 425, Deitch's Digest, 1902, p. 11.

(*k*) *Springfield Fire and Marine* v. *Fowler* (1902), Miss. S. C., Deitch's Digest, 1902, p. 79; *Erb* v. *Fidelity* (1896), 99 Iowa, 727; *Johnson* v. *Union Marine* (1879), 127 Mass. 555.

(*l*) *Insurance Co. of North America* v. *Evans* (1902), Kan. S. C. Deitch's Digest, 1902, p. 66.

(*m*) *Hinckley* v. *Germania Fire* (1885), 140 Mass. 38.

(*n*) (1858), 1 F. & F. 276; see *Pettigrew* v. *Grand River* (1877), 28 U. C. C. P. 70.

the property of a British subject employed in or in pursuance of such trade without the King's licence is void (*o*). If goods were imported from an enemy State probably neither the goods nor the warehouse in which they were stored could be insured (*p*). No contrabrand of war, whether belonging to a British subject or to a subject of a neutral State, could be insured if destined for the enemy (*q*), nor could provisions on which an embargo had been laid (*r*).

Breach of the laws of a foreign state.

As might be expected, our courts are not so zealous to protect the laws and interests of foreign states (*s*). It is extremely doubtful whether they will regard an object to be illegal which is illegal only because it is in breach of a foreign law. Lord Mansfield has said (*t*) that "no country ever takes notice of the revenue laws of another," and this dictum would probably be applicable to all breaches of the municipal law of a foreign state so long as they did not involve acts which were *mala per se* and considered wrongful by the laws of all civilised nations. A similar rule applies to acts in breach of neutrality. When England is neutral it is not illegal either by the law of nations or of this country for an individual to send money or contrabrand of war to support one belligerent power against the other (*u*). It is only illegal if it is an act prohibited by the Foreign Enlistment Act, which is confined to acts in the nature of actual service or of fitting out expeditions or ships for a belligerent.

Breach of neutrality.

Proceeds of illicit trading.

The immediate proceeds of illicit trading cannot be insured (*x*), but property subsequently purchased with the proceeds of illicit trading or immorality does not acquire the taint of illegality so so as to avoid any insurance upon it (*y*). The law will not endlessly pursue inquiries of this kind, but will confine itself to considering the immediate circumstances (*y*).

Legal and illegal risks insured together.

If an insurance in general terms covers risks which are legal and risks which are illegal, it will be valid as to the legal risks and

(*o*) *Potts* v. *Bell* (1800), 8 T. R. 548; *Henty* v. *Staniforth* (1816), 1 Stark. N. P. 254; *Robinson* v. *Morris* (1814), 5 Taunt. 720; *Williams* v. *Marshall* (1817), 7 Taunt. 468; *Vandyck* v. *Whitmore* (1801), 1 East, 475.

(*p*) *Potts* v. *Bell* (1800), 8 T. R. 548.

(*q*) Arnould, secs. 760–773.

(*r*) *Dalmady* v. *Motteux* (1785), 1 T. R. 89n.

(*s*) *Fracis* v. *Sea Insurance* (1895), 3 Com. Cas. 229; *Planchi* v. *Fletcher* (1779), 1 Doug. 251.

(*t*) *Holman* v. *Johnston* (1775), 1 Cowp. 341, 343.

(*u*) *Ex parte Chavasse* (1865), 34 L. J. Bank. 17; *The Helen* (1865), L. R. 1 A. & E. 1; see *contra*, *De Wiltz* v. *Hendricks* (1824), 2 Bing. 314.

(*x*) *Potts* v. *Bell* (1800), 8 T. R. 548, 561.

(*y*) *Bird* v. *Appleton* (1800), 8 T. R. 562.

the illegal risks will be deemed to be excepted from the contract (*z*). If illegal risks are expressly insured together with legal risks the insurance on the legal risks will be valid if the contract is severable, but if they are so mixed up as to be unseverable the whole will be void.

Insurer's knowledge of illegality immaterial.

In policies where the risk is illegal it is immaterial whether or not the insurer knew of the illegality (*a*). In the case of an illegal risk Lord Mansfield said (*b*): "If the defendant did not know that the goods were unlicensed, the exception is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal and *in pari delicto potior est conditio defendentis*," and in another case (*c*): "It appears a monstrous thing that persons standing in the situation of these defendants, and having known the objection to exist at the time when they made the contract should avail themselves of it, but they are certainly legally entitled to do so if they think fit."

Loss caused by assured's unlawful act.

A man cannot insure against the consequences of his own unlawful acts, and into every policy this exception must be read (*d*). If the loss claimed is the reasonable and probable result although not immediately caused by the assured's unlawful act he cannot recover. Thus, in life insurance a man who has insured the life of another cannot recover if he murders the person whose life he has insured (*e*). And if he insures his own life his representatives cannot recover if he commits suicide while sane or if he commits a capital offence and dies at the hands of justice (*d*). Apart from special conditions suicide committed during temporary insanity is no bar to recovery (*f*).

Loss caused by unlawful acts of assured's servants or dependents.

A man may insure against the illegal acts of his employees or dependents. Thus it would be no objection to his recovery on a fire policy to show that his servant or probably even his wife (*g*) had wilfully burned the premises provided that the assured himself was not privy to the act. In America objection was taken

(*z*) *Janson* v. *Driefontein Consolidated*, [1902] A. C. 484, 506.

(*a*) That is to say, where the insurer is defending an action for the policy money. As to a claim for return of premiums, *vide infra*, p. 793.

(*b*) *Johnston* v. *Sutton* (1779), 1 Dougl. 254.

(*c*) *Toulmin* v. *Anderson* (1808), 1 Taunt. 227.

(*d*) *Amicable Society* v. *Bolland* (1830), 4 Bligh N. S. 194, 211; *Ritter* v. *Mutual Life* (1879), 169 U. S. 139; *Burt* v. *Union Central Life* (1902), 187 U. S. 362; *M'Cue* v. *North Western Mutual Life* (1908), 167 Fed. Rep. 435.

(*e*) *Prince of Wales Assurance* v. *Palmer* (1858), 25 Beav. 605.

(*f*) *Horn* v. *Anglo-Australian Life* (1861), 30 L. J. Ch. 511.

(*g*) *Midland* v. *Smith* (1881), 6 Q. B. D. 561.

to an employee's fidelity insurance on the ground that it was contrary to public policy to permit an employer to insure against the dishonesty of his servants, as it would tend to make him less careful in his choice, but the objection was overruled (*h*).

Loss caused directly by the act of the assured.

The assured cannot recover a loss which has been caused directly by his own wilful act (*i*). But the assured's own wilful act not being illegal is no bar to recovery if it was not the immediate cause of the loss, even although it may have indirectly contributed to the result. Thus, where the owners of a vessel, having insured her, wilfully permitted her to go to sea in an unseaworthy condition, which under the circumstances was not illegal, it was held they could recover, even although the loss was indirectly attributable to her unseaworthy condition (*k*). The case was distinguished from those where through the absence of proper documents a neutral vessel was captured by belligerents, and it was held that the assured could not recover because the loss was the direct and immediate consequence of the assured's deliberate act in not providing proper papers (*l*). So in insurance other than marine, the wilful act of the assured if directly causing the loss, as, for instance, if he deliberately set his house on fire, would prevent him from recovering, even although the policy contained no express condition to that effect (*m*); but if the assured got drunk and set his house on fire while intoxicated he could recover because the loss would not have been the immediate consequence of his wilful act of getting drunk but would have only been indirectly attributable to that act (*n*).

Loss caused by assured's negligence.

Negligence of the assured is no defence to the insurers even although the loss is the direct and immediate consequence of the negligence (*o*).

Onus on insurers to prove illegality.

Where illegality is alleged it lies with the insurers to prove it, and the presumption is always against illegality (*oo*). Suicide will

(*h*) *Fidelity and Casualty* v. *Eickhoff* (1895), 63 Minn. 170.

(*i*) *Bell* v. *Carstairs* (1811), 14 East, 374; *Britton* v. *The Royal* (1866), 4 F. & F. 905, 908. In *Aubert* v. *Gray* (1861), 3 B. & S. 163, it was argued but unsuccessfully that if the loss was caused by the wilful act of the government of the country to which the assured belonged he could not recover, because the act of his government was his act.

(*k*) *Thompson* v. *Hopper* (1858), El. B. & E. 1038.

(*l*) *Bell* v. *Carstairs* (1811), 14 East, 374; *Horneyer* v. *Lushington* (1812), 15 East, 46; *Oswell* v. *Vigne* (1812), 15 East, 70.

(*m*) *Britton* v. *The Royal* (1866), 4 F. & F. 905, 908.

(*n*) *Aubert* v. *Gray* (1861), 3 B. & S. 163, 171.

(*o*) *Shaw* v. *Robberds* (1837), 6 Ad. & E. 75.

(*oo*) *Thurtell* v. *Beaumont* (1823), 1 Bing. 339.

not be readily inferred, but when the insurers have proved that the person whose life was insured destroyed himself, the burden of proof shifts to the assured, who must prove insanity if alleged (*p*). Where an accused person has been convicted in a criminal court the conviction is *primâ facie* evidence of guilt in a civil court (*q*), and the verdict of a coroner's jury on the cause of death is *primâ facie* evidence of the facts found (*r*).

Rights of assignee in case of loss caused by act of assured.

Although a policy is void in the hands of the assured or his representatives on the ground that the loss has been caused by the act of the assured, it may be valid in the hands of those who hold as assignees or incumbrancers (*s*). Thus, apart from all conditions, if the assured in a policy on his own life committed suicide his representatives could not recover, but assignees or incumbrancers would not be debarred on the ground of illegality. Public policy only demands that no claim shall be allowed on behalf of the assured's estate when he has caused his own death by suicide or felony. It does not prevent recovery by persons who claim independently and not through the assured's representatives (*t*). Probably therefore a voluntary assignee could recover as well as an onerous assignee. But where the claimant is not an assignee but merely a payee or beneficiary his claim presents more difficulty. If he has no vested interest, but merely an expectancy which can be revoked by the assured either during his lifetime or by his will, he is in no better position than a legatee, and therefore he cannot recover if the assured's representatives cannot recover (*u*). If, however, there is the relation of debtor and creditor between the assured and the payee and he is not merely payee but is entitled to the proceeds of the policy as security for his debt, or if there is an irrevocable assignment of the policy to the person who is named as payee, then his claim is independent of the claim of the assured's representatives, and he may recover notwithstanding suicide or felony of the assured. Thus, in *Moore* v. *Woolsey* (*x*), the policy was effected by a man on his own life but with his wife's money and for her benefit in pursuance of a marriage contract obligation. It

Suicide does not disentitle assignee of life policy.

Voluntary assignee.

Beneficiary.

(*p*) See cases cited *infra*, p. 862.

(*q*) *Crippen, In re*, [1911] P. 178.

(*r*) *Prince of Wales Assurance* v. *Palmer* (1858), 25 Beav. 605.

(*s*) *Moore* v. *Woolsey* (1854), 4 El. & Bl. 243.

(*t*) *Cleaver* v. *Mutual Reserve Fund Life*, [1892] 1 Q. B. 147, 159; but see *Burt* v. *Union Central* (1902), 187 U. S. 362.

(*u*) *Cleaver* v. *Mutual Reserve Fund Life*, [1892] 1 Q. B. 147, 152; but see *Kerr* v. *Minnesota Mutual* (1888), 39 Minn. 174, where a beneficiary named in a mutual benefit society policy was held entitled to recover notwithstanding the death of the member by suicide.

(*x*) (1854), 4 El. & Bl. 243.

was not formally assigned but was deposited with trustees for her use and it was held that his suicide was no bar to her right to recover. When the policy is made for the benefit of the assured's wife or children under the provisions of the Married Women's Property Act, 1882, sec. 11, there is a vested interest in the wife and children which cannot be defeated by the acts of the assured, and therefore they would no doubt be entitled to recover notwithstanding his suicide or felony. The conditions of the policy may, however, prevent the assignee from recovering, and if these provide in general terms that the policy shall be void in the event of the assured's suicide and contain no exception in favour of the assignee they must be given effect to.

Where there is a warranty against suicide.

Ellinger & Co. v. Mutual Life, New York, [1905] 1 K. B. 31

Ellinger v. *Mutual Life, New York.*

A policy was effected in the name of A upon his own life payable to B his creditor. The application form signed by A contained this stipulation, "I also warrant and agree that I will not commit suicide whether sane or insane during the period of one year from the date of the said contract." A having committed suicide within the year an action was brought on the policy by B, and A's executors were joined as co-plaintiffs. It was held that B could not recover as there had been a breach of the warranty.

Reservation from suicide clause in favour of assignees.

A life policy therefore with a suicide clause but without any reservation in favour of assignees or incumbrancers is not a proper security for a debt. It is the usual practice in this country to insert a reservation in favour of assignees and incumbrancers duly intimated during the lifetime of the assured, and the policy is thereby rendered effective as a marketable asset, and there is nothing illegal in the reservation, even although it may indirectly operate to the benefit of the assured's estate. Thus, where the insurers held the policy as security for a loan made by them to the assured, it was held that, as they were incumbrancers, the policy was valid in their hands to the amount of the debt, and they were bound to discharge the debt therefrom (*z*), and similarly where the policies were mortgaged by deposit to third parties, creditors of the assured, it was held that they were entitled to recover from the insurers, and the insurers had no claim to the other securities in their hands, nor could they require the incumbrancers to have recourse to the other securities first or even *pari passu* (*a*), the result being that the assured's

(*z*) *White* v. *British Empire Mutual Life* (1868), L. R. 7 Eq. 394.

(*a*) *The Solicitors and General Life* v. *Lamb* (1864), 1 Hem. & M. 716; *City Bank* v. *Sovereign Life* (1884), 50 L. T. 565.

representatives had the debt discharged from the policy moneys, and were entitled to a conveyance of the other securities unincumbered (*aa*). The assured's trustee in bankruptcy is in the same position as his personal representatives, and therefore, if the assured causes his own death the trustee cannot under any circumstances recover (*b*), and the ordinary reservation in favour of assignees does not include the trustee in bankruptcy (*c*).

Loss caused by act of assignee.

If a policy has been assigned absolutely, and the assured's death is caused by the assignee, such assignee cannot recover, and it is doubtful whether the assured's representatives could recover. It might be argued that the right to recover in the event of the assignee causing the assured's death was impliedly excepted from the assignment, and that therefore the right still remained with the assured and his representatives. If the death is caused by the act of a beneficiary or payee, such beneficiary cannot recover, but the assured's representatives may (*d*).

Beneficiary.

Cleaver v. Mutual Reserve Fund Life, [1892] 1 Q. B. 47

A insured his life the company promising to pay on his death to his wife if then alive, and failing her to his personal representatives. A's wife, was convicted and sentenced to death for the murder of A, the sentence being afterwards commuted to penal servitude for life. In an action by A's executors on the policy it was held that although by reason of the Married Women's Property Act, 1882, s. 11, the executors would ordinarily hold the insurance money in trust for wife or children named in the policy, the wife here having forfeited her right as a beneficiary, there was a resulting trust for the benefit of A's estate and there was no principle of public policy which would disentitle the executors from recovering the money from the insurance company.

Alien enemies

Contracts with alien enemies are void if entered into during war (*e*). If entered into before war, money claims which have accrued upon an executed consideration are not cancelled, but the right to sue in respect of them is merely suspended until peace is concluded (*e*). Beyond this, commercial contracts which are still executory are speaking generally dissolved on the outbreak of war, because performance during the war would be contrary to public policy as being a trading with the enemy, and as war is

(*aa*) But the reservation in favour of assignees may be limited so as to operate by way of indemnity only and if so the company will, on paying an indemnity to the assignee, be subrogated to his claims against the assured's estate.

(*b*) *Amicable Society* v. *Bolland* (1830), 4 Bligh. N. S. 194.

(*c*) *Jackson* v. *Forster* (1859), 1 El. & El. 463.

(*d*) *Cleaver* v. *Mutual Reserve Life*, [1892] 1 Q. B. 147; *Standard Life* v. *Trudeau* (1900), 31 Can. S. C. 376.

(*e*) Bacon's Abr. Aliens.

of uncertain duration, the only satisfactory solution is to hold that the parties are absolved from further proformance, and free to make similar contracts elsewhere (*f*).

Insurances effected during war are void.

Applying these doctrines to the contract of insurance, it is clear that no policy can be effected with an alien enemy, or by an alien enemy during the existence of war. But until war is declared all insurances with or by aliens are valid, and if a loss occurs before the commencement of war the right of action is merely suspended by the outbreak of war, and after peace is restored the insurance moneys can be recovered by action (*g*).

Insurance and loss before war.

Hostilities imminent.

The law recognises no intermediate state between peace and war, and therefore, however imminent war may be, however strained the international relationship, the alien may insure, and may recover on his loss if it has occurred at any time before a state of war actually existed (*h*).

Janson v. Driefontein Consolidated, [1902] A. C. 484

Gold, the property of a company registered in the Transvaal Republic, was insured on behalf of the company by British underwriters against loss during transit from the mines within the Transvaal to England. It was seized by the Transvaal Government shortly before war broke out, and in contemplation of war with England. It was held that the company could recover on the policy after the conclusion of peace. It is unlawful to assist the King's enemies during war, but that does not extend to assisting persons who thereafter may become the King's enemies.

Loss during war caused by act of King's forces.

It is clear that an alien cannot recover from a British insurer in respect of a loss which, during war between this country and his country, has been caused at the hands of the King's forces or those of his allies (*k*). Thus he could not recover on a fire policy in respect of damage resulting from the hostile operations of the British army or navy, or on a life policy if killed in action against the King's forces.

Loss arising independently of hostilities.

It is not quite so clear whether it would be illegal for a British insurer to insure an alien against loss arising during

(*f*) *Esposito* v. *Bowden* (1857), 7 El. & Bl. 779; Chitty on Contracts, 14th Ed. 161.

(*g*) *Harman* v. *Kingston* (1811), 3 Camp. 151; *Boussmaker Ex p.* (1806), 13 Ves. 71, and a British agent effecting a marine insurance on behalf of an alien was held entitled to sue during the war in respect of a loss sustained before war. *Flindt* v. *Waters* (1812), 15 East, 260.

(*h*) *Janson* v. *Driefontein Consolidated*, [1902] A. C. 484, 497; *Muller* v. *Thompson* (1811), 2 Camp. 610.

(*k*) *Furtado* v. *Rogers* (1802), 3 B. & P.; *Gamba* v. *Le Mesurier* (1803), 4 East, 407; *Kellner* v. *Le Mesurier* (1803), 4 East, 396.

(*l*) *Brandon* v. *Curling* (1803), 4 East, 410.

war, but independently of the hostilities. Some doubt was expressed upon this point in *Janson* v. *Driefontein Consolidated* (*m*); but Lord Lindley said: "It appears to be settled that a British subject cannot, even before war, insure a person against any loss sustained by him after the war began, and whilst he is an enemy of this country," and this broad proposition is supported by the earlier authorities. Thus, Lord Ellenborough said, in *Brandon* v. *Curling* (*n*): "When the insurance is upon goods generally a proviso to this effect shall in all cases be considered as engrafted therein, viz.:—'Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the insured and insurer.' Because during the existence of such hostilities the subjects of one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects the other." If this is so, insurance with foreign companies becomes very precarious since no loss of any kind on life, fire, accident, or other policies occurring during a state of war would be enforceable.

British subjects resident in enemy's country.

The character of an alien enemy for the purpose under consideration attaches to all persons who continue to reside in the enemy's country, and thus the insurance of a British subject resident abroad may become void (*o*), but upon the outbreak of war he will be allowed a reasonable time to withdraw himself and his effects from the enemy's country before any intention to remain will be imputed to him.

Nigel Gold Mining Co. v. Hoade, [1901] 2 K. B. 849

Nigel Gold Mining Co. v. *Hoade.*

Gold was insured by British underwriters on behalf of a British company registered and having its principal office in Natal, and also incorporated in the Transvaal for the purpose of facilitating business there. The gold was seized by the Transvaal Government shortly after the outbreak of war, and it was held that the gold must be treated as the property of a British subject, and as there was no indication of any intention to continue business in the Transvaal during the war the company could recover.

Alien enemy licensed to remain.

And just as a British subject may by continued residence in the enemy's country acquire a hostile character so an alien enemy may by licence from the Crown remain and carry on his business

(*m*) [1902] A. C. 484.
(*n*) (1803), 4 East, 410, 417.
(*o*) Bacon's Abr. Aliens, and cases cited in *Nigel Gold Mining Co.* v. *Hoade*, [1901] 2 K. B. 849.

in this country, when he will be treated as a British subject and lose his hostile character (*p*). There is no illegality in the insurance of a British subject against loss which may be sustained by him at the hands of the British Government during hostilities (*r*). It was questioned in *Janson* v. *Driefontein Consolidated* (*s*), whether in the case of a loss otherwise recoverable the parties could by agreement waive the disability of the alien to sue during the war. Lord Davey (*t*) thought they could not and that the Court ought to take the objection that the plaintiff was an alien enemy. In that case the action was commenced before the conclusion of peace, but before the case reached the House of Lords peace had been signed and the point therefore had become academic.

How far does war dissolve the contract of insurance.

It is doubtful whether war does not dissolve altogether the contract of insurance in respect of future losses (*u*). If the whole operation of the contract is suspended so that no loss whatever sustained by the alien enemy during the war can be recovered, the object of the insurance is to a great extent frustrated, and the assured is left uncovered during the uncertain duration of hostilities. He cannot, moreover, lawfully pay, nor can the insurer lawfully receive, the renewal premiums during the continuance of the war, and the policy, whether it be on life or against fire or other risks, will necessarily lapse on non-performance of the condition precedent. This subject, however, has not been judicially considered in this country. In America it has been decided that a life policy is not dissolved on the outbreak of war (*x*).

(*p*) *Usparicha* v. *Noble* (1811), 13 East, 332.

(*r*) *Aubert* v. *Gray* (1861), 3 B. & S. 163, 171.

(*s*) [1902] A. C. 484.

(*t*) [1902] A. C. at p. 499.

(*u*) *Esposito* v. *Bowden* (1857), 7 El. & Bl. 763; Chitty on Contracts, 14th Ed. 161; but see Lord Halsbury in *Janson* v. *Driefontein Consolidated*, [1902] A. C. 484, 493.

(*x*) *Saltus* v. *United Insurance* (1818), 15 Johns, 523; *Statham* v. *New York Life* (1871), 45 Miss. 581; *Smith* v. *Charter Oak Life* (1876), 64 Miss. 330.

CHAPTER III

Formation of the Contract

Section I.—Doctrine of Ultra Vires

Corporations as insurers.

The great bulk of insurance business other than marine is transacted by companies which are incorporated and which can only make contracts in so far as contractual power has been conferred upon them (*a*). For the purpose of considering their contractual capacity corporations must be primarily divided into (1) common law corporations created by the Crown, and (2) statutory corporations created under the direct authority of Parliament.

Common law corporation.

Common law corporations are created by charter or letters patent from the Sovereign. The broad distinction between such corporations and those created by statute is that the former, when created, have unlimited contractual capacity, whereas the capacity of the latter is limited to the powers conferred on them by statute. Full contractual capacity is a necessary incident of a common law corporation. It may use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and may deal with its property as a natural person might. Any attempt on the part of the Crown to limit the contractual capacity even by express negative words in the charter is ineffective as a limitation of the company's powers. If there are conditions in the instrument that the corporation which it creates shall not do certain things any infringement of the conditions may justify the Crown in repealing the charter or letters patent (*aa*), but if the Crown takes no such step neither

(*a*) Strictly speaking there is no question of *ultra vires* in the case of companies which are not incorporated, such as common law partnerships or mutual associations formed under a deed of settlement. The capacity, in the one case of the partnership, and in the other of the individual members, to contract is absolute, and the only question is as to the authority of the directors to bind the partnership or individuals as the case may be, *vide infra*, p. 185.

(*aa*) *Reg.* v. *Eastern Archipelago Co.* (1853), 2 El. & Bl. 857; Blackburn, J., in *Riche* v. *Ashbury Railway Carriage Co.* (1874), L. R. 9 Ex. 224, 263.

the corporation nor the person who has contracted with it can allege that any contract made was beyond the capacity of the corporation (*b*). No objection therefore can be taken that an insurance company created by charter or letters patent has issued a policy which is *ultra vires*.

Statutory corporations.

Statutory corporations, on the other hand, cannot be bound by any contract which is beyond the powers conferred upon them. The company as a legal entity is incapable of making a contract outside the scope of its statutory powers. If it purports to make such a contract, the contract has in fact no legal existence, and even although every single shareholder gives his express consent the contract does not bind the company (*c*). Where the contracting parties are *in pari delicto*, having equal knowledge of the fact that the company was acting *ultra vires*, the company can plead the want of power as a defence to any action brought against it. It is said that when the parties are not *in pari delicto* a company contracting *ultra vires* with an innocent party cannot set up its own illegality as a defence to an action on the contract (*d*), and this undoubtedly is so when the illegality is such that no inspection of the memorandum, deed, or act of parliament, would have disclosed the illegality. Thus where the company has power to do acts subject to the performance of certain prescribed formalities as where it has power to borrow upon the authority of a special resolution, persons dealing with the company are not bound to inquire whether the formalities have been observed, and if upon the face of their contract the company appears to be acting *intra vires*, they are entitled as against the company to assume that everything has been done which ought to have been done (*e*). But where the illegality would have been disclosed upon a perusal of the memorandum, deed, or act of parliament, the party contracting with the company cannot plead ignorance, and the company, on being sued, can take the objection that the contract was *ultra vires* (*f*).

(*b*) Bowen, L.J., in *Baroness Wenlock* v. *River Dee* (1887), 36 Ch. D. 674, 685 n.; Blackburn, J., in *Riche* v. *Ashbury Railway Carriage Co.* (1874), L. R. 9 Ex. 224, 263; Archibald, J., in the same case, at p. 292; *British South African Company* v. *De Beers*, [1910] 1 Ch. 354.

(*c*) *Ashbury Railway Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653, 672.

(*d*) *Doolan* v. *Midland Railway Co.* (1877), 2 A. C. 792.

(*e*) *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *Agar* v. *Athenæum Life* (1858), 3 C. B. (N. S.) 725; but see *Athenæum Life* v. *Pooley* (1859), 1 Giff. 102.

(*f*) *Ernest* v. *Nicholls* (1857), 6 H. L. 401, 421, 423; *Balfour* v. *Ernest* (1859), 5 C. B. (N. S.) 601; *Arthur Average Association, In re*

Since the company cannot be made directly liable upon a contract *ultra vires*, it would seem to follow that it cannot be made liable indirectly on any principle of holding out or estoppel (*g*). It has, however, been said that a company which assumes a power to make contracts *ultra vires*, and makes representations to the public that it has such power may be estopped from denying the truth of the representations (*h*), and that a company which has taken the chance of a contract of insurance turning out in its favour cannot take advantage of the defence of *ultra vires* (*i*).

Statutory corporations may derive their authority either from (1) a special act of parliament; (2) registration under the Joint Stock Companies Act, 1844; or (3) registration under the Companies Acts, 1862 to 1908. All these stand very much upon the same principles as regards their contractual capacity. The powers of the first are contained in the special Act, of the second in the registered deed of settlement, and of the third in the memorandum of association. If the necessary authority to contract is not found in whichever of these documents is appropriate to the case, then the power does not exist (*k*).

The theory that a statutory corporation has full contractual power except in so far as limited by the instrument of incorporation was exploded as regards companies under the Companies Acts in *Ashbury Railway Carriage Company* v. *Riche* (*l*). The memorandum states affirmatively the ambit and extent of vitality and power which by law are given to the corporation (*m*). It is the area beyond which the action of the company cannot go (*n*). The principle applied in *Ashbury Railway Carriage Company* v. *Riche* to companies under the Act of 1862, is equally applicable to a company incorporated by special act of parliament (*o*), or

(1876), 34 L. T. 942; *Smith* v. *The Hull Glass Co.* (1849), 8 C. B. 668; *Chapleo* v. *The Brunswick Building Society* (1881), 6 Q. B. D. 696; *London and County Assurance, In re* (1861), 30 L. J. Ch. 373.

(*g*) *Great North-West Central Ry.* v. *Charlebois*, [1899] A. C. 114.; *Islington Vestry* v. *Hornsey Urban Council*, [1900] 1 Ch. 695, 706.; *Chapleo* v. *The Brunswick Building Society* (1881), 6 Q. B. D. 696.

(*h*) *Montreal Assurance Co.* v. *MacGillivray* (1859), 13 Moore, P. C. 87; *Balkis Consolidated* v. *Tomkinson*, [1893] A. C. 396.

(*i*) *Collett* v. *Morrison* (1851), 9 Hare 162.

(*k*) *Athenæum Life* v. *Pooley* (1858), 3 De G. & J. 294.

(*l*) (1875), L. R. 7 H. L. 653.

(*m*) Lord Cairns in *Ashbury Railway Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653, 670.

(*n*) Lord Cairns in *Ashbury Railway Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653, 671.

(*o*) Lord Watson in *A.-G.* v. *Great Eastern Railway Company* (1880), 5 A. C. 473, 486; Cotton, L.J., in *Reg.* v. *Reed* (1880), 5 Q. B. D. 483, 488.

registered under the Companies Act of 1844 (*p*). If the business of an insurance company is limited to a certain class of risks, any insurance beyond the defined limit would be void and unenforceable (*q*). Where a policy included risks which were *ultra vires*, and also risks which were *intra vires*, the policy was held valid as to the latter, although void and unenforceable as to the former (*r*). Power is implied to do all acts which are in the ordinary course of business incidental to the powers expressly conferred (*s*), but it must be shown that they can fairly be regarded as incidental to or consequential upon these powers (*t*). It is not sufficient to show that one class of business can be conveniently worked with, and would be beneficial to, another class of business for which power has been expressly conferred; it must be incidental (*u*). Power may, however, be given to a company in general terms to transact all classes of insurance business (*x*). The Court will, if possible, avoid any construction of the words used which would unduly limit the scope of the company's business. Thus power to issue policies includes power to make any written contract of insurance although not in the ordinary form of a policy (*y*). It has been doubted whether it would be *ultra vires* for a life insurance company to issue a policy at a premium out of all proportion to the age of the life insured as where a policy had been allowed to drop, and the company, with or without payment of arrears, issued a fresh policy at the same premium as the original policy (*z*). It has been held that it is not *ultra vires* of the company to make an *ex gratia* payment to a policy holder upon a loss not technically within the policy, and it is conceived that on the same grounds, that is because the transaction is in the business interests of the company, it would not be *ultra vires* to renew a lapsed life policy at the old premium (*a*).

(*p*) *Ernest* v. *Nicholls* (1857), 6 H. L. C. 401, 421, 423.

(*q*) *Phœnix Life, In re* (1862), 2 John & H. 441.

(*r*) *C. P. Ry. Co.* v. *Ottawa Fire* (1907), 39 Can. S. C. 405.

(*s*) Lord Selborne in *A.-G.* v. *Great Eastern Railway Co.* (1880), 5 A. C. 473, 478; *Meredith, Ex parte* (1863), 32 L. J. Ch. 300.

(*t*) Lord Loreburn, L.C., in *A.-G.* v. *Mersey Railway Co.*, [1907] A. C. 415.

(*u*) Lord Macnaghten, in *London County Council* v. *Attorney-General*, [1902] A. C. 165, 169.

(*x*) *Norwich Provident Insurance, Bath's Case* (1878), 8 Ch. D. 334.

(*y*) *Norwich Equitable Fire, In re* (1887), 57 L. T. 241.

(*z*) *Windus* v. *Lord Tredegar* (1866), 15 L. T. 108.

(*a*) *Taunton* v. *Royal Insurance* (1864), 2 H. & M. 135. It is in fact very usual to renew a lapsed policy at the old premium if arrears are paid and the assured is in good health.

Norwich Provident Insurance, Bath's Case (1878), 8 Ch. D. 302

Norwich Provident Insurance, Bath's Case.

The company's deed of settlement stated the objects to be insurance against sickness, ill-health, advanced age . . . upon lives or survivorship . . . to grant, purchase, and sell endowments by way of annuity, and generally to make and effect insurance against all and every kind of risk, special or general, which may be effected according to law and which may at any time hereafter be determined upon by a general meeting. . . . It was held that a resolution at a general meeting to extend the business to fire and fidelity guarantee risks was *intra vires*.

Norwich Equitable Fire, In re (1887), 57 L. T. 241

Norwich Equitable Fire, In re.

The company's deed of settlement stated the objects of the company as insuring from loss by fire . . . effecting reinsurance . . . giving to or taking from other offices policies by way of guarantee for the purpose of dividing the risk of insurance. The company's reinsurances or guarantees were done by way of a request note: "The R. Co. request guarantee from N. Co. for £ , part of a policy No. . . . ." This was accepted by an indorsement: "I hereby undertake on behalf of the N. Co. to guarantee the R. Co." It was held that the indorsed request note was a "policy of guarantee" and within the powers given by the deed of settlement. The company also did what was called Treaty business; that is, they undertook to reinsure one-eighth of every fire risk which the agent of another company in Smyrna might effect on behalf of that other company, and "agreed to follow the fortunes of that other company in respect of such one-eighth risk as if the two companies formed only one." This arrangement was also held to be *intra vires*.

Taunton v. Royal Insurance (1864), 2 Hem. and M. 135

Taunton v. Royal Insurance.

The company's policies excluded damage by explosion other than gas. An explosion of gunpowder occurred on board a vessel lying in the Mersey, and a large number of houses in Liverpool were damaged by the concussion. The company's directors proposed to make an *ex gratia* payment to their policy holders in respect of such damage, and it was held that as that was a reasonable thing to do with a view to future business it was within the company's powers.

Meredith, Ex parte (1863), 32 L. J. Ch. 300

Meredith, Ex parte.

The deed of settlement of a fire insurance company provided that the liability should by limited to the funds of the company; but the deed also gave power to the directors to sign bills for the purpose of discharging claims, such bills to take effect only on the capital stock of the company. Agents authorised by the directors issued bills in discharge of fire claims, and it was held that the company were liable upon the bills to the full amount, and not merely to the extent of the capital stock. Bills of exchange must be unconditional, and could not in their nature be limited so as to affect the capital stock only, and therefore the power to issue bills must be read without any such restriction.

Companies' powers defined in memorandum, deed of settlement

In the case of companies formed under the Companies Acts, 1862 to 1908, the powers are defined in the memorandum of association, which is unalterable except, to a limited extent, by leave of the Court; and the rules and regulations for the conduct of

business are contained in the articles of association, which can be altered by the company in the manner prescribed therein. Under the Joint Stock Companies Act, 1844, the deed of settlement fulfilled the double duty of defining the powers and regulating the conduct of business, and thus it is sometimes difficult in construing a deed of settlement to determine whether a particular provision limits the scope of the company's capacity or whether it merely defines the scope of the directors' authority, the important distinction being that the company as a whole can ratify an act done by the directors without authority, but cannot ratify an act which the company itself has no power to do. When the deed merely prescribes the manner in which an act shall be done, as for instance the necessary formalities for the execution of a policy, the presumption is that the provision is not intended to limit the company's capacity (*b*). The provision may limit the directors' authority by permitting them to contract only in a particular form (*c*), or it may be merely in the nature of a direction for the guidance of the directors without actually limiting their authority (*d*). Where the company is incorporated by a special Act, similar difficulties may arise from the want of a distinct dividing line between the company's powers and the directors' powers or other rules for internal management.

or act of parliament.

Section II.—Authority of Directors

Unless restrained by particular provisions in the articles, deed, or Act, as the case may be, the directors of a company have implied authority to do everything necessary for carrying on the business of the company in a customary and proper manner (*e*). Even although the manner of conducting business is not expressly defined, the directors' authority is limited to what is usual and right in the particular business (*f*).

Implied authority.

Just as persons dealing with a company have notice of the company's power, so also they have notice of any limitation upon

Authority expressly limited.

(*b*) *Prince of Wales Life* v. *Harding* (1857), El. B. & E. 183.

(*c*) *Athenæum Life, In re* (1858), 4 K. & J. 549.

(*d*) *Prince of Wales Life* v. *Harding* (1857), El. B. & E. 183; but see Pollock, C.B., in *Hambro* v. *Hull and London Fire Insurance* (1858), 3 H. & N. 789, 796.

(*e*) *Smith* v. *The Hull Glass Co.* (1849), 8 C. B. 668; *Charles* v. *National Guardian* (1857), 5 W. R. 694; *Norwich Equitable Fire, In re* (1887), 57 L. T. 241.

(*f*) *Small* v. *Smith* (1884), 10 A. C. 119; *Security Mutual Life* (1858), 6 W. R. 431; *Hambro* v. *Hull and London Fire* (1858), 3 H. & N. 789.

the authority of the directors contained in the articles, deed, or Act, and if the directors act outside their authority, as therein defined, they do not bind the company (*g*) unless the company has extended the directors' authority, or has subsequently ratified the unauthorised act. But where persons are acting *de facto* as directors, and apparently within the scope of their authority, and there is nothing on the face of the contract made with them to show that all proper formalities have not been observed, the company are bound, and a policy holder is not affected by any irregularity in the internal management of the company's affairs, whether it be some informality in the appointment of the directors (*h*) or in the execution by them of their powers (*i*).

Prince of Wales Life v. Harding (1857), El. B. & E. 183

Prince of Wales Life v. *Harding.*

The company's deed of settlement provided that the common seal should not be affixed except by the order of three directors, signed by them and countersigned by the manager, and that every policy should be given under the common seal and the hand of three directors. A policy was issued sealed with the seal of the company and signed by three directors, one of whom was the manager. No order had previously been signed for the affixing of the seal. The Court were of opinion that this provision in the deed was only for the guidance of the directors and intended to operate only as between them and the shareholders, and secondly, that if it did have any effect as between the company and a policy holder, the latter, when he received a policy apparently in order, was entitled as against the company to assume that the directors who signed it had done their duty, and that they had obtained the preliminary order for executing the policy.

County Life Insurance, In re (1870), L. R. 5 Ch. 288

County Life Insurance, In re.

P was the promoter of a company formed under the Companies Act, 1862, for the purpose of carrying on the business of life insurance. The articles provided that A, B, C, and D should be directors and that P should be manager. The subscriptions not being satisfactory, the directors called a meeting and passed a resolution that no shares should be allotted or further steps taken. P took no notice of this resolution, but himself appointed other directors and a secretary, and proceeded to allot shares and carry on business, and policies were issued signed by the new directors and under the company's seal. On the company being wound up it was held that the policy holders were entitled to prove as creditors of the company. The policies on the face of them were perfectly valid and binding. People dealing with those who held themselves

(*g*) *Athenæum Life, In re* (1858), 4 K. & J. 549; *Hambro* v. *Hull and London Fire* (1858), 3 H. & N. 789; *Wood, Ex parte* (1853), 17 Jur. 813; *Lawe's Case* (1852), 1 De G. M. & G. 421; *Featherstonhaugh* v. *Lee Moor Porcelain Co.* (1865), L. R. 1 Eq. 318.

(*h*) *County Life Insurance, In re* (1870), L. R. 5 Ch. 288; *Mahony* v. *East Holyford* (1875), L. R. 7 H. L. 869.

(*i*) *Prince of Wales Life* v. *Harding* (1857), El. B. & E. 183.

out as acting for a company were taken to have read the general Act and articles of association, but they were not taken to have knowledge of the internal affairs of the company.

Extension of authority.

The authority of the directors may be extended by the company. In the case of a company under the Companies Acts the company are absolute masters of their own internal regulation, and by altering the articles of association they may extend the directors' authority. This may be done by passing a special resolution to that effect (*l*). The articles cannot be altered by an ordinary resolution, and therefore an ordinary resolution does not authorise the directors to act beyond the authority conferred by the articles (*m*). But when an act within the power of the company has been done by the directors without authority, it may be ratified by an ordinary resolution (*m*).

The whole body of shareholders in any company may by general consent, and without any formality, either sanction beforehand, or subsequently ratify, an act of the directors otherwise *ultra vires* (*n*). The shareholders may by acquiescence in a course of conduct on the part of the directors enlarge their authority beyond the limits defined in the articles, Act, or deed of settlement. But the company is not bound by the informal concurrence of some of the shareholders unless the acquiescence of each shareholder can be reasonably inferred. In *In re Athenæum* (*o*), Page Wood, V.C., said that if the form of a policy were not authorised by the deed of settlement, it would be very doubtful whether the shareholders could be said to have acquiesced in its being so executed unless notice distinct and clear had been brought home to them in the shape of a report that the policy had been executed on their behalf. In *Ashbury Company* v. *Riche* (*p*), Lord Cranworth, speaking of ratification, said that in every case of ratification by shareholders of an act *ultra vires* there ought to be no mere presumption of consent from notice of the unauthorised act, and absence from a meeting called to legalise it, but there ought to be proof of the

(*l*) Comp. Act, 1908, secs. 13, 69. A special resolution is one passed by a three-fourths majority at a general meeting of the company held after notice specifying the particular matter to be dealt with, and confirmed by a simple majority at a subsequent general meeting.

(*m*) *Grant* v. *United Kingdom Switchback Railway Co.* (1888), 40 Ch. D. 135.

(*n*) Lord Cairns in *Ashbury Railway Carriage Co.* v. *Riche* (1875), 7 H. L. 653, 675.

(*o*) (1858), 4 K. & J. 549.

(*p*) (1875), 7 H. L. 653, 680.

actual assent of each shareholder; but the same judge said in *Houldsworth* v. *Evans* (*q*), that if with knowledge of the facts the shareholders remain a long time and take no step whatever, still more if they remain so while great alterations are going on in the company, they must be taken to have retrospectively sanctioned what has been done; and in *Phosphate of Lime Company* v. *Green* (*r*), it was held that it was certainly unnecessary to prove conclusively that each shareholder had notice of the facts, and consented. It is sufficient to show that the facts were made known to the shareholders as a body, and that they ought to have objected at the time if they did not intend to sanction the acts of the directors. If there is evidence of consent in this sense it is a question of fact for a jury to say whether there was consent or not.

Section III.—Authority of Agents

Apparent authority.

Much insurance business is transacted through agents, and therefore the question of the agent's authority is one of supreme importance.

A principal is bound, not only to the extent of the actual authority which he has given to his agent, but to the extent of the apparent authority which he has permitted his agent to assume in acting with third persons (*s*).

The authority of a company's agent may be defined in the company's Act, deed, or articles, and as persons dealing with the company are supposed to have read these documents, they are deemed to have notice of any restrictions on the agent's authority contained therein (*t*). A policy holder must also be deemed to have notice of any limitations upon the agent's authority expressed in his policy (*u*), but he is probably not deemed to have notice of limitations contained in the company's ordinary form of policy before a policy has been delivered to him (*x*).

The general rule is that a person dealing with an agent must make reasonable inquiry as to his authority and not merely assume that the agent has authority because he says

(*q*) (1868), L. R. 3 H. L. 263, 276.
(*r*) (1871), L. R. 7 C. P. 43.
(*s*) *Montreal Assurance* v. *MacGillivray* (1859), 13 Moore P. C. 87, 120.
(*t*) *Montreal Assurance* v. *MacGillivray* (1859), 13 Moore P. C. 87; *Modern Woodmen* v. *Tevis* (1902), 117 Fed. Rep. 369.
(*u*) *Conway* v. *Phœnix Mutual* (1893), 140 New York, 79.
(*x*) *Coleman's Depositories, Ltd.* v. *Life and Health Association*, [1907] 2 K. B. 798.

so (*y*). An agent, however, has the full apparent authority which would in ordinary course attach to the position which the principal permits him to occupy (*z*), and private instructions to the contrary may be disregarded unless the person dealing with him has actual or constructive notice of such instructions. Thus general agents of a company who are entrusted with blank policies, signed by the directors and merely requiring the agent's signature to make the execution complete, have apparent authority to accept all risks in the ordinary course of business to which such policies would be applicable (*a*). An agent appointed to receive and forward applications for insurance and to countersign and deliver completely executed policies issued from the head office has, in general, no apparent authority to make any binding contract with applicant (*b*), but an agent appointed to receive applications on behalf of a fire office is usually entrusted with forms for interim insurance, and has thereby apparent authority to bind the company in terms of the printed form. An agent entrusted with renewal receipts has apparent authority to renew the risk in ordinary course, but not to grant a renewal so as to cover a loss which has already occurred (*c*). An agent entrusted with a completely executed policy has apparent authority to deliver it to the assured against payment of premium, and the company cannot allege secret instructions to the agent not to deliver in certain events (*d*).

The extent of the agent's apparent authority depends upon the general custom of insurance business, and may vary in any particular county or place in accordance with the local practice. This principle is thus stated in the Supreme Court of the United States: "It is an elementary principle applicable to all kinds of agency that whatever an agent does can only be done in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity and prescribes the manner as well as the limit of its exercise."

(*y*) *Potter* v. *Phœnix* (1894), 63 Fed. Rep. 382.

(*z*) *Rainbow* v. *Howkins*, [1904] 2 K. B. 322; *Potter* v. *Phœnix* (1894), 63 Fed. Rep. 382.

(*a*) *Ruggles* v. *American Central* (1889), 114 New York, 415; *Sanford* v. *Orient* (1899), 174 Mass. 416.

(*b*) *Linford* v. *Provincial Horse and Cattle Insurance* (1865), 34 Beav. 291; *Insurance Co.* v. *Mowry* (1877), 96 U. S. 544.

(*c*) *Carpenter* v. *Canadian Accident* (1908), 18 Ont. L. R. 388.

(*d*) *American Employers* v. *Barr* (1895), 68 Fed. Rep. 873.

The practice of a particular agent, if recognised by the company, may be such as to extend the agent's apparent authority beyond the authority usually held by similar agents in other companies (*e*).

When the agent's actual authority is less than his apparent authority the company must show that the person dealing with the agent had clear and unambiguous notice of the restriction. It is sufficient if the applicant's agent had clear notice of the restricted authority of the company's agent; but where one insurance agent, not being able to place a risk with his own company, handed the application on to the agent of another company, the first agent was held not to be the agent of the assured, so as to fix him with his knowledge of the second agent's restricted authority (*f*). If the notice of restriction is ambiguous, and persons acting on it fairly and honestly construe it in one sense, the company cannot afterwards be released on the ground that it intended that it should be construed in another sense (*g*), and on this principle it was held that where a company sent to its agent a list of expiring fire policies, and marked some "renew" and others "drop," and this was shown to the assured whose policy was marked "drop," he was justified in reading it not as an instruction to drop the policy altogether but as an instruction to reduce the amount (*h*).

Restrictions upon the agent's authority are frequently printed in the proposal forms supplied to the agents, and when such form is presented to the applicant to fill up or sign, it is his duty to read it, and not to trust to what the agent tells him (*i*); but the restriction must be printed prominently upon the application form, and if printed on the back or in such small print that an ordinary prudent man could not be expected to see it the applicant will not necessarily be deemed to have had notice of it (*k*). The restrictions upon the agent's authority contained in the proposal form or policy or elsewhere may be waived

(*e*) *Insurance Co.* v. *Colt* (1874), 20 Wall. 560; *Lightbody* v. *North American Insurance* (1840), 23 Wend. 18; *Brockelbank* v. *Sugrue* (1831), 5 Car. & P. 21.

(*f*) *Teutonia Insurance* v. *Ewing* (1898), 90 Fed. Rep. 217.

(*g*) *Ireland* v. *Livingstone* (1872), L. R. 5 H. L. 395.

(*h*) *Winne* v. *Niagara Fire* (1883), 91 N. Y. 185.

(*i*) *Henry* v. *Agricultural Mutual* (1865), 11 Grant, 125; *Harris* v. *Great Western* (1876), 1 Q. B. D. 515.

(*k*) *Cockburn* v. *British American* (1890), 19 Ont. R. 245; *Henderson* v. *Stevenson* (1875), L. R. 2 Sc. & Div. 470; *Richardson* v. *Rowntree*, [1894] A. C. 217; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178; *Parker* v. *South-Eastern* (1877), 2 C. P. D. 416.

by a persistent disregard of the restriction by the agent and the company (*l*).

Where an underwriter at Lloyd's had express authority from his names to act as their agent for the purpose of underwriting policies of insurance, and carrying on the ordinary business of an underwriter at Lloyd's, it was held that he had authority to underwrite guarantee policies, that being part of the ordinary business of an underwriter at Lloyd's (*m*).

Agent acting in his own interests or dishonestly.

If an agent has authority, or is held out by his principal as having authority, to make any contract or do any act on behalf of his principal, he will bind his principal by making such contract or performing such act, even although in fact he is acting in his own interests, and with intent to defraud his principal (*m*). If the person dealing with the agent acts in good faith he can, as against the principal, enforce a contract so made (*m*). Thus an agent who fraudulently issues the company's cover notes and appropriates the premiums to his own use will bind the company (*o*).

Authority to perform ministerial acts only.

But where an agent is held out not as having authority to contract but only as having authority to perform some ministerial act, such as the affixing of a seal or the counter-signing of a policy otherwise duly executed by the directors, the company is not estopped from denying that the policy to which he affixed the seal, or which he countersigned, was not in fact executed by the directors (*p*). And if an agent is only held out as having authority to communicate the decision of the directors to a person who has made a proposal for insurance, such agent does not bind the company if he says the directors have accepted the proposal, whereas, in fact, they declined it (*q*).

Agent's authority to delegate duties.

Primâ facie an agent has no power to delegate his functions to another. Where an agent, appointed with power to grant interim receipts and entrusted with blank receipt forms, employed a canvasser to solicit insurances and gave him receipt forms and authority to sign interim receipts, it was held that the company

(*l*) *Cockburn* v. *British American* (1890), 19 Ont. R. 245; *Post* v. *Aetna Insurance* (1864), 43 Barb. 351.

(*m*) *Hambro* v. *Burnand*, [1904] 2 K. B. 10.

(*o*) *Hawke* v. *Niagara District* (1876), 23 Grant, 139; *Patterson* v. *The Royal* (1867), 14 Grant, 169.

(*p*) *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439.

(*q*) *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A. C. 174; *More* v. *New York Bowery* (1892), 130 N. Y. 537. See *contra*, *Union Central* v. *Phillips* (1900), 102 Fed. Rep. 19; *Penley* v. *Beacon* (1859), 7 Grant, 130.

were not bound by the receipts so signed by the canvasser (*r*). Where a policy provided that it should not be valid unless countersigned by the agent, the signature of the agent's clerk signing in the name of the agent " per C.F.M." was held not to be sufficient to complete the policy (*s*).

Company's agent insuring with the company.

An officer or agent of a company may lawfully insure in his own company, but an agent with a general authority to bind the company cannot accept his own proposal on behalf of the company (*t*). In an American case (*u*) where A was secretary of X company, and general agent of Y company, and in these capacities concluded a contract of reinsurance between the two companies, it was held that the policy was voidable in equity at the election of either company, but was valid unless avoided. It was alleged that A exceeded his authority as agent of the Y company in reinsuring the X company, but it was held that it was within the general scope of his apparent authority, and the fact that he was secretary of the insured company did not affect it with notice of his want of authority. The rule as to the knowledge of an agent being the knowledge of the principal is confined to cases where the knowledge comes to the agent in the course of the transaction in question.

Ratification by insurers.

If a contract is made by an agent without authority it may be afterwards ratified by the principal on whose behalf it was, or was professed to be, made. A contract made in the name of a principal without his authority may be ratified by the principal, although in fact the agent making the contract intended to make it for his own benefit (*x*); but a contract made without authority must be professedly made on behalf of some principal, either disclosed or undisclosed, and if the agent makes the contract without stating that he is acting as an agent, the fact that he intended to make it on behalf of a particular principal is not material, and does not entitle the principal to ratify (*y*).

The right to ratify a contract must be exercised within a reasonable time, the right of the principal being an election to

(*r*) *Summers* v. *Commercial Union Insurance* (1881), 6 Can. S. C. 19; *Canadian Fire* v. *Robinson* (1901), 31 Can. S. C. 488.

(*s*) *Walkerville Match Co.* v. *Scottish Union* (1903), 6 Ont. L. R. 674.

(*t*) *Pratt* v. *Dwelling House Mutual* (1891), 130 New York, 206.

(*u*) *New York Central* v. *National Protection* (1854), 20 Barb. 468; 14 New York, 85.

(*x*) *Tiedemann and Ledermann, In re*, [1899] 2 Q. B. 66.

(*y*) *Keighley Maxsted & Co.* v. *Durant*, [1901] A. C. 240.

confirm, and not an election to repudiate (*z*). The principal may ratify the contract even after the contract has been repudiated by the person with whom the agent contracted (*a*), but if the agent and third person agree to rescind a contract which the agent has made on behalf of his principal the principal cannot afterwards ratify (*b*).

A principal cannot ratify a contract which he could not in the first instance have made (*c*), and an agent cannot on behalf of the principal ratify a contract made by another agent or a sub-agent unless the agent purporting to ratify has either authority to make the contract or authority to ratify it (*d*).

Ratification may be express or it may be implied from knowledge of and acquiescence in the contract made by the agent; but ratification can only be with full knowledge of the character of the act to be adopted or with intention to adopt it under any circumstances (*e*). Thus if a contract of insurance has been made on behalf of a company, but in a form not authorised, it may be ratified by the subsequent conduct of the company (*f*), but the mere recognition of the contract does not amount to ratification unless the company has notice of the irregularity, or acts in such a way as to warrant an inference that it intends to waive any question as to the regularity of the contract (*g*).

Section IV.—Warranty of Authority

By directors and agents.

If directors of a company or other persons purporting to act as agents exceed their powers they may be personally liable to third parties for a breach of warranty of authority.

A person purporting to make a contract on behalf of another warrants that he has the authority of that other to make the contract, and if he has not authority he is liable to compensate the party with whom he contracts for any damage which may result from his want of authority (*h*).

(*z*) *In re Portuguese Consolidated Mines* (1890), 45 Ch. D. 16.

(*a*) *Bolton Partners* v. *Lambert* (1888), 41 Ch. D. 295.

(*b*) *Walter* v. *James* (1871), L. R. 6 Ex. 124.

(*c*) *La Banque Jacques-Cartier* v. *La Banque d'Epargne* (1887), 13 A. C. 111.

(*d*) *Portuguese Consolidated Mines, In re* (1890), 45 Ch. D. 16.

(*e*) Willes, J., in *Phosphate Lime Co.* v. *Green* (1871), L. R. 7 C. P. 43, 56.

(*f*) *Reuter* v. *Electric Telegraph* (1856), 6 El. & Bl. 349.

(*g*) *Lewis* v. *Read* (1845), 13 M. & W. 834; *Freeman* v. *Rosher* (1849), 13 Q. B. 780.

(*h*) *Collen* v. *Wright* (1857), 8 El. & Bl. 647; *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295; *Weeks* v. *Propert* (1873), L. R. 8 C. P. 427.

The fact that the contracting party could have ascertained the absence of authority by making inquiry does not affect the agent's liability, and therefore directors of a company entering into a contract *ultra vires* of the company or beyond the scope of their own authority may be liable for breach of warranty of authority, and this notwithstanding that the want of power or authority was patent in the company's Act, deed of settlement, memorandum, or articles (*i*).

Directors or other agents of a company may become personally liable by representing that a sub-agent has greater or other authority from the company than he has in fact (*k*), or if they permit a sub-agent to hold himself out as having such authority.

Where a party dealing with the directors or other agents of a company has in fact notice of the limitations upon their authority, and the parties enter into a contract under a mutual mistake in law as to the meaning or effect of the limitation, there is no implied warranty that the view taken of the law is the right one (*l*).

Section V.—Form of the Contract

Contracts of marine insurance.

There is apparently no absolute rule of law requiring any contract of insurance other than marine to be made in any particular form. The law requires every contract for sea insurance to be expressed in a policy (*m*), and the policy must be stamped (*n*), but since 1876 it may be stamped at any time after execution on payment of a penalty (*o*). It has never been definitely settled whether or not a slip initialed by underwriters at Lloyd's on an agreement for a marine policy is in itself a " policy " within the meaning of the Stamp Act. If it is it can be stamped and enforced in a court of law as a binding contract, but if not it is merely evidence of a moral obligation. In *Home Marine Insurance* v. *Smith* (*p*), Mathew, J., held that a slip was not a

(*i*) *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360; *Chapleo* v. *The Brunswick Building Society* (1881), 6 Q. B. D. 696; *Firbank's Exors.* v. *Humphreys* (1886), 18 Q. B. D. 54; *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276.

(*k*) *Cherry* v. *Colonial Bank of Australasia* (1869), L. R. 3 P. C. 24.

(*l*) *Beattie* v. *Lord Ebury* (1874), L. R. 7 H. L. 102; *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750.

(*m*) Stamp Act, 1891, 54 & 55 Vict. c. 39, sec. 93.

(*n*) Stamp Act, 1891, 54 & 55 Vict. c. 39, sec. 93, Schedule I., Policy of Sea Insurance.

(*o*) Stamp Act, 1891, 54 & 55 Vict. c. 39, sec. 95.

(*p*) [1898] 1 Q. B. 829.

policy, and therefore could not be stamped and sued on. The Court of Appeal in that case held that the particular slip or cover note in question was not a valid policy since it did not specify the sum or sums assured as required by section 93 of the Stamp Act, but they declined to decide whether a slip could be treated as a policy if it contained all the necessary particulars.

The Stamp Act.

Contracts of insurance other than on marine risks are fortunately free from any doubt of this kind. The Stamp Act, 1891, requires all policies of insurance to be stamped, but it does not expressly avoid contracts of insurance other than marine which are not expressed in a policy.

Informal writings.

A Lloyd's slip in respect of a fire risk on land can be enforced as a binding contract (*q*), and there is apparently nothing in law to prevent any contract of fire, life, accident, burglary, or any other kind of insurance on land from being constituted by informal writings (*r*), or even by mere oral communications (*s*).

Oral contracts.

It has been suggested that an oral contract of insurance would be void since it is evasive of the Stamp Act, but the absence of any provision in the Act to this effect and the contrast with the express provision as to marine insurance points to the inference that there was no intention to prohibit any informal contracts of insurance except in respect of marine risks.

The Statute of Frauds.

A contract of insurance may come within the 4th section of the Statute of Frauds, which provides that no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing. If a contract may be fully performed within the year the statute does not apply (*t*), and therefore contracts for life insurance are probably not within the statute. Contracts for fire and burglary insurance and the like are not quite so clearly outside the statute. On June 20th A promises to insure B's house for a year from June 25th. A's part cannot be performed within the year because, even although there is a loss within the year, he is still liable for further loss up to June 25th, which is more than a year from

(*q*) *Thompson* v. *Adams* (1889), 23 Q. B. D. 361.

(*r*) *Eames* v. *Home Insurance* 4 (1876), 94 U. S. 621.

(*s*) *Coulter* v. *Equity Fire* (1904), 9 Ont. L. R. 35; *Relief Fire* v. *Shaw* (1876), 94 U. S. 574; *Mills* v. *Albion Insurance* (1826), 4 S. 575.

(*t*) *MacGregor* v. *MacGregor* (1888), 21 Q. B. D. 424.

the date upon which the contract was made, but it has been held that it is sufficient if one party to the contract can perform his part within a year, however long a period may have to elapse before the agreement is performed by the other party (*u*), and as the assured may perform his part by paying the premium within the year it would seem that the contract is not within the statute. Things which the assured must do as a condition precedent to recovering upon a loss, such as giving notice and furnishing proofs, do not extend the assured's obligations beyond the year, because these are not matters in respect of which the insurer cannot enforce performance if the assured chooses to forgo his claim. Contracts of insurance could be conceived which would fall within the statute. It was held in America (*x*) that an oral agreement that until notice to the contrary a fire policy then current should be renewed from year to year, and the assured should pay the premiums on demand, was not within the Statute of Frauds (*y*), but it is difficult to see how such a contract could be performed by either party within the year unless the agreement was determined by notice, and the fact that an agreement may be determined within a year does not take it out of the Statute (*z*).

Whether custom requires writing.

The law in some countries requires all contracts of insurance to be made in writing, and in an American case it was contended that the custom among business men was such that a like rule had been incorporated into the law merchant and ought to be recognised as part of the common law of England. The Supreme Court of the United States, however, rejected this contention, and held that where the president of an insurance company was in the habit of making oral agreements the company were bound (*a*).

No formalities required by law.

Restrictions therefore upon the form in which a contract of insurance other than marine may be made are seldom imposed by law, but if at all by the rules of insurance companies or the general practice of insurance business which permits the companies' agents to contract only in a particular form.

(*u*) North, J., in *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, 276; *Donellan* v. *Read* (1832), 3 B. & Ad. 899; *Cherry* v. *Heming* (1849), 4 Ex. 631; *Erskine* v. *Adeane* (1873), L. R. 8 Ch. 756.

(*x*) *Trustees of Baptist Church* v. *Brooklyn Fire* (1859), 19 N. Y. 305.

(*y*) See the same point raised but not decided in *Isaacs* v. *The Royal* (1870), L. R. 5 Ex. 296.

(*z*) *Dobson* v. *Collis* (1856), 1 H. & N. 81; *Reeve* v. *Jennings*, [1910] 2 K. B. 522.

(*a*) *Commercial Mutual Marine* v. *Union Mutual* (1856), 19 How, 318.

Whether corporations must contract under seal.

The general rule of law is that a corporation is bound only by a contract under its corporate seal, but the exceptions engrafted upon this rule are so numerous that the rule has for practical business purposes almost entirely disappeared. One exception is that a trading corporation may without seal make all such contracts as are necessary for carrying on the trade for which it was incorporated (*b*), and therefore an insurance company may, unless expressly prohibited from doing so, make valid contracts of insurance without the corporate seal. All companies formed under the Companies Acts, 1862 to 1908, have power to make any contract in the same manner as an individual.

Formalities required by instrument of incorporation.

Sometimes the deed of settlement or other incorporating instrument requires that all contracts of insurance made on behalf of the company shall be made in a particular manner, as, for instance, that they shall be made in writing, or that they shall be made under the corporate seal, or that they shall be signed and countersigned by certain officers of the company (*c*). A provision that every policy shall be executed in a certain form does not, however, prevent the company from entering into preliminary informal contracts which will bind the company (*d*), and the Supreme Court of Canada has held that although an incorporating statute provided that no contract of the company should be valid unless made under seal, yet where the seal has been inadvertently omitted, and both parties had acted upon the policy as a valid policy, the company ought to be estopped from setting up the absence of the seal as a defence (*e*).

Waiver of formalities required by term of policy.

Where any particular form of executing or completing a policy is required only by the conditions of the policy such conditions may be waived by the principal officers of the company issuing the policy without the required formalities having been observed. Thus, where a policy contained a memorandum, "This policy is not valid unless countersigned by agent at Countersigned this day of Agent"; but the policy was delivered

(*b*) *South of Ireland Colliery Co.* v. *Waddle* (1868), L. R. 3 C. P. 463; (1869), L. R. 4 C. P. 617.

(*c*) *Cope* v. *The Thames Haven Dock Co.* (1849), 3 Ex. 841.

(*d*) *Athenæum, In re* (1858), 4 K. & J. 549; *Insurance Co.* v. *Colt* (1874), 20 Wall. 560; *Wright* v. *Sun Mutual* (1880), 5 Ont. A. R. 218; *Commercial Mutual Marine* v. *Union Mutual* (1856), 19 How. 318; *Sanford* v. *Orient* (1899), 174 Mass. 416; *Pratt* v. *Dwelling House Mutual* (1891), 130 New York, 206; *Citizens Insurance* v. *Parsons* (1881), 7 A. C. 96.

(*e*) *London Life* v. *Wright* (1880), 5 Can. S. C. 466.

in return for premium without the memorandum having been filled up or signed by the agent, it was held to be a complete and valid instrument (*f*).

Whether oral contracts are within the agent's apparent authority.

Oral contracts of insurance are certainly not in the ordinary course of business of an insurance company, and as an agent's apparent authority is limited to an authority to make contracts in the usual way, an oral contract would probably not bind an insurance company unless the agent had express authority, or was held out by the company as having authority to make such contracts (*g*). In America an oral agreement made by a soliciting agent for a fire insurance company to insure pending the issuing of a policy has been held binding upon evidence that it was the general usage and custom in the district for agents to make such contracts, and for the companies to recognise them (*h*), and there are numerous American cases where the company has been held bound by an oral agreement upon evidence of a course of business followed by the company's agent, and acquiesced in by the company (*i*), and there are some cases where it has been held that a general agent with full contracting power has incidentally power to make preliminary oral agreements in fire and accident business (*k*). In a Canadian case (*l*) it was held that an oral agreement made by an agent to give interim protection on a fire risk did not bind the company. The ordinary course of dealing was to insure by interim receipt which gave a temporary insurance in carefully guarded terms. There was no evidence of authority to the agent to depart from the ordinary course.

Contract concluded by entry in agent's books.

An agent acted for several fire companies, and had full authority to bind any of them. He received a proposal from an applicant which he accepted, promising to apportion the risk among several of the companies for which he acted, and the applicant left the apportionment to the agent. The agent subsequently entered various proportions of the risk in his register against several

(*f*) *Confederation Life* v. *O'Donnell* (1888), 16 Can. S. C. 717.

(*g*) *Montreal* v. *MacGillivray* (1859), 13 Moore P. C. 90; *Davis* v. *National* (1889), 10 N. S. W. L. R. (Law) 90; [1891] A. C. 485, 496.

(*h*) *Brown* v. *Franklin Mutual* (1895), 165 Mass. 565.

(*i*) *Commercial Mutual Marine* v. *Union Mutual* (1856), 19 How. 318; *Insurance Co.* v. *Colt* (1874), 20 Wall. 560; *Baker* v. *Union Mutual* (1894), 162 Mass. 358; *Post* v. *Aetna Insurance* (1864), 43 Barb. 351.

(*k*) *Ruggles* v. *American Central* (1889), 114 N. Y. 415; *Sanford* v. *Orient* (1899), 174 Mass. 416; *Ellis* v. *Albany City Fire* (1872), 50 N. Y. 402; *Rhodes* v. *Railway Passengers* (1871), 5 Lans. 71; *Audubon* v. *Excelsior* (1863), 27 N. Y. 216.

(*l*) *Parsons* v. *Queen Insurance* (1878), 29 U. C. C. P. 188.

companies, and it was held that each company was bound from the time he made the entry against its name (*m*).

Section VI.—Interim Receipt

Form of interim receipt.

In life insurance business interim protection pending the acceptance or rejection of the proposal by the directors is hardly known except in the case of foreign branches or agencies which owing to their distance from the head office are given this limited power of acceptance (*n*). On the other hand, in fire, burglary, and accident insurance, the usual practice is to issue upon application and payment of the whole or part of the first year's premium an "interim receipt," or "cover note." The usual form of this document is similar to that discussed in *Mackie* v. *The European* (*o*), which was as follows:—"Memorandum of Deposit. A having this day proposed an insurance of £2700 to the E. Co., on property described in their fire order of this date, and having made a deposit of £2 in part payment of premium and duty, it is hereby declared that the property so described shall be held insured in virtue of such deposit for one month from this date or until notice be sooner given that the proposal is declined." Such a receipt, if given by an authorised officer or agent of the company, creates a binding insurance for the specified period, but subject to determination by notice at any time within that period. In a Canadian case (*p*), the receipt was in the following terms:—"Received the sum of £ . . . . , being the premium for an insurance against fire upon . . . . subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date within which time the determination of the board will be notified. If approved a policy will be delivered, otherwise the amount received will be refunded less the premium for the time so insured." This receipt was in substance the same as that in *Mackie* v. *The European*, and the Court held that there was an insurance for twenty-one days irrespective of the approval of the board, but that the board might reject the risk within that period, and that liability would cease after notice. If the assured received no notice he would be insured for twenty-one days, but not longer.

Determinable by notice.

(*m*) *Ellis* v. *Albany City Fire* (1872), 50 N. Y. 402.
(*n*) *Infra*, p. 869.
(*o*) (1869), 21 L. T. 102.
(*p*) *Goodfellow* v. *Times and Beacon* (1859), 17 U. C. Q. B. 411.

Interim insurance not subject to approval of directors.

The principal object of the ordinary interim receipt is to give immediate protection pending the decision of the directors and the issuing of a policy; and a receipt will not readily be construed as affording merely conditional protection subject to the approval of the directors (*r*). Such a construction would make the receipt practically useless.

May insure beyond specified period if not determined by notice.

The receipt may be so worded as to insure beyond the specified days in the event of no notice to determine the risk being given by the company. Thus, in a Canadian case (*s*), the following receipt was issued by an agent on payment of the premium:—"Agent's Provisional Receipt—Received of A the sum of $ .... being the premium of insurance upon property for twelve months and for which a policy will be issued by the R. Co. within sixty days if approved by the manager in Toronto, otherwise this receipt will be cancelled and the amount of unearned premium refunded." The agent never informed the manager of the risk, and after sixty days had expired a loss occurred. The Court held that the receipt bound the company until rejection, and that after the expiration of the sixty days the applicant was entitled to a twelve months' policy subject to the company's usual conditions. The applicant was entitled to assume that the agent did his duty by the company, and the company and not the applicant must suffer for the fraud of their agent. In another Canadian case (*t*) the receipt ran:—"The applicant will be considered insured until otherwise notified within one month from the date hereof, when, if declined, the receipt shall become void and be surrendered. N.B., should applicant not receive a policy in conformity with his application within twenty days from the date hereof, he must communicate with the secretary direct, as after one month from this date the receipt becomes void." This was held to create an insurance which the insurers could terminate by notice within a month, but which after the expiration of a month without notice became binding and irrevocable for a year. In another Canadian case (*u*) the application was for a four years' fire policy. The receipt issued on payment of premium was: "Received from B $ .... being a premium for an insurance to the extent of $ .... on the

(*r*) *Wylie* v. *Times Fire* (1860), 22 D. 1498.

(*s*) *Patterson* v. *The Royal* (1867), 14 Grant, 169.

(*t*) *Hawke* v. *Niagara District* (1876), 23 Grant, 139.

(*u*) *Barnes* v. *Dominion Grange Mutual* (1895), 22 Ont. A. R. 68.

property described in the application . . . . subject, however, to the approval of the board of directors, who shall have power to cancel this contract within fifty days from this date by causing a notice to that effect to be mailed to the applicant. And it is hereby mutually agreed that unless this receipt be followed by a policy within the said fifty days from this date, the contract of insurance shall wholly cease and determine, and all liability on the part of the association shall be at an end." The Court was equally divided as to whether this was a four years' insurance determinable upon notice, or only a fifty days' insurance which would lapse by effluxion of time without notice.

What is sufficient notice to determine risk.

Where the protection of the interim receipt is determinable by notice, such notice must be given to the applicant himself, or to some person authorised by him to receive notice on his behalf. A broker instructed to obtain an insurance is not necessarily the applicant's agent to receive notice of the determination of the risk. As a rule, the insurers would be safe in giving notice to a person authorised generally to manage the applicant's insurance business, and if the applicant indicates a particular manner of communicating information the insurers are not bound to do more than adopt the manner of communication indicated. Thus, where the assured gave his address to an insurance company, and the company sent a notice to that address, but the applicant did not receive it because he had changed his place of abode without making proper provision for forwarding his correspondence, it has held that the notice was sufficient (*x*). And if the natural method of communication would be through the post-office the posting of a notice properly addressed would probably be sufficient to determine the risk at such time as in ordinary course of post the letter would have been received by the applicant even if the letter is lost or delayed in the post through no fault of either party (*y*).

Receipt and acknowledgment of premium is not *ipso facto* an insurance.

The mere acknowledgment of the receipt of premium does not in itself amount to an interim insurance (*z*). Thus, in *Linford* v. *Provincial Horse and Cattle Co.* (*a*), where upon an application for insurance on cattle a local agent inspected the

(*x*) *Henry* v. *Agricultural Mutual* (1865), 11 Grant, 125.

(*y*) *James* v. *Institute of Chartered Accountants* (1907), 98 L. T. 225.

(*z*) *Armstrong* v. *State* (1883), 61 Iowa, 212; *Lightbody* v. *North American* (1840), 23 Wend. 18.

(*a*) (1864), 10 Jur. (N. S.) 1066.

cattle, and stated that they would be insured, and accepted a year's premium and gave the company's printed receipt in the following form:—"On account of the P. Co., Received of A the sum of 35*s.* for insurance on cows," it was held that the company was not bound. The receipt was not an insurance, and the agent had no authority to do more than accept the proposal and premium and forward them to the company. But, on the other hand, there need not be an express undertaking to insure if the receipt contains expressions from which a promise may be inferred, as in the Canadian case (*b*) above cited, where it was stated that if the risk was not approved by the directors the receipt would be cancelled, and the unearned premium refunded.

Lloyd's slip constitutes a binding contract.

When insurances on fire, burglary, and other non-marine risks are made at Lloyd's the practice is for the broker to prepare in the first instance a slip, as in marine insurance, indicating briefly the nature of the risk, the premium, the duration, and the amount insured. The slip is initialled by the various underwriters who are willing to underwrite the risk, and afterwards the broker makes out a policy in accordance with the slip and containing the ordinary conditions of insurances at Lloyd's, and presents it to the underwriters for their signature. Until the policy is signed the slip is a binding contract, and can be sued upon, so that it operates in this respect as an interim receipt. In *Thompson* v. *Adams* (*c*), which was a case of fire insurance at Lloyd's, a loss occurred after the slip was initialled, but before the policy had been put forward by the broker for signature. It was contended that the slip created no binding obligation, but was merely an expression of willingness to sign the policy when tendered, or alternatively, that the preliminary contract contained in the slip was subject to the policy being presented within a reasonable time, and if not so presented the insurance must be treated as abandoned. Both contentions failed, and the underwriters were held liable.

Whether liability can be determined by notice before loss.

After loss, therefore, the underwriters cannot escape from the contract contained in the slip; but it has been said that before a loss has occurred the underwriters may determine the risk, and refuse to issue a policy, in the same way as an insurance company can terminate the protection afforded by the cover note.

(*b*) *Patterson* v. *The Royal* (1867), 14 Grant, 169; and see *Welsh* v. *Continental* (1888), 47 Hun. 598.

(c) (1889), 23 Q. B. D. 361.

It is doubtful whether the slip can be treated from this point of view merely as a cover note, and it is submitted that it has the force of a definite contract to insure from which the insurers cannot withdraw. In an American case (*d*) an insurance company issued to an applicant for fire insurance the following "binding slip" or "binder":—"Insure A $10,000 for 12 months on building. . . . . Binding this 1st day of January at noon (this memo. to be void on delivery of the policy)." The Court held that this was not necessarily a complete contract to insure for twelve months, and they admitted evidence tending to show a custom of the New York fire business to treat these "binders" as interim insurances, binding only until acceptance or rejection by the company's directors.

Interim receipt does not express all the terms of the contract.

An interim protection note is not conclusive evidence of the contract made. Thus where the assured made an oral agreement with a duly authorised agent to insure him against fire for a year, and subsequently a sub-agent, as a matter of routine, issued on payment of premium an interim protection note purporting to insure for thirty days only, it was held that, notwithstanding the terms of the protection note, there was a binding contract for the year (*e*). Although an interim receipt may be a "policy" for revenue purposes it is not a policy of insurance in the ordinary sense of the word, and it does not purport to contain the complete and final contract between the parties (*f*). The extent of the protection afforded is not defined in the instrument itself, but it is usually expressed to be on the company's usual terms, or subject to the conditions contained in the company's policies. Where the conditions are so referred to they are binding on the assured, whether he has seen them or not, and the insurer does not have to prove that they were brought to the notice of the assured, or even that he had an opportunity of making himself acquainted with them (*g*). The assured is bound to take notice of the conditions contained in the form of the company's policy then in use and applicable to the case (*h*).

Conditions in policy may be incorporated by reference.

Where policy conditions are inapplicable.

Certain conditions contained in the company's policy may not be applicable to insurance under an interim receipt. If a

(*d*) *Underwood* v. *The Greenwich* (1900), 161 N. Y. 413.

(*e*) *Coulter* v. *Equity Fire* (1904), 9 Ont. L. R. 35.

(*f*) *Citizens' Insurance* v. *Parsons* (1881), 7 A. C. 96.

(*g*) *McQueen* v. *Phœnix Mutual* (1879), 29 U. C. C. P. 511.

(*h*) Wilson, C.J., 29 U. C. C. P. 511, 522.

condition is wholly inapplicable, such as a condition with reference to renewal of the insurance at the end of the year, it may be entirely ignored. Others may be discarded as inapplicable on the ground that they impose obligations upon the assured to do certain things which it would be unreasonable to expect him to do, unless he had actual notice of the condition (*i*). Thus in *In re Coleman's Depositories* (*k*), a cover note was issued on December 28, 1904, in respect of a proposal for insurance against employers' liability. The company's policies contained the condition that the assured should give immediate notice of any accident; but the Court (*l*) held that the condition was not applicable until the contents of the policy had been communicated to the assured. Until then, it was impossible to comply with the condition, and it was not reasonable to suppose that the parties intended the assured to be bound by such a condition while ignorant of its existence. Some conditions which are not in terms applicable to insurance under an interim receipt may be applied in substance *mutatis mutandis*. Thus, where there is a condition that certain circumstances will vitiate the contract unless allowed by indorsement on the policy. In one Canadian case (*m*) this condition was held to be applicable, and the indorsement was required on the interim receipt, whereas in another case (*n*) it was held sufficient if notice of the circumstances was given to the agent authorised to grant an interim receipt, and his consent obtained.

How far the policy conditions are incorporated by implication.

Even although there is no express stipulation in the receipt that it is issued subject to the conditions in the insurers' policies, such a stipulation is probably implied (*o*), or, at any rate, the insurance must be held to be subject to the ordinary conditions contained in policies in that particular class of risk. In an American case (*p*), where the only evidence of the contract of insurance was an entry in the insurers' books containing particulars such as would be given in a slip it was held that the insurance was subject to the conditions contained in the insurers' policies, and this was approved in a Canadian case (*r*), where Proudfoot, V.C., said, "It would

(*i*) *Union Central Life* v. *Phillips* (1900), 102 Fed. Rep. 19.
(*k*) [1907] 2 K. B. 798.
(*l*) Vaughan Williams and Farwell, L.JJ., Fletcher Moulton, L.J., dissenting.
(*m*) *Hawke* v. *Niagara District* (1876), 23 Grant, 139, 148.
(*n*) *Parsons* v. *Queen Insurance* (1878), 43 U. C. Q. B. 271, 279.
(*o*) *Coleman's Depositories, In re*, [1907] 2 K. B. 798.
(*p*) *Eureka Insurance* v. *Robinson* (1867), 56 Pa. 256, 264.
(*r*) *Hawke* v. *Niagara District* (1876), 23 Grant, 139.

be unreasonable to hold that by giving an interim receipt the company meant to insure a larger liability than they were subject to on a policy; they must be understood as contracting for an insurance of the ordinary kind. The plaintiff asks for the completion of the contract by the issuing of a policy, and he does not pretend that he is entitled to any other than the ordinary policy; he cannot, therefore, be in any better condition than if he had the policy in his possession." It may, however, be questioned whether, if a company's policies contained some altogether unusual condition, the assured would be bound by such condition in the absence of an express stipulation in the receipt, that it was issued subject to the conditions in the company's policies.

If an agent issues an interim receipt and makes an oral agreement which is not inconsistent with the terms of the receipt, then the assured will not be bound by the terms of the company's policy so far as they are inconsistent with the oral agreement (*s*); but, on the other hand, the question will arise whether the agent had authority to make any contract otherwise than in terms of the company's policies.

Agent's authority to issue interim receipts.

An agent has apparent authority to grant interim receipts in accordance with the forms provided by the company; but if the company does not provide the agent with anything except forms of receipt for premium which do not purport to give interim protection, the mere fact of agency does not give the agent any apparent authority to bind the company in any way (*t*). On the other hand, if the company's receipts are so framed as to give the applicant protection until the directors have approved or rejected the risk, the company are bound by such receipt, notwithstanding that the agent never communicates the matter to the company, and appropriates the premiums to his own use (*u*). If the protection given by the interim receipt is for a specified number of days only, the agent has no apparent authority to grant an interim receipt for a longer period, nor to grant a permanent insurance without submitting the proposal to the directors. In one Canadian case the agent granted a succession of interim receipts each as the previous one expired, but it was held that

(*s*) *Canadian Casualty* v. *Hawthorn* (1907), 39 Can. S. C. 558.

(*t*) *Linford* v. *Provincial Horse and Cattle Co.* (1864), 10 Jur. (N. S.) 1066.

(*u*) *Hawke* v. *Niagara District* (1876), 23 Grant, 139; *Patterson* v. *The Royal* (1867), 14 Grant, 169. See *supra*, p. 200.

he could not in this indirect manner grant an insurance for a longer period than thirty days without submitting a proposal to the company (*x*).

Section VII.—Proposal and Acceptance

How far acceptance creates a binding contract.

When a proposal for insurance is made, the usual course is for it to be submitted to the directors of the company for their consideration. The decision of the directors to take the risk does not *ipso facto* create a binding contract (*y*). Their acceptance must at least be communicated to the assured or his agent, and even communication to the assured of the fact that the directors are willing to take the risk does not necessarily conclude a binding contract between the parties.

Presumption in life insurance that no binding contract is contemplated until the policy is issued.

With regard to this point, life insurance must probably be differentiated from other classes of insurance. In life insurance there is a strong presumption that all communications before the execution of the policy are preliminary only. The parties negotiate upon the footing that there shall be no binding contract until the first premium is paid, and the policy issued (*z*). This may be definitely expressed on the company's forms of proposal (*a*), or in the secretary's letter of acceptance intimating the directors' approval of the risk (*aa*), but if not expressed it will be implied in the absence of anything pointing to a contrary conclusion. On the other hand, if appropriate words are used showing the clear intention of the parties, a binding contract may be made before the issuing of the policy (*b*).

(*x*) *Hawke* v. *Niagara District* (1876), 23 Grant, 139.

(*y*) *Armstrong* v. *Provident Savings Life* (1901), 2 Ont. L. R. 771.

(*z*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727; *Wolfe* v. *Equitable Life* (1906), The Times Newspaper, Jan. 26; *Equitable Life* v. *M'Elroy* (1897), 83 Fed. Rep. 638; *Iowa Life* v. *Lewis* (1902), 187 U. S. 335; *New York Life* v. *M'Master* (1898), 87 Fed. Rep. 63.

(*a*) *Paine* v. *Pacific Mutual* (1892), 51 Fed. Rep. 689; *Kohen* v. *Mutual Reserve* (1886), 28 Fed. Rep. 705; *Misselhorn* v. *Mutual* (1887), 30 Fed. Rep. 545; *Marks* v. *Hope Mutual* (1875), 117 Mass. 528; *M'Master* v. *New York Life* (1900), 99 Fed. Rep. 856.

(*aa*) Most companies have a printed form so that the secretary may intimate the approval of the risk in carefully guarded terms. The latter informs the applicant that his proposal has been "approved" and that "the assurance may be completed" by payment of the first premium on or before a named date. It also states that until the premium is paid "and accepted" the company will be under no liability, and that the directors "reserve the power of withdrawing their approval of the proposal in the meantime."

(*b*) *Armstrong* v. *Provident Savings Life* (1901), 2 Ont. L. R. 771; *Hebert* v. *Mutual Life* (1882), 12 Fed. Rep. 807.

Whether this presumption extends to other classes of risk.

It is doubtful how far the presumption applicable to life insurance ought to be extended to other classes of risk. In the Scottish case of *Sickness and Accident* v. *General Accident* (*c*), Lord Adam seemed to think that the principle might be equally applicable to insurance against liability for accident, but there is no doubt that in risks such as fire and burglary an informal contract by letters or notification of acceptance will be much more readily construed as binding than in life insurance, and it is submitted that the ordinary business presumption is that a definite contract has been made from which the insurers cannot withdraw (*d*). The condition that there shall be no insurance until the first premium is paid does not in itself operate to prevent there being a binding agreement before the payment of the premium (*e*). When, however, the agreement is made subject to that condition the contract is one to issue a policy on tender of premium, and even although the agreement is to insure from a specified date, it only binds the company to issue a policy if, when the premium is tendered, the risk remains the same. Consequently if a loss occurs before the premium is tendered the company is not liable, nor is the company bound to accept the premium and issue a policy if there has been any material alteration in the risk since the date of the preliminary agreement. Alteration of risk for this purpose means any change of circumstances which makes any of the statements in the proposal cease to be true or which the assured would have been bound to disclose in the first instance under the doctrine of *uberrima fides*. Thus any declination or extra rating by another office, even although there was no alteration in the actual risk, would entitle the company to withdraw (*ee*).

Canning v. Farquhar (1886), 16 Q. B. D. 727

C applied for life insurance upon one of the insurance company's printed forms with the usual questions and declaration. The risk was considered and approved by the directors, and the actuary wrote to C's agent: "The proposal to insure £2000 with profits on the life of C has been accepted at the annual premium of £47 18*s.* 4*d.* No insurance can take place until the first premium is paid." Before the premium was paid or the policy issued, C fell over a cliff and was seriously injured. The premium was then tendered but refused, and

(*c*) (1892), 19 R. 779.
(*d*) *Thompson* v. *Adams* (1889), 23 Q. B. D. 361; *Eames* v. *Home Insurance* (1876), 94 U. S. 621.
(*e*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow. 255; *General Accident* v. *Cronk* (1901), 17 T. L. R. 233.
(*ee*) *Vide infra*, p. 308.

shortly afterwards C died. On an action by C's representatives it was held that the company was not liable. The Court of Appeal gave the following reasons for their decision :—(1) The application and notification of acceptance was never intended by the parties to constitute a binding contract, but were merely in the nature of preliminary expressions of mutual willingness to enter into a contract of insurance ; (2) there could have been no binding contract, since the so-called acceptance contained a new term, viz. the amount of the premium which had been previously mentioned, and therefore the acceptance so called was in reality a counter offer which could not be considered as continuing after the risk had changed ; (3) that if there was an agreement to insure it was on the implied condition that the risk was the same when the policy was called for.

Sickness and Accident v. General Accident (1892), 19 R. 977

Sickness and Accident v. *General Accident.*

A policy was issued to a tramway company against liability for accidents for a year from November 17, 1888, to November 17, 1889. The policy contained the clause, "No insurance shall be held to be effected until the premium due thereon shall have been paid." The secretary of the assured company thereupon, on November 19, wrote to the insurers' agent : "I am duly in receipt of this policy, and will send you a cheque for the premium in the course of a few days. There are one or two points upon which I must confer with my directors. The date from which I desire to be covered is from the 24th inst. inclusive, and not the 17th inst., as stated therein." The agent replied on the 20th : "I shall be pleased to make the alteration in policy required by your directors." On November 24, before the premium had been paid or a new policy issued, an accident occurred for which the assured company were liable. On November 26 the secretary of the assured company wrote to the insurers' agent enclosing cheque for premium, and the agent replied : "I am much obliged for your favour enclosing cheque for the third party risk from the 24th inst. . . . Please return policy for alterations." The Court of Session held that the insurers were not liable. The Lord Ordinary decided on the ground that there could be no risk until the premium was paid, and the acceptance of the premium, although it made the insurance effective for the future, did not act retrospectively so as to make it effective for the past. The Inner House decided on the ground that the agreement to insure being one for cash against the issue of a policy was subject to an implied condition that the circumstances were not changed before the company were called on to issue a policy, and the acceptance of the premium created a new agreement to insure from, but not including, the 24th. Lord Adam doubted whether, even if there had been no change of risk, the insurers would have been bound on tender of the premium to issue a policy.

Thompson v. Adams (1889), 23 Q. B. D. 361

Thompson v. *Adams.*

The plaintiff's merchants in New Zealand instructed an insurance broker, who was entitled to effect insurances at Lloyd's, to effect insurances upon goods in their premises. The broker, in accordance with the usual course of business, prepared a slip containing the particulars of the proposed insurance and showing the risk in the same way as if it were a marine risk. The defendant,

amongst other underwriters at Lloyd's, initialled the slip for a line of £300. The slip was initialled in October, 1886, and in accordance with the ordinary course of business it was the duty of the broker to put forward a policy for the signature of the underwriters. The broker, however, omitted to put forward a policy, and no premium was paid, when on February 27 some of the plaintiff's goods were burned. On March 1 the premium was tendered, but the underwriters refused to accept it or to sign a policy. The plaintiff sued upon the contract contained in the slip. The defendant argued (1) there was no contract of insurance, but merely an honorary undertaking; (2) if there was a binding contract it was subject to the condition that a policy should be put forward within a reasonable time after the slip had been initialled; (3) by not putting forward a policy the plaintiff had elected to abandon the insurance. It was held that there was an unconditional contract to insure, and that it had not been abandoned and that the defendant was accordingly liable for the loss.

Essential elements of a binding contract.

The first essential to a binding contract is that the parties must be agreed upon every material term (*f*). Probably the most essential terms are the nature of the risk, the duration of the risk, the premium, and the amount of insurance. As to all these there must be a *consensus ad idem*, that is to say, there must either be an express agreement or the circumstances must be such as to admit of a reasonable inference that the parties were tacitly agreed.

Must define the nature of the risk,

If there is doubt as to what property is insured there is no contract, as where the proposal was to insure "my house," and the agent accepted the risk believing that the applicant referred to his previous residence (*g*). But where the property was defined, and the insurers agreed "to insure it," it was a reasonable inference that the intention was to insure it against fire, and there was, therefore, a binding contract (*h*).

the duration of the risk,

The commencement and duration of the risk must be agreed. Where, however, an application for life insurance did not specify the date when the risk was to commence, the issue of a policy ante-dated to the date of the application was held to be a good acceptance (*i*). If the *terminus a quo* is agreed upon, it will not as a rule be necessary to expressly agree the *terminus ad quem*. The universal practice in fire, burglary, and accident risks is to

(*f*) *Travis* v. *Nederland Life* (1900), 104 Fed. Rep. 486; *M'Nicoll* v. *New York Life* (1907), 149 Fed. Rep. 141.

(*g*) *Mead* v. *Westchester* (1875), 3 Hun. 608.

(*h*) *Baile* v. *Joseph* (1880), 73 Me. 371.

(*i*) *Armstrong* v. *Provident Savings Life* (1901), 2 Ont. L. R. 771. This was held to be so notwithstanding that the proposal was made and the policy insured on the express terms that the insurance should not be binding or the policy go into effect until payment of the first premium.

insure for a year, and, in the absence of anything to indicate the contrary, that may be taken as an implied term in the contract (*k*). The duration of the risk may also be inferred from previous insurances between the same parties (*l*).

the rate of premium,

The rate of premium must be defined (*m*), but it may be inferred to be the company's ordinary rate if they have a fixed rate, and there is no doubt as to how the risk should be classed (*n*), or it may be inferred to be the same as the rate previously insured (*o*). In insurance at Lloyd's it is a common practice for underwriters to take certain risks at a rate to be agreed. The parties thereby agree to leave the rate open for future settlement, and if a loss occurs before settlement the loss becomes payable subject to deduction of a reasonable premium (*p*). In default of agreement between the parties, the amount of the premium will be settled by the Court or arbitrator. This is not a common form of insurance in fire, life, and accident risks, but it is not unknown.

and amount of insurance.

Another matter which must necessarily be defined is the amount of the insurance. And if the amount of insurance requires to be apportioned upon different portions of property to be insured the contract is not complete until this has been done. Thus there was no contract where the parties contemplated apportionment between the real and personal property, and this had not been done when a loss occurred (*q*). And so, where insurers offered to insure at a certain rate upon certain buildings, if in "specific form," that is to say, if the various buildings and contents were specified with a separate amount on each, and the applicants accepted the rate, and sent details of the amount which they hoped would be sufficiently specific, it was held that there was no binding contract until the insurers had signified their approval of the apportionment (*r*).

Preliminary contract is made subject to the usual conditions.

Just as the interim receipt is issued subject to the usual conditions contained in the company's policies, so every proposal

(*k*) *Eames* v. *Home Insurance* (1876), 94 U. S. 621.

(*l*) *Winne* v. *Niagara Fire* (1883), 91 N. Y. 185.

(*m*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727; *Christie* v. *North British* (1825), 3 S. 519; *Rose* v. *Medical Invalid* (1848), 11 D. 151.

(*n*) *Train* v. *Holland* (1875), 62 N Y. 598; *Boice* v. *Thames* (1885), 38 Hun. 246.

(*o*) *Winne* v. *Niagara Fire* (1883), 91 N. Y. 185; *Audubon* v. *Exelsior* (1863), 27 N. Y. 216.

(*p*) *Hyderabad Company* v. *Willoughby*, [1899] 2 Q. B. 530.

(*q*) *Kimball* v. *Lion* (1883), 17 Fed. Rep. 625.

(*r*) *Phœnix* v. *Schultz* (1897), 80 Fed. Rep. 337.

and acceptance is made with reference to these conditions (*s*), and when the contract is concluded the only obligation of the company is to issue a policy with such conditions as are usually attached to the company's policies, and are not inconsistent with terms of the preliminary contract (*t*). Where, however, a mutual company tendered to an applicant for fire insurance a policy which recited that he had agreed to become a member of the company, it was held that he was not bound to accept such a policy as his proposal was for insurance only, and not also for membership in the company (*u*).

What is acceptance of an offer.

Silence does not give consent, and, therefore, there is no binding contract until the person to whom the offer is made says or does something to signify his acceptance (*x*). Mere delay in giving an answer cannot be construed as an acceptance (*y*).

Newspaper coupons.

Primâ facie acceptance must be communicated to the offeror (*yy*), but communication is not necessarily essential if the acceptance is made in the manner indicated by the particular terms of the offer (*z*), or by the general course of business (*a*). For example, an offer to insure holders of newspaper coupons might be made in such a manner as to conclude a contract between the company and purchasers of the newspaper who signed the coupon (*b*), or were regular subscribers to the paper (*c*). Whether an offer to insure all purchasers of the paper could be accepted by a person purchasing a newspaper in ignorance of the offer is doubtful (*d*). Where a coupon contained in Letts' diaries was in the form of a promise by the company to pay £1000 to the representatives of any person killed in a railway accident provided he was the owner of the diary, and had caused

(*s*) *General Accident* v. *Cronk* (1901), 17 T. L. R. 233; *Eames* v. *Home Insurance* (1876), 94 U. S. 621; *Coulter* v. *Equity Fire* (1904), 9 Ont. L. R. 35.

(*t*) *Palmer* v. *Commercial* (1889), 53 Hun. 601.

(*u*) *Star Fire and Burglary* v. *Davidson*, [1903] 5 F. 83.

(*x*) *Felthouse* v. *Bindley* (1862), 11 C. B. (N. S.) 869.

(*y*) *Equitable Life* v. *M'Elroy* (1897), 83 Fed. Rep. 631; *More* v. *New York Bowery* (1892), 130 N. Y. 537; *Harp* v. *Granger's Mutual Fire* (1878), 49 Md. 307; *Paine* v. *Pacific Mutual* (1892), 51 Fed. Rep. 689.

(*yy*) *Powell* v. *Lee* (1908), 99 L. T. 284.

(*z*) *Carlill* v. *Carbolic Smokeball Co.*, [1893] 1 Q. B. 261; *Williams* v. *Carwardine* (1833), 2 B. & Ad. 621; *Adams* v. *Lindsell* (1815), 1 B. & Ald. 681.

(*a*) *Household Fire Insurance* v. *Grant* (1879), 4 Ex. D. 216; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27; *Dunlop* v. *Higgins* (1848), 1 H. L. C. 381.

(*b*) *Law* v. *George Newnes, Ltd.* (1894), 21 R. 1027; *Carlill* v. *Carbolic Smokeball Co.*, [1893] 1 Q. B. 261.

(*c*) *Shanks* v. *Sun Life* (1896), 4 S. L. T. 66.

(*d*) *Gibbons* v. *Proctor* (1891), 64 L. T. 594; *Fitch* v. *Snedaker* (1868), 38 N. Y. 248.

his name to be registered at the head office of the company, and the claim was made within twelve months of registration, it was held that there was a binding contract, and that the risk attached at latest when the letter applying for registration was received by the company's servants, and possibly at the date when the letter was posted (*e*).

Acceptance by posting letter.

As the post-office is now the customary medium of communication between persons at a distance, an invitation to communicate by post will readily be inferred, and, if the post is thus impliedly indicated as the manner of accepting an offer, a letter delivered to the post-office concludes the contract as at the time of posting the letter (*f*) and the subsequent delay or loss of the letter in course of transit is immaterial (*g*).

Contract concluded by agent subject to the directors' approval.

If an agent has merely authority to forward a proposal to the directors, some external act of acceptance is necessary; but the agent may have authority to conclude a contract with the applicant on the terms that it shall not be effective until approved by the directors, and when the negotiation with the agent takes this form, no notification of acceptance by the directors is necessary, and the contract becomes operative when, in fact, the directors approve the risk, although their approval has not been indicated by any outward act. Thus, in an American case the general agent of an English company upon receiving a proposal gave the following receipt:—"Received the sum of £ premium on a proposal of assurance for £ on the life of A, which is to be forwarded immediately to the head office at Liverpool, England, for acceptance. If it be accepted, a policy will be issued in accordance therewith; if declined, the above-mentioned premium will be returned. But in case the said A die before the decision of the head office shall have been received the sum insured will be paid." The proposal was transmitted and accepted and a policy issued and forwarded to the agent, who, in accordance with instructions, declined to deliver it on the ground that the applicant's health was failing. It was held in New York that as the risk had in fact been accepted by the head office, there was a binding contract to issue a policy (*h*). And in a fire case in America the agent gave a receipt for application and premium

(*e*) *General Accident* v. *Robertson*, [1909] A. C. 404.

(*f*) *Taylor* v. *Merchants' Fire* (1850), 9 How. 390.

(*g*) *Household Fire Insurance* v. *Grant* (1879), 4 Ex. D. 216; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.

(*h*) *Fried* v. *Royal Insurance* (1872), 50 N. Y. 243.

on one year's insurance " subject to the approval of the company," and it was held that the contract became absolutely binding on the company from the date when the directors in fact considered and approved the risk although no intimation of their decision was made to the applicant (*i*). And in another American case (*k*) where the agent accepted a fire risk " subject to acceptance by the directors of the premium agreed," and a loss occurred before the agent had communicated with the head office, it was held that the company were bound if the rate was a reasonable one.

Acceptance not in same terms as offer.

An acceptance must necessarily be unconditionally in the terms of the offer, for otherwise it is not an acceptance but a counter offer (*l*) ; but a mere verbal variation from the offer (*m*), or the expression of a term which if not expressed would have been implied, does not constitute a departure from the terms of the offer, and therefore the delivery of a policy containing all sorts of conditions not previously referred to between the parties may constitute a complete acceptance of the offer, if the policy contains nothing but the company's ordinary terms with reference to which the proposal must be deemed to have been made (*n*). If the policy as delivered is not in accordance with the proposal in this sense then the mere delivery of the policy cannot constitute an acceptance, and there is no complete contract (*o*). Where a proposal for fire insurance was made to a mutual company it was held that the issue of a policy wherein it was narrated that the assured became a member of the company, did not complete any binding contract, the assured never having proposed or agreed to become a member of the company (*p*). If the policy is under seal the company may be bound by their deed, but the delivery of an unsealed policy cannot bind either party unless it is in accordance with the terms of the proposal, or until the applicant by word or act signifies his assent to what is in fact a counter proposal (*q*). If the applicant refuses to accept a policy

(*i*) *Welsh* v. *Continental* (1888), 47 Hun. 598.

(*k*) *Perkins* v. *Washington* (1825), 4 Cow. 645.

(*l*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727 ; *Jordan* v. *Norton* (1838), 4 M. & W. 155 ; *Honeyman* v. *Marryat* (1857), 6 H. L. C. 112 ; *Aetna Indemnity* v. *Crowe* (1907), 154 Fed. Rep. 545.

(*m*) *Colonial Insurance* v. *Adelaide* (1886), 12 A. C. 128.

(*n*) *Commonwealth Mutual* v. *Knabe* (1898), 171 Mass. 265.

(*o*) *Insurance Co.* v. *Young* (1874), 23 Wall. 85 ; *Mowat* v. *Provident Savings Life* (1900), 27 Ont. A. R. 675.

(*p*) *Star Fire and Burglary* v. *Davidson* (1903), 5 F. 83.

(*q*) *Laing* v. *Provincial Homes Investment*, [1909] S. C. 812 ; *National Benefit Trust* v. *Coulter*, [1911] 1 S. L. T. 190 ; *M'Master* v. *New York* (1899), 99 Fed. Rep. 856 ; *German*

tendered to him, and insists upon alterations being made, he cannot sue upon the rejected policy, and until the parties are agreed upon the alterations he remains uninsured (*r*).

Withdrawal of offer.

An offer, when made, remains open for acceptance for the time specified, if any, or for a reasonable time (*s*); but the offeror may withdraw his offer at any time before acceptance (*t*). A withdrawal, however, does not operate until actually communicated, and therefore a withdrawal posted before acceptance is of no effect, unless it is communicated to the offeree before a letter of acceptance has been posted. A proposal for insurance may, therefore, be withdrawn by an applicant if notice of withdrawal is communicated to the company at any time before the company has posted an acceptance (*u*); and thus, where an applicant, having made a proposal, afterwards made another proposal relating to the same risk, but in different terms, it was held that the second proposal was a withdrawal of the first, and the subsequent acceptance of the first proposal by the company created no binding contract (*x*). Where upon proposal for life insurance the first premium was paid and an interim receipt given providing that the insurance should be binding from the date of the approval of the medical officer, it was held that the proposer could withdraw his proposal and recover the premium at any time before the medical officer signified his approval (*a*).

Section VIII.—Increase of Risk before Policy Issued

Change of risk between proposal and acceptance.

It may happen that between the time a proposal is made and the time it is accepted a material change has taken place in the nature of the risk. The general rule is that acceptance is made in reliance upon the continued truth of the representations made in the proposal, and in the belief that there has been no material change in the risk offered (*b*). If, therefore, anything has occurred

Insurance v. *Downman* (1902), 115 Fed. Rep. 481; *Kerr* v. *Milwaukee Mechanics* (1902), 117 Fed. Rep. 442.

(*r*) *Equitable Life* v. *M'Elroy* (1897), 83 Fed. Rep. 631; *Smith* v. *Provident Savings* (1895), 65 Fed. Rep. 765; *Piedmont* v. *Ewing* (1875), 92 U. S. 377.

(*s*) *Ramsgate* v. *Montefiore* (1866), L. R. 1 Ex. 109; *Dunlop* v. *Higgins* (1848), 1 H. L. C. 381.

(*t*) *Cook* v. *Oxley* (1790), 3 T. R. 653; *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463.

(*u*) *Wolfe* v. *Equitable Life* (1906), The Times Newspaper, Jan. 26; *Globe Mutual* v. *Snell* (1880), 19 Hun. 560.

(*x*) *Travis* v. *Nederland* (1900), 104 Fed. Rep. 486.

(*a*) *Henderson* v. *State Life* (1905), 9 Ont. L. R. 540.

(*b*) *Equitable Life* v. *M'Elroy* (1897), 83 Fed. Rep. 631, 636.

to increase the risk between offer and acceptance *primâ facie* the insurers are not bound (*c*).

Agreement to insure "lost or not lost."

It is however competent to the insurers to agree that they shall be bound as from some prior date notwithstanding any loss or changes of risk which may have occurred at the time they accept the proposal. This in effect is an agreement to insure "lost or not lost," to use the familiar clause in marine policies. It has long been decided that this is a perfectly valid form of insurance, and that the insurers are bound by their agreement if both parties were equally cognisant or equally ignorant of the fact that a loss had occurred when the contract was made (*d*). Marine policies almost invariably contain the "lost or not lost" clause, but it seems clear, and it has been so decided in America, that these words are not essential even in marine policies, and that any form of words which expresses an intention to cover past losses is sufficient (*e*). Where, therefore, insurers agree to insure from the date of a proposal or from some other prior date they undertake to bear losses which have, in fact, occurred at the time the contract is made, and *à fortiori* they undertake to bear the consequence of any increase in the risk.

Duty to disclose information received after proposal made.

An applicant for a retrospective insurance could not recover if he was aware at the time he made the proposal that a loss had occurred. A more doubtful class of case is that where knowledge of a loss or increase of risk comes to the applicant after he has made his proposal. In an American case (*f*) a proposal for fire insurance requested insurance from a specified date. The proposal was accepted after that date, and in ignorance of a loss which had occurred meanwhile. It was held that the loss was covered, and that there was no obligation upon the insured to disclose the fact that there had been a loss. It is difficult to reconcile this case with the principle of *uberrima fides* (*g*). It is submitted that an applicant, who has made a proposal of this kind and subsequently becomes aware of a loss or an increase of risk, is bound to disclose the fact. If, however, he sends notice

(*c*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727.

(*d*) *Mead* v. *Davidson* (1835), 3 Ad. & E. 303; *Bradford* v. *Symondson* (1881), 7 Q. B. D. 456; *Stone* v. *Marine* (1876), 1 Ex. D. 81.

(*e*) *Insurance* v. *Folsom* (1873), 18 Wall. 237.

(*f*) *Whitaker* v. *Farmers' Union* (1859), 29 Barb. 312.

(*g*) See *Fitzherbert* v. *Mather* (1785), 1 T. R. 12; *Proudfoot* v. *Montefiore* (1867), 2 Q. B. 511.

to the insurers in the most expeditious manner available, he probably does all that is required of him, and if the insurers accept the proposal before they receive the intimation of loss they are bound by the retrospective term in their contract. In a Canadian case (*h*) company A had agreed to renew X's fire policy from October 2 to October 2. On October 15, desiring to be off the risk, company A went to company B and asked them to insure X; company B agreed to take the risk, and on October 17 issued a policy to X insuring him from October 2 to October 2. Meanwhile, on October 13, a loss had occurred of which X was aware, but of which the companies were both ignorant. It was held that X could recover from company B on their policy notwithstanding that it was effected after his knowledge of the loss. This, however, was not a case where *uberrima fides* was required on the part of the assured since the agreement was essentially one between the companies to the effect that company B should take over from company A their whole liability, whatever it might prove to be.

An intention to make an insurance contract retrospective must be clearly expressed, and *primâ facie* an acceptance does not relate back to the date of the proposal (*i*).

Change of risk after acceptance and before issue of policy.

After the proposal has been accepted change of risk may still avoid the contract. Where acceptance is merely an intimation that the insurers are willing to issue a policy they are obviously free to decline to carry the matter further, since there never was any binding contract. But even where acceptance creates a binding contract to insure, it may nevertheless be subject to the express or implied condition that the risk shall be the same when the applicant tenders the first premiums and calls for the policy. In *Canning* v. *Farquhar* (*k*) the proposal for a life policy had been accepted subject to the condition that "no insurance shall take place until the first premium is paid." Lord Esher held that even if this was a binding contract to insure it was only a contract to insure if the risk was the same when the premium was tendered and the policy called for, and therefore where, after acceptance and before tender of premium, the applicant fell over a cliff and became seriously injured, the insurers were entitled to decline to issue

(*h*) *Giffard* v. *Queen Insurance* (1897), 103 Iowa, 337.
(1869), 1 Hannay (N. B.) 432.
(*i*) *Rogers* v. *Equitable Mutual* (*k*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727.

a policy. Speaking of the truth of the representations, Lord Esher said that the material time was the moment when the insurance was made, meaning thereby, not the making of the preliminary contract, but the payment of the premium and the commencement of the risk. In this case as in practically all cases of life insurance the agreement was that the risk should commence on payment of the first premium. The material time before which change of risk will relieve the insurers from any obligation to carry out the preliminary contract is probably in all cases the time when it is agreed that the risk shall attach. If the insurers agree unconditionally to insure from a specified date or from the date of the agreement, a change of risk occurring after such date does not entitle the insurers to refuse to issue a policy. The insurers are liable for losses happening after the agreed date (*l*), and *à fortiori* they must bear the consequence of increased risk. When the agreement is to insure from a specified date, but subject to the condition that the insurance shall not be effective until the premium is paid, a change in the risk after the specified date, but before payment of the premium or execution of the policy, entitles the insurers to decline to issue a policy (*m*). The date when the premium is paid is really the commencement of the risk, and must be considered the material time notwithstanding the fact that the insurers are to receive their premium from the date specified as the *terminus a quo* of the insurance. Thus, in *Sickness and Accident* v. *General Accident* (*n*), where the agreement was to insure against liability for accidents from a specified date, but subject to the condition that "no assurance shall be held to be effected until the premium due thereon shall have been paid," an accident for which the assured were liable occurred after the specified date, but before the premium had been tendered or the policy issued. The Court of Session held, on the authority of *Canning* v. *Farquhar* (*o*), that as the circumstances had changed before the company were called on to issue a policy they were relieved from their contract.

Change of risk after policy issued.

As the rule in *Canning* v. *Farquhar* applies to preliminary contracts only, it would seem that after a policy of insurance has been executed and delivered, no subsequent alteration of the

(*l*) *Thompson* v. *Adams* (1889), 23 Q. B. D. 361; *Insurance Co.* v. *Colt* (1874) 20 Wall. 560; *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111.

(*m*) *Sickness and Accident* v. *General Accident* (1892), 19 R. 977.

(*n*) (1892), 19 R. 977.

(*o*) (1886), 16 Q. B. D. 727.

circumstances, whether before or after the commencement of the risk, entitles the insurers to withdraw from their obligations. Thus, if the policy in the case of *Canning* v. *Farquhar* had been executed and delivered with a condition that the insurance should not be in force until payment of the premium by the assured, the fact that the premium was unpaid when the assured fell over the cliff would not have entitled the insurers to refuse a subsequent tender of the premium, and they would have been liable if the assured had died at any time after such tender. So in the case of fire insurance, if a policy is issued, say, on the 1st of June, insuring premises for a year from June 24, and subject to the condition that the insurers shall not be liable in respect of any loss occurring before payment of the premium, the insurers could not refuse to accept the premium on the ground, say, that an extensive fire had broken out in adjoining premises on June 23, and was still burning when the premium was tendered. Of course the above principle does not apply to alterations in premises, varying them from the description in the policy, or to alterations prohibited by the conditions of the policy. Such alterations are an entirely different matter, and avoid the policy in whole or in part, whether they are made before or after the execution of the policy or before or after the commencement of the risk.

Section IX.—Execution and Delivery of Policy

When does the policy become an operative instrument.

From what has been said it will be seen that it may be of the utmost importance to determine the time when the policy becomes effective as a binding insurance, as distinguished from a contract to insure.

Distinction between policies under seal and policies not under seal.

When the policy is not under seal it is a simple contract, and is probably not operative as a completed policy until it has been actually delivered to the assured or his agent, and even then, if it varies from the terms of the proposal, it is not operative until the assured accepts it by word or deed as the contract by which he agrees to be bound (*p*). When the policy is under seal it is a contract by deed, and becomes operative from the time when it is formally "signed, sealed, and delivered," although there may have been, in fact, no actual delivery to the assured or his agent.

(*p*) *Coffin* v. *New York Life* (1904), 127 Fed. Rep. 555; *M'Nicoll* v. *New York Life* (1907), 149 Fed. Rep. 141; *Insurance Company* v. *Young's Adrs.* (1874), 23 Wall. 85.

Signing and sealing.

A deed is executed by being "sealed" by the grantor, and no signature is necessary (*q*). It is of no importance what the seal is made of; whether of wax, wafer, or impressed in relief upon the paper, it is equally valid (*r*). It may be affixed before the time of execution if at the time of execution it is sufficiently recognised as the seal of the party executing the deed. In one case where the document bore nothing but the ribbon by which it was customary to attach the wax seal to the parchment it was held that the ribbon might well have served for a seal, and when the document was acknowledged by the grantor as his deed and attested as such, the Court held that there was a fully executed deed. Lindley, L.J., however, thought this was a "good-natured" decision, and doubted whether it ought to be followed (*s*), and where there was nothing of any kind that could stand for a seal the Court held that the intention to give effect to the document as a deed could not have that effect (*t*).

Deed operates from date of delivery,

A deed, although signed and sealed, does not take effect until it is delivered (*u*), but if it has passed out of the possession of the grantor it is presumed to have been delivered (*x*). If a deed is dated it is presumed to have been completely executed, that is, signed, sealed, and delivered on the day of the date (*y*), but the parties are not estopped from alleging that it was signed, sealed, or delivered on a date subsequent to that stated in the deed (*a*).

and *primâ facie* speaks from that date.

Primâ facie a deed speaks from the date of delivery, but the deed may be expressed so as to operate retrospectively (*b*). Where a deed is dated and time is computed from the date of the deed the party executing the deed agrees that the date mentioned in the deed shall be the date for the purposes of computation (*c*).

What is delivery?

A deed may be delivered, although the grantor does not part with possession (*d*). Any word or act of the grantor at the time of execution which shows the grantor's intention that the deed shall be a complete effective instrument is sufficient to

(*q*) Norton on Deeds, p. 5.
(*r*) *National Provincial Bank* v. *Jackson* (1886), 33 Ch. D. 1, 11.
(*s*) *National Provincial Bank* v. *Jackson* (1886), 33 Ch. D. 1, 14.
(*t*) *National Provincial Bank* v. *Jackson* (1886), 33 Ch. D. 1.
(*u*) *Doe* v. *Day* (1809), 10 East, 427.
(*x*) *Hall* v. *Bainbridge* (1848), 12 Q. B. 699, 710.
(*y*) *Steele* v. *Mart* (1825), 4 B. & C. 272.
(*a*) *Hall* v. *Cazenove* (1804), East, 477.
(*b*) *Jayne* v. *Hughes* (1854), 10 Ex. 430.
(*c*) *Styles* v. *Wardle* (1825), 4 B. & C. 908.
(*d*) *Doe* v. *Knight* (1826), 5 B. & C. 671; *Exton* v. *Scott* (1833), 6 Sim. 31.

constitute delivery (*e*). An insurance policy signed and sealed in the prescribed manner may therefore become effective as a completed policy immediately the last signature has been written.

Xenos v. *Wickham.*

In *Xenos* v. *Wickham* (*f*) a marine policy had been executed by an insurance company, and purported, on the face of it, to be "signed, sealed, and delivered" by two directors of the company. There was no other evidence of delivery, and the policy, on being executed, was kept by the company until it might be sent for by the assured or his broker. A loss occurred while the policy was still in the company's possession. The House of Lords held that the policy was complete and operative from the time when it was executed. The statement on the face of the policy that all acts were done to render the execution complete was in the absence of any other evidence as to what took place at the time of execution conclusive against the company that it was not only signed and sealed but also delivered. Although the policy was retained by the officers of the company when formal execution of it had taken place, they held it for the assured, whose property it became from that moment.

Roberts v. *Security.*

In *Roberts* v. *Security* (*g*) a burglary policy was signed and sealed in the prescribed manner by two directors and the secretary. The policy recited that the first premium had been paid, and it contained the condition that no insurance should be held to be effective until the premium due thereon should have been paid. After being signed and sealed the policy remained at the company's office, and the premium had not in fact been paid, but there was no other evidence tending to show that the execution of the policy was conditional. The Court of Appeal held that the policy was fully executed when it was signed, and that no further delivery or act was necessary to make it a complete operative deed, and that the company were estopped from denying the truth of the recital that the first premium was paid.

Delivery is a question of intention.

Whether or not a policy is delivered so as to complete the execution appears, therefore, to be a question of intention on the part of the company's officials who sign and seal the deed. This intention may be inferred from all the facts and circumstances of the case, and no direct evidence of any word or act indicating a formal delivery appears to be necessary. In

(*e*) *Doe* v. *Knight* (1826), 5 B. & C. 671.

(*f*) (1867), L. R. 2 H. L. 296.

(*g*) [1897] 1 Q. B. 111.

Roberts v. *Security* (*h*) there appears to have been no evidence at all beyond the fact that the policy was sealed and signed, and the policy itself did not, as in the case of *Xenos* v. *Wickham* (*i*), purport on the face of it to have been " delivered." The principle adopted seems to have been that, in the absence of evidence to the contrary, it may be assumed that a policy which has been signed and sealed in the prescribed form, and is on the face of it complete, has also been " delivered," as a completed deed. No doubt where a deed is in the possession of the grantee and is signed and sealed by the grantor, the fact of delivery may be inferred (*k*), but the case of *Roberts* v. *Security* (*l*) appears to be the first decision that the essential fact of " delivery " may be inferred without any further proof from the other two essential facts of signing and sealing. If the directors of an insurance company desire to execute a policy which shall not be immediately effective as a completed deed they must in some manner or other clearly indicate that it is not " delivered " or that it is " delivered " as an escrow, and not as a completed deed (*ll*).

Conditional delivery of a deed as an escrow.

So long as a deed remains in the possession of the grantor, or of some third party for safe custody on behalf of the grantor, there is not necessarily any delivery (*m*), but if the grantor parts with possession to some person not being his agent there is delivery, and unless delivered as an escrow the deed is completely executed. An escrow is a deed delivered subject to a suspensive condition that it is not to take effect as a completed deed until the happening of some future event. In *Roberts* v. *Security* (*n*), Lord Esher said that if a policy was retained in the hands of the company itself it could not be delivered as an escrow. This does not appear to coincide with the view of Lord Cranworth in *Xenos* v. *Wickham* (*o*), where he clearly contemplates such a possibility; and on principle there appears to be no reason why, if the grantor may completely deliver the deed while in his

(*h*) [1897] 1 Q. B. 111.
(*i*) (1867), L. R. 2 H. L. 296.
(*k*) *Hall* v. *Bainbridge* (1848), 12 Q. B. 699, 710.
(*l*) [1897] 1 Q. B. 111.
(*ll*) This might be done by means of a general standing resolution of the board of directors or better still by introducing into each resolution which authorises the signing and sealing of policies words to the effect that if signed and sealed in advance of payment of premium they should not be treated as delivered and are not intended to operate as completed deeds until in each case the premium has actually been paid and the policy sent to the assured or his agent.
(*m*) *Doe* v. *Knight* (1826), 5 B. & C. 671.
(*n*) [1897] 1 Q. B. 111.
(*o*) (1867), L. R. 2 H. L. 296.

own hands, he should not be able to deliver it conditionally as an escrow, and if he can keep it in his own hands as an escrow *à fortiori* he can deliver it to his agent as an escrow. The common case of an escrow is no doubt by conditional delivery to a stranger on behalf of the grantee, and probably delivery to the grantee himself cannot be conditional, but must be deemed to be an unconditional delivery of a completed deed. There are cases, however, where an escrow has been delivered to one of several grantees (*p*) or to the grantee's solicitor (*q*). If a policy is not under seal it may be delivered to the assured or his agent conditionally, and so as not to be operative until the condition is fulfilled (*r*), but if under seal it will probably take immediate effect, notwithstanding any alleged suspensive condition (*s*).

Delivery as an escrow may be inferred without express words.

Whether or not a deed is delivered as a complete instrument or as an escrow is seldom a question of express words, but usually an inference from the nature of the deed, and from all the circumstances attending the execution (*t*). If a policy remains in the hands of the company or its agents after execution, and it is so held merely for the convenience of the assured until he should demand it, authority both here and in America is clear to the effect that such policy is completely operative (*u*) ; but if the object of holding the policy is to obtain payment of the premium or to make inquiries before finally committing themselves to the risk, it is a natural inference that the directors did not intend complete execution of the policy, and in America there are numerous decisions where it has been held that the execution and delivery of a policy to the company's agent for delivery against premium to the assured does not complete a binding insurance, either because there is no delivery at all or because the delivery is conditional upon the performance of the condition that the premium shall first be paid (*x*). At first sight these decisions appear inconsistent with

(*p*) *London Freehold* v. *Suffield*, [1897] 2 Ch. 608 ; *Johnson* v. *Baker* (1821), 4 B. & Ald. 440.

(*q*) *Watkins* v. *Nash* (1895), L. R. 20 Eq. 262 ; *Millership* v. *Brookes* (1860), 5 H. & N. 797.

(*r*) *Hartford Fire* v. *Wilson* (1902), 187 U. S. 467.

(*s*) *Harnickell* v. *New York* (1886), 40 Hun. 558 ; *Hodge* v. *Security* (1884), 33 Hun. 583.

(*t*) *Bowker* v. *Burdakin* (1843), 11 M. & W. 128 ; *Gudgen* v. *Besset* (1856), 6 El. & Bl. 986 ; *London Freehold* v. *Suffield*, [1897] 2 Ch. 608.

(*u*) *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296 ; *Insurance Co.* v. *Colt* (1874), 20 Wall. 560 ; *Yonge* v. *Equitable* (1887), 30 Fed. 902 ; *Shattuck* v. *Mutual Life* (1878), 4 Cliff. 598 ; *Bragdon* v. *Appleton Mutual* (1856), 42 Me. 259 ; *Union Century* v. *Phillips* (1900), 102 Fed. 19.

(*x*) *Wainer* v. *Milford* (1891), 153 Mass. 335 ; *Markey* v. *Mutual Benefit* (1879), 126 Mass. 158 ; *Marks* v. *Hope Mutual* (1875), 117 Mass.

the decision in *Roberts* v. *Security* (*y*), but as in each case it is a question of fact as to what the intention of the directors was, a very slight difference in the circumstances may justify a different inference as to that intention. As a matter of fact, the decision in *Roberts* v. *Security* (*y*) was not very cordially received by the Privy Council in the case of *Equitable Fire and Life* v. *The Ching Wo Hong* (*yy*), and it is possible that if the former case had gone to the House of Lords the decision would have been reversed.

Effect of the performance of the condition subject to which a policy has been delivered as an escrow.

When a deed is produced from the possession of the grantee or his representatives, it is presumed *primâ facie* to have been delivered unconditionally (*z*), and if shown to have been delivered conditionally it is presumed *primâ facie* that the conditions have been fulfilled, and that the deed has become completely operative (*a*). The consequence of the performance of a condition precedent to the effective operation of the deed is to make it effective, as if it had been delivered unconditionally at the date when it was delivered as an escrow (*b*). If, therefore, the delivery of a policy by the directors of a company to its own officials or agents is a delivery of the deed, as an escrow, for instance if it is delivered conditionally and with the intention that it shall not be completely executed until the premium is paid, payment of the premium or the performance of any other suspensive condition would render the policy as effective for all purposes as if it had been delivered unconditionally at the time when it was delivered conditionally to the officials or agents of the company (*c*). If a loss had happened in the interval the company might, upon principles already discussed (*d*), be entitled to refuse to accept the premium, or they might not be liable if liability for loss before payment of premium was expressly excepted by the conditions (*e*), but if they accepted the premium, or were bound to accept the premium after loss, the policy would be effective as a completed policy from the original date of conditional delivery, and the question of whether or not the company were liable for the loss would be one of construction of the terms of the policy.

528; *Green* v. *Lycoming* (1879), 91 Pen. 387.

(*y*) [1897] 1 Q. B. 111.

(*yy*) [1907] A. C. 96.

(*z*) *Mutual Life* v. *Gignère* (1902), 32 Can. S. C. 348.

(*a*) *Hare* v. *Horton* (1833), 5 B. & Ad. 715.

(*b*) *Graham* v. *Graham* (1791), 1 Ves. 272, 275.

(c) *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111, 116.

(*d*) *Supra*, p. 216.

(*e*) *Infra*, p. 228.

Policy cannot be delivered subject to defeasance upon a condition not contained in the policy.

Although a policy may be delivered as an escrow not to take effect until a certain condition has been fulfilled, it cannot be delivered subject to the condition that it shall take effect immediately but become void on the happening of some future event. Any such condition subsequent must be inserted in the policy, for once the policy has been delivered as a fully completed deed no condition can be effective which is not part of the written agreement. Thus, where an apparently complete policy was delivered subject to the alleged oral condition that it should be surrendered and cease if and when cancelled by the company's head office, it was held that such condition could have no effect, as to give effect to it would be to introduce a term into the contract inconsistent with the written agreement (*f*).

No acceptance of a policy under seal is necessary.

The peculiarity of an instrument under seal is that it requires no acceptance on the part of the grantee to give it binding effect. Even in the case of a bilateral deed or indenture where the covenants of the one party are expressed to be in consideration of the covenants of the other, the execution of the deed by one party binds him, even although the other party never executes his part (*g*). As, in general, grants are for the benefit of the grantee he may, so long as he has not rejected the deed, come in at any time and say, "I claim by the deed;" but he has the full power, so long as he has not assented, to say that he declines, and will have nothing to do with the deed (*h*). The grantee, therefore, so long as he has neither assented nor dissented, is free to elect whether he shall take the deed or not, and although he can sue he is not liable to be sued upon it (*i*). If, however, he has assented to the deed by taking any benefit under it or otherwise he is bound to perform his part of the deed although he has not, in fact, executed it (*k*). Upon these principles it follows that a policy under seal may be relied on by the assured, although it varies from his proposal, and although he has never acquiesced in it, and even although he has never seen it or has no knowledge that it has been executed. If he has seen it and repudiated it he can no longer rely upon it, but until it has been repudiated he has the right to elect.

(*f*) *Hodge* v. *Security* (1884), 33 Hun. 583.

(*g*) *Morgan* v. *Pike* (1854), 14 C. B. 473; *Rose* v. *Poulton* (1831), 2 B. & Ad. 822.

(*h*) *Siggers* v. *Evans* (1855), 5 El. & Bl. 367, 381.

(*i*) *Petrie* v. *Bury* (1824), 3 B. & C. 353.

(*k*) *Webb* v. *Spicer* (1849), 13 Q. B. 886, 893.

CHAPTER IV

Duration of the Risk

Section I.—Computation of the Period of Risk

Risk runs *primâ facie* from date of contract.

Where the risk is not specified as running from a particular date, the presumption is that it runs from the date of the policy (*a*), or, where no policy has been issued, from the time when a binding contract to insure was made. Unless so specified, an acceptance does not relate back to the date of the proposal or offer (*b*). It is not uncommon, however, to antedate the policy to the date of the proposal, and if the assured accepts the policy in this form the period of risk will be computed as from the nominal date of the policy (*c*).

Risk specified as running "from" or "to" a particular day.

Where the risk is specified as running from or to a particular day or from the date of the policy the question may arise whether the specified day is included or excluded. In an early life insurance case, Holt, C.J., drew a distinction between the expression "from the day of the date thereof," and "from the date hereof," holding that the former was exclusive of the day of the date, but the latter inclusive. Lord Mansfield, however, disapproved of any such rigid distinction, and said that the construction must vary according to the subject matter, and that "from" a particular date may mean inclusive or exclusive according to the context (*d*).

In the absence of anything in the context to indicate the intention of the parties, the word "from" is to be used in what the Courts have said is its primary meaning, that is, exclusive of the specified day.

(*a*) *McMaster* v. *New York Life* (1901), 183 U. S. 25.

(*b*) *North American Life* v. *Elson* (1903), 33 Can. S. C. 383.

(*c*) *Johnson* v. *Mutual Benefit* (1906), 143 Fed. Rep. 950; *McConnell* v. *Provident Savings Life* (1899), 92 Fed. Rep. 769.

(*d*) *Pugh* v. *Duke of Leeds* (1777), 2 Cowp. 714; Lord Low, in *Sickness and Accident* v. *General Accident* (1892), 19 R. 977.

Isaacs v. The Royal (1870), L. R. 5 Ex. Ch. 296

Isaacs v. *The Royal.*

A fire insurance policy was issued by the company whereby they declared "that from the 14th day of February, 1868, until the 14th day of August, 1868, and for so long after as the said assured shall pay the sum of 225 dollars at the time above mentioned and the directors, by their authorised agent, shall accept the same, the funds and property of the said company shall be liable to pay and make good to the assured all such loss or damage by fire as shall happen to the property above mentioned." The property was destroyed by fire between 11 and 12 p.m. on August 14, 1868, and the half-year's premium due on that day had not been paid. The Court held that the original term included the 14th of August, and that the insurers were therefore liable. It was proved that both parties intended to renew the policy, and the Court thought they were entitled to place some reliance upon this fact, in order to interpret words which, taken by themselves, were somewhat equivocal. If August 14 was not included the assured would be unprotected for at least part of the day upon which the renewal premium was payable. In giving judgment the Court did not give any opinion as to whether the policy covered February 14; but Martin, B., during the argument, said: "I do not think both days were protected by this policy. Otherwise a period of more than six months would be covered by the policy."

South Staffordshire Tramways v. Sickness and Accident, [1891] 1 Q. B. 402

South Staffordshire Tramways v. *Sickness and Accident.*

A policy was issued on December 2, 1887, to indemnify the assured against liability for accidents. The policy recited that the assured had paid the sum of £200 "as premium for such indemnity for twelve calendar months from November 24, 1887," and witnessed that the company did thereby agree to pay the assured certain sums "in respect of claims for personal injury and damage to property for which the assured shall be liable." It was stipulated that the policy was renewable and that the premium was due on November 24. It was not renewed, and on November 24, 1888, an accident occurred for which the assured was liable. The Court held that the assured was entitled to recover, and Day, J., said: "The insurance being 'for twelve calendar months from November 24, 1887,' obviously either November 24, 1887, or November 24, 1888, must be excluded, for otherwise the period covered would exceed twelve calendar months by one day. I decide without hesitation that the former date is excluded and the latter included. . . . I cannot but think that as regards time 'from' is akin to 'after,' and excludes the date fixed for the commencement of the computation."

Sickness and Accident v. General Accident (1892), 19 R. 977

Sickness and Accident v. *General Accident.*

The insurers had agreed by letter to insure the assured against liability for accidents for twelve months from November 24 inclusive, subject to the condition that there should be no insurance until the premium was paid. The premium was not paid, and the policy was not issued, when on November 24 an accident for which the assured was liable, occurred. According to the view taken by the Court of Session the happening of the accident before the issue of the policy entirely relieved the insurers from their contract. The insurers

denied liability, and on November 26 the assured sent a cheque for the first year's premium, and the insurers accepted it in the following terms: "I am obliged by your favour enclosing cheque value £240 for the third party risk of the So. Staffo., etc., Tram Co. from the 24th inst." The Court held that this created a new contract to insure from November 24, but not inclusive, and Lord President Robertson said, "I consider the primary meaning of 'from the 24th' to be from the expiry of the 24th. It was strenuously maintained, indeed, that the previous correspondence showed that the defenders had used those very words 'from the 24th' as including the 24th, and this is the case. But then, this cannot be taken to stereotype a secondary meaning as applying to a common expression when used by a particular person, irrespective of all changes of circumstances and intervening meetings. In reading the receipt as excluding the 24th, I do not go upon the extreme improbability of the insurance company meaning to include it, but upon the primary meaning of the words, and I decline to adopt a secondary meaning upon the sole medium of the previous letters."

Coupon insurances.

Many accident insurances are now completed by the signing, posting, and registering of coupons issued with periodicals or diaries. According to the terms of the particular coupon the insurance becomes effective from the date of signing, or from the date of posting with a remittance, or from the date of registration by the company. Usually the risk will run for twelve months only from the date on which it attaches, but in the following case, owing to the peculiar wording of the coupon, it was held that the risk, although commencing at latest upon the date when the coupon and remittance were received by the office, ran until the expiration of a year from the date when the coupon was "registered," and it was held to be "registered" when it was filed in alphabetical order along with other similar coupons.

General Accident v. Robertson, [1909] A. C. 404

General Accident v. *Robertson.*

The company issued insurance coupons which were attached to Letts' diaries. On or before December 25, 1905, H purchased a diary for 1906. It contained the company's coupon whereby they promised to pay £1000 to the heirs, executors, or administrators of any person killed in a railway accident provided that the person so killed was the owner of the diary and had caused his or her name to be registered at the head office and had paid the fee for registration and that notice of claim was sent to the head office within fourteen days after the accident and within twelve months after the registration. On December 25, 1905, H sent in the coupon slip for registration, together with a remittance for 6*d.*, the prescribed fee. The company's office was closed on December 26. On December 27 H's letter was opened, and the coupon slip was stamped as received on that day. The ordinary course of business was to date-stamp all coupon slips on the day when the letters were opened and to

divide them into classes and to enter in a book the total number of coupons in each class received that day. Subsequently, but not necessarily on the day of receipt, a printed form of acknowledgment was filled up for each coupon slip and dispatched to the assured, and the coupon slips were then made up according to classes in separate bundles of not more than 100 slips in alphabetical order. Each bundle might contain slips of more than one date of stamping. The form of acknowledgment sent to H was dated December 29, but it was not dispatched until January 3, 1906. On December 28, 1906, H was killed in a railway accident, and a claim was made by his widow on January 2, 1907. The House of Lords held that the contract of insurance was complete, and that the risk attached if not when H's letter was posted on December 25, then at all events on December 26, when it was delivered, or on December 27, when it was opened. If the coupon was not registered on that day the company alone was to blame, and it could not take advantage of its own default. The question was how long the insurance was to continue. On this the documents were silent, except that the claim had to be made within twelve months of registration. If there was no registration the liability would be protracted without limit, and if registration was delayed the liability would be deferred accordingly. Then, when was the coupon registered ? The date-stamp was not registration, and neither was the entry in the books of the total number of coupons received. The only registration was the filing of the coupons in bundles in alphabetical order. There was no direct evidence as to when that was done, but as the bundle in which the slip in question was contained also contained slips dated January 1, 1906, it could not have been done before that date, and very likely it was done later. The claim was made on January 2, 1907, and the onus was on the company to prove that there had been registration before January 2, 1906. They had not proved it, and the fact that they did not send their letter of acknowledgment until January 3 was evidence to the contrary. The House held, therefore, that the claim had been made within the time stipulated.

Section II.—No Insurance until First Premium is Paid

Effect of condition that the policy shall not be in force until first premium paid.

Where there is a binding contract to insure, or a policy has been issued, in either case subject to the condition that there shall be no insurance until the first premium is paid, this condition saves the company from the unsatisfactory position of being on a risk for which they may never be paid. The condition operates to suspend the risk where but for the condition it would have attached at the time the contract was made or at some specified date. Further than this, the proviso does not affect the period of risk. It does not affect the dates upon which the renewal premiums are payable or the expiration of the risk upon non-payment (*f*).

(*f*) *Armstrong* v. *Provident Savings Life* (1901), 2 Ont. L. R. 771 ; *North American Life* v. *Elson* (1903), 33 Can. S. C. 383 ; *M'Connell* v. *Provident Savings Life* (1899), 92 Fed. Rep. 769.

When it also purports to insure from a specified date.

The expression that there shall be no insurance, or that the insurance shall not be in force, until the premium is paid is not altogether free from ambiguity. If it is coupled with an agreement to insure from a specified date it is open to argument that the condition has the effect of making the insurance subject to a suspensive condition, and that when the condition is satisfied by payment of the premium, the insurers are bound to indemnify the assured in respect of losses happening between the specified date and the payment of the premium (*ff*). Where no policy has been executed the insurers may escape liability by refusing to accept the premium on the ground that there has been a change of risk before the policy was called for (*g*). But if a policy has been executed the insurers are probably liable (*h*).

Where it insures from the date of the policy.

Even where the insurance is not from a specified date, but is expressly or impliedly to run from the date of the policy or from the delivery of the policy, the condition that it shall not be in force until the premium is paid is probably in itself not sufficient to exclude all liability for loss happening after the execution of the policy and before payment of the premium. If insurers desire to avoid all risk of having to pay upon such a loss they must either delay execution of the policy until the premium has been paid or else insert the less ambiguous proviso that they shall not be liable in respect of any loss happening before the premium is paid, and at the same time take care that they do not by declaration in the policy or otherwise admit payment of the premium before it has in fact been received. In life policies upon the life of the assured a proviso that "the policy shall not be in force until the premium is paid," might perhaps be sufficient, as payment means payment by the assured, and he cannot pay after his death; but a safer form of proviso, available also for insurances upon the lives of third parties, is that "the policy shall not be binding until the premium has been received during the lifetime of the party assured."

(*ff*) This argument is strengthened where it is the practice of the office to accept the full premium for the specified period even although not paid until part of that period has elapsed. Many offices charge the premium only from the date of payment and acceptance thereof, and this is a much safer course.

(*g*) *Sickness and Accident* v. *General Accident* (1892), 19 R. 977.

(*h*) Rigby, L.J., in *Roberts* v. *Security*, [1897] 1 Q. B. 111, 116; *Whittaker* v. *Farmers' Union* (1859), 29 Barb. 312; contra, Lord Low (Ordinary) in *Sickness and Accident* v. *General Accident* (1892), 19 R. 977.

Condition requiring prepayment of premium will not be implied.

When there is no express provision in a policy that it should not attach until payment of the premium, such a condition will not be implied (*i*).

Acknowledgment in policy of receipt of premium; effect upon prepayment condition.

The condition in the policy for prepayment of premium may be rendered inoperative if, in a policy under seal, the company formally acknowledge receipt of premium. This is said to follow from the doctrine of estoppel by deed. The company having in a completely executed deed declared that it has received the first premium is said to be estopped from thereafter denying such receipt. The Court of Appeal have carried this doctrine so far that they have held that even where the policy has not been handed to the assured or his agent, but is still in the custody of the company and its agents, yet if it is a completely executed deed, "sealed and delivered," the company are estopped from denying the receipt of premium therein acknowledged (*k*). This decision was doubted in a later case in the Privy Council, where it was held that the receipt clause in the particular policy then under consideration ought to be read as merely matter of common form, and when taken in conjunction with the condition that the company should not be liable in respect of loss until the premium "is actually paid," could not reasonably be read as conclusive evidence of actual payment (*l*). In Canada it has been held that where a policy is executed acknowledging receipt of premium and containing the condition for prepayment of premium and is delivered to an agent of the company to exchange against the premium in cash, the company is not estopped from alleging the non-payment of premium (*m*). In the United States it has been held that even where the policy has been delivered to the assured the acknowledgment of receipt of premium is not conclusive when it is coupled with the condition that there shall be no insurance until the actual payment of the premium (*n*).

Roberts v. Security, [1897] 1 Q. B. 111

Roberts v. *Security.*

A proposal for burglary insurance dated December 14 was presented by the plaintiff, and on December 18 the company's agent sent a protection note

(*i*) *Kelly* v. *London and Staffordshire* (1883), Cab. & E. 47; *Thompson* v. *Adams* (1889), 23 Q. B. D. 361.

(*k*) *Roberts* v. *Security*, [1897] 1 Q. B. 111.

(*l*) *Equitable Fire and Life* v. *The Ching Wo Hong*, [1907] A. C. 96.

(*ll*) *Vide supra*, p. 221, for suggestion as to the possibility of avoiding this result by means of a resolution of the board of directors.

(*m*) *Western Assurance* v. *Provincial Assurance* (1880), 5 Ont. A. R. 190.

(*n*) *Sheldon* v. *Atlantic Fire* (1863), 26 N. Y. 460.

purporting to protect the plaintiff against burglary risk (subject to the conditions contained in and indorsed on the form of policy used by the company) for seven days from the date thereof or until the proposal should be in the meantime rejected. The protection note contained an intimation that in the event of the proposal being declined the deposit would be refunded, less the proportion of the premium for the period covered. The note was inclosed in a letter from the agent stating that a policy would be sent in due course. No sum of money was ever paid by way of premium, and nothing further was done until December 26, when a burglary was committed and loss sustained. On December 27 the directors of the company, who were then ignorant of the fact that a loss had occurred, executed a policy in conformity with the proposal. The policy recited that the plaintiff had paid to the company the sum in the margin thereof, being the first premium for the assurance of the property from noon of December 14, 1895, to noon of January 1, 1897, and purported to insure the property described accordingly. It was provided by the policy that no insurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. The policy was never delivered to the plaintiff, but remained in the company's office. The Court held that the policy was completely executed and that the company were not entitled to plead in contradiction of the terms of their own deed that the premium had not been paid. They had treated the premium as paid, and if it had not been paid they thereby waived the previous payment as a condition of the existence of an insurance.

Equitable Fire and Life v. The Ching Wo Hong, [1907] A. C. 96

Equitable Fire and Life v. The Ching Wo Hong.

A policy was issued by the Western Assurance company covering certain property against fire risks, and the policy recited "that the insured having paid the sum of (blank) for insuring against loss or damage by fire the property (described) in the sum of (mentioned) the company agreed, etc. . . ." The policy contained the condition, "This insurance will not be in force until, nor will the company be liable in respect of any loss or damage happening before, the premium or a deposit on account thereof is actually paid." No premium was ever paid, and the policy was treated by both parties thereto as having been abandoned; but other insurers of the same risk attempted to set up this insurance as a subsisting insurance, and therefore a breach of the terms of their own policy which prohibited double insurance. The Board held that the policy of the Western Assurance Company was not enforceable as the premium had not been paid, and that the Western were not estopped from denying payment by reason of the recital in the policy. Lord Davey said: "The instrument must be read as a whole for the purpose of ascertaining the intention of the parties, and effect so far as possible must be given to every part of it. Their Lordships are of opinion that the condition qualifies and restricts the engagement of the company and converts what would otherwise be an absolute engagement into a conditional one, and that the words 'having paid' to the company are common form words or words of style for expressing the consideration for the company's engagement which would become accurate when that engagement became effective. The Judicature Act provides that where the rules of law and of equity differ the rules of equity shall prevail. It is familiar law that in equity a vendor was never held to be estopped by a statement in

the conveyance that the purchase money had been paid or even by an endorsed receipt for the money signed by him so as to exclude the enforcement of the vendor's lien. Their Lordships think that in any case the parties should not be held in equity to be estopped as between themselves from showing that the consideration had not in fact been paid. But in the present case they think that the condition read with the operative part of the instrument negatives any such estoppel; for the only meaning which can be given to the words is that the consideration must be not only expressed to be paid, but actually paid. Their Lordships cannot treat the fact of the executed policy having been handed to the respondents as a waiver of the condition or attach any importance to the circumstances. What was handed to the respondents was the instrument with this clause in it, and that was notice to them, and made it part of the contract that there would be no liability until the premium was paid. It is not a question of conditional execution, but of the construction of what was executed. The learned counsel for the appellant company cited and relied on a decision of the Court of Appeal in England in *Roberts* v. *Security Co., Ltd.* It is enough for their Lordships to say that the words of the instrument in that case were different from those which their Lordships have to construe, and they are relieved from saying whether they would otherwise have been prepared to follow it."

Presumption in marine insurance that premium has been paid is not applicable to other risks.

The well-known principle in marine insurance that the acknowledgment of the receipt of premium cannot be disputed by the underwriter has been cited in support of the application of a similar doctrine to other classes of insurance. It has long been held in marine insurance, where the contract is concluded through a broker, that the underwriter must look to the broker for payment of his premium, and as between underwriter and assured the premium is deemed to be paid, and it is no defence for the underwriter who is sued by the assured on the policy or for a return of premium to say that he in fact never received it (*o*). It is sometimes said that the acknowledgment contained in the policy is conclusive as between underwriter and assured (*p*), but as a Lloyd's policy is not under seal this cannot be so on the doctrine of estoppel, and the rule has arisen merely from the universal practice among business men to treat the premium as paid as between underwriter and assured. This is clearly shown by the decision of the Court of Appeal in *Universo Insurance* v. *Merchants' Marine* (*r*), where they held that, even where the policy contained an express promise by the assured to pay the premium, the underwriter could not sue the assured, since by the custom of

(*o*) *Dalzell* v. *Mair* (1808), 1 Camp. 532; *Power* v. *Butcher* (1829), 10 B. & C. 329; *Foy* v. *Bell* (1811), 3 Taun. 493; *De Gaminde* v. *Pigou* (1812), 4 Taun. 246.

(*p*) *Anderson* v. *Thornton* (1853), 8 Exch. 425.

(*r*) [1897] 2 Q. B. 93.

insurance the premium was as against the assured deemed to be paid, and the underwriter's remedy was against the broker only. It will thus be seen that the doctrine in marine insurance that the premium is deemed to be paid has really no application to other branches of insurance where the custom or practice which is the basis of the doctrine does not exist.

Estoppel as against assignee of policy.

Although acknowledgment of the receipt of premium contained in the policy may not be conclusive evidence of payment as against the assured, the insurers may be estopped as against third parties into whose hands the policy may afterwards come as purchasers, from denying, as against them, the payment of the premium so acknowledged in the policy to have been paid (*s*).

Waiver of prepayment condition.

Besides estoppel by deed, the insurers may be estopped by their conduct from relying upon the conditions for prepayment of the premium, or in other words they may expressly or impliedly waive this condition precedent to liability. Generally any act leading the assured to believe that the contract will be effective without payment of premium amounts to a waiver of the condition (*t*), but unless the insurers do or omit some act whereby the insured has just ground to believe and does believe that the contract will be made, continued, or restored without payment of premium there is no estoppel, and can be no waiver (*u*).

Delivery of policy without demanding payment.

The actual delivery of the policy to the assured without demanding payment of premium may constitute a waiver, notwithstanding that the condition is contained in the policy as delivered (*x*). Where the usual practice is to insist upon payment of the premium against the delivery of the policy, a departure from the usual practice by delivering without demanding payment may justify the assured in believing that the prepayment condition is not to be insisted on. The question is, was the delivery made on such terms as implied a giving of credit without prejudice to the immediate validity of the policy (*y*). This is a question for the jury. Probably the bare fact that a policy

(*s*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), secs. 54, 55.

(*t*) *Sheldon* v. *Atlantic Fire* (1863), 26 N. Y. 460; *O'Brien* v. *Union* (1884), 22 Fed. Rep. 586; *Bragdon* v. *Appleton Mutual* (1856), 42 Me. 259.

(*u*) *Equitable Assurance* v. *M'Elroy* (1897), 83 Fed. Rep. 631.

(*x*) *Mutual Reserve Life* v. *Heidel* (1908), 161 Fed. Rep. 535; *Washoe Tool Co.* v. *Hibernia Fire* (1876), 7 Hun. 74; Aff. 66 N. Y. 613; *Boehen* v. *Williamsburgh Insurance* (1866), 35 N. Y. 131; *Bodine* v. *Exchange Fire* (1872), 51 N. Y. 117; *Trustees of Baptist Church* v. *Brooklyn Fire* (1859), 19 N. Y. 305; *Hodge* v. *Security* (1884), 33 Hun. 583.

(*y*) *Farnum* v. *Phœnix* (1890), 83 Cal. 246.

was actually delivered to the assured would not be evidence upon which a jury could find that a condition in that policy requiring prepayment of the premium was waived (*z*), but very little more would be sufficient; as, for instance, the fact that the insurers usually did insist upon payment before delivery (*a*).

Delivery of a policy containing no prepayment condition.

A condition in a preliminary contract requiring prepayment would undoubtedly be waived by delivery of a policy without such condition, and in an American case (*b*) where the company's policies contained the condition and there was an oral contract to insure, the Court held that the fact that the company had previously issued policies to the same assured without demanding prepayment, was evidence of the condition having been waived.

Section III.—What Constitutes Payment of Premium

Premium payable at head office.

Primâ facie premiums are payable in cash to the insurers at the principal place of business, that is to say, in the case of companies at the head office of the company (*c*).

Conditions specifying the place of payment.

The assured is presumed to have notice of any condition in the policy relating to the place of payment, and will be bound thereby (*d*). But the conditions of the policy may be waived, and payment to an agent will be sufficient if such agent was expressly or impliedly authorised by the company to receive payment, or held out by the company as a person having such authority (*e*). If the terms of the policy require payment to be made to one particular agent, payment to some other agent is not good payment, and the assured must use reasonable diligence to find the particular agent to whom payment must be made, and the fact that he has called once or twice and found the agent out is no excuse for non-payment of premium (*f*). But, even where payment is directed to be made to a particular agent, the officials at the head office may probably be assumed, in the absence of express stipulation to the contrary, to have a concurrent authority to accept the premium.

(*z*) *Wood* v. *Poughkeepsie* (1865), 32 N. Y. 619; *Equitable Fire and Life* v. *The Ching Wo Hong*, [1907] A. C. 96.
(*a*) *Miller* v. *Life Insurance Co.* (1870), 12 Wall. 285.
(*b*) *Church* v. *La Fayette* (1876), 66 N. Y. 222.
(*c*) *Palmer* v. *Phœnix* (1881), 84 N. Y. 63.
(*d*) *Mulrey* v. *Shawmut Mutual* (1862), 86 Mass. 116.
(*e*) *State Life* v. *Murray* (1908), 159 Fed. Rep. 408; *Talbott* v. *Metropolitan Life* (1906), 142 Fed. Rep. 694.
(*f*) *Cronkhite* v. *Accident* (1888), 35 Fed. Rep. 26.

Insurers holding out persons as agents to collect premiums.

Payment to the company's examining physician, who undertook to transmit the money to the company, was held to be insufficient in the absence of evidence of authority or holding out of authority by the company (*g*). An agent to whom a policy is transmitted for delivery to the assured has probably implied authority to collect the premium, and in one American case (*h*) a provision in the policy that payment should be made to the secretary or agent appointed in writing was held to be waived by the company transmitting the policy to an agent under such circumstances that authority to collect the premium would be implied. Where the assured has been in the habit of paying the premium to a certain local agent, payment to that agent is sufficient payment until the agent's authority has been revoked (*i*), and the assured has clear notice of the fact (*k*). An agent with authority to deliver policies and collect premiums has *primâ facie* authority to collect premium notes (*l*).

Agent to collect premiums may not delegate his authority.

An agent is not entitled to delegate his authority without the express or implied consent of his principal, and therefore, where an insurance company appoints a particular person to receive the premiums, that person cannot appoint any one else to receive them on his behalf, unless authorised by the company to do so. But an agent has implied authority to do his business in the ordinary way through a staff of clerks or other servants in his employment, and therefore payment to such persons would be deemed payment to the company. In one American case (*m*) the secretary's wife was in the habit of receiving premiums on behalf of the secretary. This practice was acquiesced in by the company, and payment to the wife was accordingly held to be sufficient payment. In another American case (*n*) an agent authorised his daughter to receive payment of premiums during his absence. The Court held that the agent had acted within the scope of his authority in temporarily delegating that authority to his daughter, and that therefore payment to the daughter was sufficient payment to the company.

Condition requiring

A not uncommon condition is that no payment of premium

(*g*) *Teeter* v. *United Law* (1899), 159 N. Y. 411.

(*h*) *Arthurholt* v. *Susquehanna* (1893), 159 Pa. 1.

(*i*) *McNeilly* v. *Continental Life* (1876), 66 N. Y. 23.

(*k*) *Insurance Co.* v. *McCain* (1877), 96 U. S. 84.

(*l*) *Mutual Life* v. *Logan* (1898), 87 Fed. Rep. 637.

(*m*) *Anderson* v. *Supreme Council* (1892), 135 N. Y. 106.

(*n*) *McNeilly* v. *Continental Life* (1876), 66 N. Y. 23.

printed receipt.

can be recognised unless the company's printed receipt signed by the president and secretary was received at the time. This condition may be waived. Thus where the company terminated an agency, and did not send the agent the usual forms, but authorised him to remit to the head office the premiums then falling due, it was held that payment to the agent was sufficient, although no printed receipt had been given (*o*). In an Australian case (*p*) the renewal receipt granted by the agent was subject to the following terms:—"This temporary receipt has the full force of the company's policy (and is subject to its conditions) for fourteen days only from the date of issue, but on the expiry of that time none other than the head office receipt will be acknowledged by the company." A fire occurred after the fourteen days, and before the agent had transmitted the premium to the head office, and it was held that the renewal was good for the year, even although no receipt had been issued from the head office. The Court thought that the condition referred rather to the duty of the agent than to any obligation imposed on the assured.

Broker's authority to collect premiums.

Primâ facie a broker employed by the assured to effect an insurance has no authority to collect the premium for the company, and therefore payment to him is not necessarily payment to the company (*q*). But the broker may be held out by the company as having authority to collect the premium.

Kelly v. London and Staffordshire Fire (1883), Cab. & E. 47

Kelly v. *London and Staffordshire Fire.*

P, an insurance broker, was employed by K in America to effect a fire insurance. P did so with the London and Staffordshire through C, the company's agent in Washington, U.S.A. P was in the habit of effecting insurances with the London and Staffordshire, and the course of business was for him to deduct 20 per cent. from the premiums as commission. The policy was delivered by C to P on June 9 and immediately handed over to K, who paid the premium to P. The policy contained the clause, "It is part of this contract that any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured, and not of this company under any circumstances whatsoever, or in any transaction relating to this insurance." It was held that the money was received by P on behalf of and with the authority of the company, and as between the company and K must be deemed to have been paid. The object of the condition was to prevent the company being bound by the representations of the broker, and did not prevent his being held out by the company as agent to receive the premium.

(*o*) *McNeilly* v. *Continental Life* (1876), 66 N. Y. 23.

(*p*) *Moore* v. *Halfey* (1883), 9 Vict. L. R. 400.

(*q*) *Wilber* v. *Williamsburgh* (1890), 122 N. Y. 439; *Becker* v. *Exchange Mutual* (1908), 165 Fed. Rep. 816.

Negotiable instruments accepted as payment of premiums:

The insurers may accept a cheque, promissory note, or bill of exchange as whole or part payment of the premium, and the question then arises whether they have accepted it as absolute payment or only as payment conditional on the document being honoured at maturity. Whether a negotiable instrument is accepted by a creditor as absolute or conditional payment is a question of fact for a jury (*r*). If a creditor were for his own convenience to take a bill drawn or accepted by a third party instead of payment in cash, the presumption would be that he accepted it as an absolute payment in satisfaction of his debt (*s*). The authorities differ (*t*) as to whether a negotiable instrument accepted by way of premium is equivalent to payment of the premium so as to waive all conditions in the contract as to suspension or forfeiture in the event of non-payment, or whether it only enlarges the time for payment, so that if the cheque is dishonoured, or the note or bill is not met at maturity, the conditions relating to non-payment become effective. Just as in other cases of creditors accepting payment in this way it is a question of fact whether the payment was taken in satisfaction or not.

may be accepted in satisfaction

The tendency of the authorities is to hold that if the insurers take a bill drawn or accepted by a third party it is taken in satisfaction (*x*). When a negotiable instrument is accepted in satisfaction, the dishonour of the instrument at maturity does not affect the assured's right to sue upon the policy, unless there is a special condition in the policy that the policy shall be forfeited in that event (*y*).

or merely as conditional payment.

When the assured gives his cheque or a bill or promissory note upon which he alone is liable, the presumption is that it is not accepted in satisfaction of the claim for premium, but as conditional payment only (*z*).

Acceptance of negotiable instrument as conditional payment of debt.

Conditional payment of a debt by bill or note suspends the debt until the bill or note has matured and become payable, and if at that time the instrument has passed into the hands of a third

(*r*) *Goldshede* v. *Cottrell* (1836), 2 M. & W. 20.

(*s*) *Anderson* v. *Hillies* (1852), 12 C. B. 499.

(*t*) *Thompson* v. *Insurance* (1881), 104 U. S. 252; *McGugan* v. *Manufacturers* (1879), 29 U. C. C. P. 494; *McAllister* v. *New England Mutual Life* (1869), 101 Mass. 558.

(*x*) *Barker* v. *North British* (1831), 9 S. 869; *Shaw* v. *Republic Life* (1877), 69 N. Y. 286.

(*y*) *Shaw* v. *Republic Life* (1877), 69 N. Y. 286; *McAllister* v. *New England Mutual Life* (1869), 101 Mass. 558.

(*z*) *Neill* v. *Union Mutual Life* (1881), 7 Ont. A. R. 171; *McGugan* v. *Manufacturers* (1879), 29 U. C. C. P. 494; *MacMahon* v. *U. S. Life* (1904), 128 Fed. Rep. 389; *Brady* v. *Aid Association* (1899), 190 Pa. 595.

party, that is to say if the creditor has negotiated it, the debt remains suspended until the instrument gets back into the creditor's possession (*a*). When the bill has matured and is in the creditor's own hands the debt revives. If the debtor himself is primarily liable on the bill or note there is no obligation on the creditor to give notice of the fact that it is overdue and unpaid, and it is for the debtor if charged with the debt to show that the bill or note is still current or has been met (*b*). On the other hand, if a creditor accepts a bill drawn by the debtor on a third party he must present the bill to the drawee and give notice of dishonour to the debtor before the original debt can be revived (*c*). When the bill or note is met conditional payment becomes actual payment, and relates back to the time when the bill or note was first given (*d*).

Acceptance of negotiable instrument as conditional payment of the premium.

Applying the above general principles to the case of bills or notes accepted conditionally for payment of premium, it would seem that the effect of such acceptance is not to waive all conditions relating to the punctual payment of premium, but merely to suspend their operation. If the bill or note is ultimately met, then the premium is deemed to have been paid on the date when the bill or note was first accepted (*e*); but if the bill or note is not met, then the parties are in the same position as if no payment of any kind had ever been made. The result is practically the same as if there had been a condition for forfeiture on non-payment of the bill or note at maturity.

Whether insurers must give notice of overdue bill before claiming a forfeiture.

Where there is a clause working forfeiture in the event of non-payment of a note or bill at maturity, and the assured is primarily liable on the note or bill, it is not necessary to give him notice when it is due (*f*), nor to signify any election on the part of the insurers to avoid the policy (*g*). Where a third party is primarily liable on a bill, it must be presented to him for payment on the due date; but, this having been done, the Supreme Court of the United States held that it was not necessary to give notice of dishonour to the assured in order to work a forfeiture under the express condition that "the policy shall become void if this draft is not paid at

(*a*) *A Debtor, In re* [1908] 1 K. B. 344.
(*b*) *Price* v. *Price* (1847), 16 M. & W. 232.
(*c*) *Soward* v. *Palmer* (1818), 8 Taun. 277.
(*d*) *Felix Hadley* v. *Hadley*, [1898] 2 Ch. 680.
(*e*) *American Credit Indemnity* v. *Champion* (1900), 103 Fed. Rep. 609.
(*f*) *Thompson* v. *Insurance* (1881), 104 U. S. 252; *Roehner* v. *Knickerbocker* (1875), 63 N. Y. 160.
(*g*) *McGeachie* v. *North America Life* (1893), 23 Can. S. C. 148; *Frank* v. *Sun Life* (1893), 20 Ont. A. R. 564.

maturity" (*h*). And where there is an express condition of this kind it would seem that non-payment of the note or bill at maturity will work an immediate forfeiture even although the instrument has been negotiated by the insurers and is in the hands of third persons (*i*).

Condition for forfeiture on non-payment of a bill at maturity.

Even although the policy acknowledges payment of the premium, it is competent to the insurers to show that it was paid not in cash, but by note, and that the policy has become void by reason of the dishonour of the note (*k*). And where the policy contained no condition for forfeiture in the event of non-payment of a note, but the notes themselves given for the premium contained the proviso that the policy should be void if not paid on the day named, a Canadian Court held that the assured could not rely upon the note as payment of the premium without being bound by the proviso (*l*).

Payment of premium by cheque.

Primarily the company is not bound to accept a cheque in payment of premiums. Posting a cheque is therefore not payment of premium, either conditionally or unconditionally, unless the company have authorised payment by cheque, either by express invitation or by a previous course of dealing (*m*). Where payment by cheque has been sanctioned it is sufficient if the assured posts the cheque in time to reach the company in ordinary course of post before the expiration of the time limited for payment, even although, owing to some accident, the letter is delayed or even lost in the post (*n*). If a cheque is dishonoured on presentation at the bank there is no payment of premium, even although the company continue to hold the cheque, and there are subsequently sufficient funds of the assured in the bank to meet it (*o*).

Payment of premium by agent of insurers on behalf of assured.

Although an agent may not be authorised to give credit on behalf of the company, or otherwise waive the conditions for punctual payment of the premium, he may himself pay the premium on behalf of the assured, and give the assured credit in respect

(*h*) *Knickerbocker Life* v. *Pendleton* (1884), 112 U. S. 696.

(*i*) *London and Lancashire* v. *Fleming*, [1897] A. C. 499; *Hutchings* v. *National Life* (1905), 37 Can. S. C. 124.

(*k*) *Baker* v. *Union Mutual* (1871), 43 N. Y. 283; *Pitt* v. *Berkshire Life* (1868), 100 Mass. 500.

(*l*) *Frank* v. *Sun Life* (1893), 20 Ont. A. R. 564; *Town Life* v. *Lewis* (1902), 157 U. S. 335.

(*m*) *Taylor* v. *Merchants' Fire* (1850), 9 How. 390; *Kenyon* v. *Knights Templar* (1890), 122 N. Y. 247; *Palmer* v. *Phœnix* (1881), 84 N. Y. 63; *McNeilly* v. *Continental Life* (1876), 66 N. Y. 23.

(*n*) *Mutual Life* v. *Tuchfield* (1908), 159 Fed. Rep. 833; *Krebs* v. *Security Trust Life* (1907), 156 Fed. Rep. 294.

(*o*) *Neill* v. *Union Mutual Life* (1881), 7 Ont. A. R. 171.

of the personal debt then due by the assured to him (*p*). But probably there must be an actual payment in cash made by the agent to the company within the time limited, and the agent cannot by agreement with the assured to give him personal credit give the assured the benefit of his periodical account with the company, and, by merely debiting himself with the premium, claim that it was paid on behalf of the assured when he made the entry in his book (*q*). *À fortiori*, in the absence of any agreement between the agent and the assured, the assured cannot avail himself of any arrangement between the company and the agent, whereby the agent is made personally liable for the premium if he does not immediately notify the company of the failure of the assured to pay the premium within the days of grace (*r*).

Acey v. Fernie (1840), 7 M. & W. 151

Acey v. *Fernie*

A company gave the following instructions to its agents :—" The premium on every life policy must be renewed within fifteen days at the latest from the time of its becoming due, and if not paid within that time you are to give immediate notice to the office of such fact, and in the event of your omitting to do so your account will be debited for the amount after the fifteen days are expired, and you will be held responsible to the directors for the same." The renewal premium on a life policy was not paid to the agent within the fifteen days, but the agent accepted it some days afterwards. He gave no notice to the company that the premium was overdue, and the premium was accordingly debited against the agent in the company's books in ordinary course. It was held that the assured could not take advantage of the arrangement between the company and its agent, whereby it penalised the agent for neglect of his duty. There was no evidence that the agent had undertaken to pay the premium on behalf of the assured, and therefore the premium was not paid within the fifteen days.

Busteed v. West of England Fire and Life (1857), 5 Ir. Ch. R. 553

Busteed v. *West of England Fire and Life.*

A company gave the following instructions to its agents :—" Every policy of life insurance must be renewed within fifteen days after the same becomes due or the policy will be void. If any person shall omit to renew his life insurance within the fifteen days before mentioned the agent shall immediately give notice thereof to the secretary, and such policy shall not thereafter be renewed without the fine and subject to the restrictions stated in the general printed proposals and conditions of the company. All receipts for the renewal of life insurances not paid within a month from the date of the expiration of

(*p*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow. 255 ; *Yonge* v. *Equitable Life* (1887), 30 Fed. Rep. 902 ; *Train* v. *Holland* (1875), 62 N. Y. 598.

(*q*) *Busteed* v. *West of England Fire and Life* (1857), 5 Ir. Ch. R. 553 ; *London and Lancashire Life* v. *Fleming*, [1897] A. C. 499.

(*r*) *Acey* v. *Fernie* (1840), 7 M. & W. 151.

the policies are to be returned to the office at the end of that period." A policy was taken out by S on the life of K. B, the agent of the company through whom the policy was effected, agreed to accommodate S by taking his promissory notes and bills for the amount of the premiums, and to debit himself with the amount in his account with the company. This was done for several years, and the company had no knowledge of the facts and believed the premium to have been paid in ordinary course. The agent did not, in fact, make any entry in his books within the fifteen days, but he did make the entry when he subsequently rendered his account to the company. The Court held that the premiums had not been paid within the fifteen days, and that even if the agent had debited the amount in his books within that time it could not, considering his instructions, have been deemed payment of the premium by the assured to the company.

London and Lancashire Life v. Fleming, [1897] A. C. 499

London and Lancashire Life v. *Fleming.*

A life policy provided that "if a note or other obligation be taken for the first or renewal premium or any part thereof and such note be not paid when due, the policy or assurance becomes null and void at and from default." W, the district manager of an English company at Toronto, took notes from the assured in respect of premiums on a life policy, but they were not in accordance with the forms furnished by the company. W himself discounted the notes and applied the proceeds to his own use. He gave his own note to the company for this and other premiums. The notes given by the assured to W were not paid when due. It was contended for the assured that the notes were not paid to W as premium, but in order that W, as agent of the assured, might raise money to pay the premiums, and that the company had accepted W's note as satisfaction of the premium due. It was held that the policy was void under the condition. There was no evidence to show that the nature of the transaction was as contended for, but, on the contrary, as the notes were the exact amount of premium, the presumption was that they were paid as premium, and being dishonoured the policy became void. The Court would not assume that the company accepted W's note in satisfaction of the premium when they were ignorant of all the facts.

Payment by periodical accounts.

Where there are frequent transactions between the same parties actual payment of a cash premium upon each occasion might be extremely inconvenient, and therefore it is not unusual to have periodical settlements. Where this is the recognised course of business the premium may, for the purpose of the conditions in the policy, be deemed to be paid when an entry is made in the business books, or the transaction is in some other way recorded (*s*). But *primâ facie* agents of different companies have no authority to give one another credit, and unless the course of business is recognised by the companies themselves, their agents do not by

(*s*) *Prince of Wales* v. *Harding* (1858), El. B. & E. 183.

debiting one another against periodical settlements effect payment of the premiums (*t*).

Prince of Wales v. Harding (1858), El. B. & E. 183

Prince of Wales v. *Harding.*

Two insurance companies were in the habit of taking part of one another's risks by way of reinsurance. The course of business between them was for the company granting the reinsurance policy to give the other company a receipt for the premium as it became due. No money passed at the time, but periodically the balance was struck and paid according as it fell to the one or the other. In the case of a policy granted by A company the usual receipt for premium was given to B company. A company was then indebted to B company, and at the next settlement a balance was struck in favour of B company and paid by A company to B company. The condition in the policy was that no "policy shall be considered in force beyond thirty days after the expiration of the period within mentioned for payment of the same unless the premium then due shall have been paid at the office of the company or to some one of the agents of the company." The Court held that the premium must be deemed to have been paid when the receipt was given, and Lord Campbell, C.J., said: "The amount of premiums went in reduction of the debt of A company, and was taken as payment of so much on account, and in effect was payment of the premiums at the time the entries of these payments were made to the credit of A company in account with B company."

Broker's periodical accounts.

In America it has been held that where an insurance company deals with a broker on the terms of a monthly settlement, the broker being responsible to the company for the premiums, the premiums must be deemed as between company and assured to have been paid when the contract was concluded, and the fact that the assured has not paid the broker is immaterial (*u*). This is in accordance with the law and practice in marine insurance in this country, and it would seem that, even in the case of other risks, if the insurers accept the credit of the broker and look to him alone for payment of the premium the agreement with the broker for a monthly account must be a waiver of all conditions in the policy requiring punctual payment by the assured.

Appropriation of assured's money in hands of insurers towards payment of premiums.

The insurers may, under certain circumstances, be bound to appropriate moneys in their hands, but belonging to the assured, to the payment of premiums falling due.

Kirkpatrick v. South Australian Insurance (1886), 11 A. C. 177

Kirkpatrick v. *South Australian Insurance.*

K. & Co., a firm of merchants, acted as agents for an insurance company. They had effected with the company fire insurances upon their own stock and premises. Those insurances were allowed to lapse, and the company sent

(*t*) *Western Assurance* v. *Provincial Assurance*, (1880), 5 Ont. A. R. 190.

(*u*) *White* v. *Connecticut* (1876), 120 Mass. 330; *Potter* v. *Phœnix* (1894), 63 Fed. 382.

several letters and telegrams urging renewal. K. & Co. finally sent a telegram, "The whole of the premiums will be wired to you on Monday first." That was not done, but some time afterwards K. & Co. telegraphed, "One hundred pounds your credit of Bank of South Africa for premiums." The company received the money from the bank and signed a receipt for a hundred pounds "on account of premiums." At that time K. & Co. owed the company in respect of other policies, partly agency and partly their own, £41 17*s.* 9*d.* The premiums on the policies in question were £28 2*s.* 6*d.* These figures were known to the company. It was held that although there was no specific appropriation either by K. & Co. or the company of the £100 or any part of it, the remittance and acceptance must be taken on reference to the previous correspondence to have been partly in respect of these policies and to have effected their renewal.

Appropriation of dividends towards payment of premiums.

There is a considerable difference of opinion in America as to whether insurance companies are bound to appropriate dividends due to the assured towards payment of premiums so as to save the policy from forfeiture. On the one hand, it has been held that a dividend in the hands of the company is not payment of premium unless so stipulated, or subsequently allocated as such (*x*). On the other hand, it has been held that the company ought to apply dividends in hand towards payment of premium or premium notes becoming due, and especially if the assured has been in the habit of applying his dividends in this way (*a*). If the course of dealing has been such as would lead the assured to expect the company to apply the dividends to premiums without special instructions, the company would probably be bound to do so (*b*). Profits earned but not declared cannot be treated as funds in the hands of the company applicable to payment of premium (*c*). Thus, where the directors declared a dividend as at a prior date out of profits earned up to that date it was held that such dividend could not be set off as payment of a premium which fell due after the date specified, but before the declaration of dividend (*d*).

Appropriation of claims towards payment of premiums.

If the assured has a good claim against the insurers he can, while it is still unliquidated, set it off against premiums due under the same or other policies (*e*). Thus, where the assured had a claim against a mutual company and tendered the balance of

(*x*) *Wheeler* v. *Connecticut Mutual* (1880), 82 N. Y. 543, 553; *Mutual Fire* v. *Miller* (1882), 58 Md. 463.

(*a*) *Girard Life* v. *Mutual* (1881), 97 Pa. 15.

(*b*) *Matlack* v. *Mutual* (1897), 180 Pa. 360.

(*c*) *Mutual* v. *Girard Life* (1882), 100 Pa. 172.

(*d*) *Mutual* v. *Girard Life* (1882), 100 Pa. 172.

(*e*) *Roberts* v. *Security*, [1897] 1 Q. B. 111, 117.

calls setting off the amount of his claim, it was held that there was a sufficient tender in respect of the calls if the claim was well founded (*f*). The insurers are not bound to appropriate moneys due for claims towards payment of premiums unless directed to do so (*g*), although in an American case where a member of a mutual society was in receipt of sick benefits it was held that they could not cancel the policy for non-payment of dues when they could have deducted the amount of dues from the weekly allowances (*h*).

Section IV.—The Renewal Premium

Right of renewal.

A policy may be issued to cover a certain risk for a definite period at a definite premium without any provision for renewal; but more usually the policy is expressed to cover first a definite period, say a year, for which the premium is acknowledged to have been received, and second, an indefinite period thereafter, so long as an annual or other periodical payment shall be paid in accordance with the conditions on the policy. In the case of risks other than life the assured is not given an absolute right of renewal, the continuance of the policy being conditional not only upon the payment of the premium by the assured, but also upon the acceptance of it by the insurers. The insurers may therefore terminate the risk at each renewal period by refusing to accept the premium tendered, and sometimes the further right is expressly reserved of terminating the risk at any time upon giving notice, and returning the unearned premium (*i*).

Sun Fire Office v. Hart (1889), 14 A. C. 98

Sun Fire Office v. *Hart.*

The conditions in a fire policy provided that if there was any alteration increasing the risk the policy should cease to attach in respect of the property affected thereby, and then provided that, "if by reason of such change or from any other cause whatever the society or its agents should desire to terminate the insurance," they might cancel the policy on repayment of a rateable proportion of the premium. During the currency of the policy the assured received an anonymous letter containing threats of incendiarism. This letter was shown to the society's agent, who immediately gave notice to terminate the policy and tendered repayment of the rateable proportion of the premium for the unexpired period of the term. Subsequently a loss occurred. The assured contended that the insurers could only terminate the policy

(*f*) *Williams* v. *British Mutual Marine* (1886), 57 L. T. 27.

(*g*) *Simpson* v. *Accidental Death* (1857), 2 C. B. (N. S.) 257.

(*h*) *Conley* v. *Washington Casualty* (1900), 93 Me. 461.

(*i*) *Sun Fire Office* v. *Hart* (1889), 14 A. C. 98; *International Life* v. *Franklin Fire* (1876), 66 N. Y. 119.

on the ground of increased risk or something *ejusdem generis*. The Judicial Committee of the Privy Council held that the ordinary course of construction which requires that general words at the end of the specific enumeration should be limited to matters *ejusdem generis* did not apply, since there was in this case no specific enumeration but rather the enumeration of a genus, and they held that the clause gave the insurers complete discretion to terminate the risk without any further reason for doing so than their own desire, however capricious that might be.

Notice to determine risk.

Notice to determine the risk must be given to the assured, or to some agent whose duty it is to receive and communicate the information to the assured. Notice therefore given to the assured's agent who procured the policy would not necessarily be sufficient, as his duty as agent might have terminated when he delivered the policy to his principal (*k*). Under a condition similar to that in *Sun Fire Office* v. *Hart* the insurers must, in addition to giving notice, have tendered a return of the unearned premium before the policy can be deemed to be cancelled (*l*).

Is a life policy an annual risk?

The contract of life insurance is essentially different from other classes of insurance. The assured must in life insurance have the absolute right of renewal subject to reasonable conditions. There has, however, been considerable difference of judicial opinion as to whether the contract of life insurance made in consideration of an annual premium is an insurance for a year with an irrevocable offer to renew upon payment of the renewal premium, or whether it is an insurance for the entire life subject to defeasance or forfeiture upon non-payment of the renewal premium at the times stated. In *Pritchard* v. *The Merchants' Life*, Willes, J. (*m*), takes the view that the contract is an annual contract with the privilege of renewal, and in *Stuart* v. *Freeman* (*n*), Collins, M.R., cites the judgment of Willes, J., in the former case with apparent approval, and refers to a life policy as being "a contract for a year with a provision for renewal which would entitle the insured to insure in a future year at the same premium, and not at a higher one, provided he approaches the insurers within a certain time." The other judges in *Stuart* v. *Freeman* appear to doubt the dictum of Willes, J., and in America, where the subject has been more carefully considered, it has been held

(*k*) *Hodge* v. *Security* (1884), 33 Hun. 583.

(*l*) *White* v. *Connecticut* (1876), 120 Mass. 330.

(*m*) (1858), 3 C. B. (N. S.) 622, 643, and see Lord Chelmsford in *Phœnix Life* v. *Sheridan* (1860), 8 H. L. C. 745, 750.

(*n*) [1903] 1 K. B. 47.

that a life policy is not an insurance for a single year with a privilege of renewal from year to year by paying the annual premium, but is an entire contract of insurance for life, subject to discontinuance or forfeiture for non-payment of any of the stipulated premiums (*o*). Bradley, J., in the Supreme Court of the United States said, " Such is the form of the contract, and such its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year as in fire policies. But the position is untenable. . . . The value of insurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of insurance for the year in which it is made " (*p*). In a Canadian case (*q*) the four judges of the Court of Appeal in Ontario were equally divided upon the question whether a life policy was an insurance continuing for life until forfeiture or an annual insurance from year to year. The distinction is one of considerable importance, particularly with relation to the legal effect of the days of grace, and the insurer's liability for losses occurring during the days of grace, but before payment of the renewal premium (*r*).

Punctual payment of renewal premium is of the essence of the contract.

In all classes of insurance the punctual payment of the renewal premium according to the terms of the policy is a condition precedent to the continuance of the risk (*s*).

Frank v. Sun Life (1893), 20 Ont. A. R. 564

Frank v. *Sun Life.*

A premium on a life policy was payable by quarterly instalments on specified days. It was held that default in the payment of any one quarterly instalment even for a day would release the company from further liability, notwithstanding the absence of any express forfeiture clause. Burton, J., said (*t*) : " Promptness in payment is of the very essence of the business of life insurance, and if, therefore, any one of the quarterly instalments remains unpaid the forfeiture is absolute, unless there is something in the contract itself to dispense with it. When no such stipulation exists it is the well-established understanding that time is material, or, as it is sometimes expressed, is of the essence of the contract."

Premiums payable by instalments.

A premium expressed to be an annual premium is sometimes, for the convenience of the assured, made payable in quarterly or

(*o*) *New York* v. *Statham* (1876), 93 U. S. 24.
(*p*) 93 U. S. 24, 30.
(*q*) *Manufacturers' Life* v. *Gordon* (1893), 20 Ont. A. R. 309.
(*r*) See *infra*, p. 246.
(*s*) *Frank* v. *Sun Life* (1893), 20 Ont. A. R. 564; *Nederland Life* v. *Meinert* (1905), 199 U. S. 171.
(*t*) At p. 567.

other periodical instalments; but in order that the insurers may not lose thereby it is provided that if the assured die in any one year before the whole instalments for that year have been paid, the balance may be deducted from the sum insured. Such a proviso does not render the punctual payment of the instalments any less a condition precedent to the continuance of the risk (*u*).

Phœnix v. Sheridan (1860), 8 H. L. C. 745

Phœnix v. *Sheridan.*

A life policy dated August 2, 1856, was headed, "Sum assured, £1000; annual premium, £33, whole term; payable quarterly instalments £8 5*s.* each." The insurers acknowledged receipt of £8 5*s.* premium to November 2, 1856, and undertook to pay the sum assured "if B shall die before the termination of twelve calendar months from the date hereof, or shall live beyond such period, and the assured shall on or before that period or on or before the expiration of every succeeding twelve calendar months, provided B be still living, pay the annual amount of premium," and then it was provided "that if B shall happen to die before the whole of the said quarterly payments shall have become payable under these presents for the year in which he shall so die it shall be lawful for the directors to deduct and detain from the said sum of £1000 so much as will be sufficient to pay and satisfy the whole of the said premiums of that year, reckoning the said year to commence from the 2nd day of August." The life dropped within twelve months from the date of the policy and the third quarterly instalment was overdue. It was held that the assured could not recover as the insurance was conditional on the punctual payment of each quarterly instalment so long as the life was in being, and Lord Chelmsford said (*x*): "I do not agree with those who think that it is a policy from quarter to quarter (*y*). I think it is an annual policy, of which the premium is payable by quarterly instalments. Then the nature of the contract, as I gather from the operative words of the policy, is that, 'if B shall die before the termination of twelve calendar months' and 'if he shall on or before that period pay or cause to be paid the annual amount of premium,' then the policy shall be paid. Now, what is the meaning of these words 'the annual amount of premium'? Why, the 'annual amount of premium according to the stipulations of the policy, that is, 'the annual amount of premium' payable by quarterly instalments. Therefore as the quarterly instalments become due he must pay the quarterly instalment which is due."

Remedy for wrongful refusal to

Where the insurers wrongfully refuse to accept a renewal premium on a life policy the assured may treat the refusal as

(*u*) *Phœnix* v. *Sheridan* (1860), 8 H. L. C. 745; *McConnell* v. *Provident Savings Life* (1899), 92 Fed. Rep. 769. Note that these are not cases where the premium was a true quarterly premium as to which there could have been no question as to the effect of unpunctuality in payment. In the case of an annual premium payable by quarterly instalments the whole premium, that is all four instalments is earned whenever the year begins to run. In the case of a true quarterly premium each quarterly premium is earned whenever the quarter in respect of which it is payable begin to run.

(*x*) At p. 750.

(*y*) So held by the Queen's Bench per Lord Campbell, El. B. & E. 156, 159.

receive a renewal premium.

a final breach of the contract and sue for the value of the policy at that time; or tender the exact amount of each premium in cash until the policy money becomes payable (*z*). The assured is not entitled, on account of the insurer's refusal to receive the premium, to a declaration of the Court that his policy is valid (*zz*). If the insurers repudiate the contract and declare it void, the assured need tender no further premiums (*a*), but if he takes that course he treats the repudiation as a final breach, and would therefore be bound to commence proceedings within the period allowed by the Statutes of Limitations, that is, twenty years if the policy is under seal, and otherwise six years from the date when the insurers declared the policy void.

Section V.—The Days of Grace

Object and meaning of the days of grace.

If the continuance of the risk under a policy were conditional on the payment of a premium on a certain specified date in each year or quarter, and no provisions were made for the payment of overdue premiums, the policy would immediately lapse if a premium was even one day in arrear, and in consequence the assured would be placed in the position of having to apply for a new contract of insurance which, in the case of life insurance, he could not obtain on the same terms, and the insurers, if they accepted the application, would have to prepare a new duly stamped policy in order to avoid the penalties of the Stamp Act (*b*). To obviate this expense and inconvenience to the insurers and hardship to the assured, the practice has long been resorted to in all classes of insurance of making the future risk conditional on the payment of the renewal premium on a certain day, or within so many days thereafter, or else of declaring that the policy should not be considered void if the renewal premium was paid within so many days after it fell due. These days are called the days of grace, and the position of the assured during the days of grace, but before the renewal premium has been paid, depends upon the nature of the insurance, and the particular conditions as to renewal which are inserted in the policy.

(*z*) *Day* v. *Connecticut Gen. Life* (1878), 45 Conn. 480.

(*zz*) *Honour* v. *Equitable Life, U.S.A.*, [1900] 1 Ch. 852.

(*a*) *Mutual* v. *Home Benefit* (1897), 181 Pa. 443; *Byram* v. *Sovereign Comp.* (1899), 108 Iowa, 430.

(*b*) *Doe* v. *Shewin* (1811), 3 Camp. 134.

Loss happening within the days of grace.

In fire, burglary, and other risks where the insurers reserve the right to refuse renewal the days of grace do not primarily afford protection while the renewal premium is unpaid, that is, before it is tendered and accepted (*c*). If the insurers expressly covenant that the assured shall be protected during the days of grace, notwithstanding the non-payment of the premium, then the assured is covered during these days for so long as the question of renewal is in abeyance (*d*) ; but if the insurers decline to renew before the days of grace have begun to run, or perhaps even at any time before a loss has occurred they thereby relieve themselves from liability during the days of grace (*e*), and it seems to follow that if in like manner the assured has either by word or act declared his intention of not renewing the policy, he cannot afterwards claim indemnity for a loss occurring during the days of grace. In life insurance the insurers cannot decline to renew the policy ; but is the assured protected without renewal during the days of grace, or if not, can the policy still be renewed after the life has dropped ? This appears to depend upon the fundamental nature of the provisions for renewal. If the risk expires on the day when the premium is due and the days of grace are given merely as an opportunity for renewal, then death before payment of premium is not covered, because there is an implied condition that the subject matter of the insurance is still in existence when renewal is claimed (*f*). On the other hand, if there is a continuing risk carrying the insurance beyond the day on which the premium is payable, and subject only to defeasance upon non-payment of the premium upon that day or within the days of grace, then death before payment of premium is covered, because until the days of grace have expired there can be no forfeiture (*g*). Whether the insurance is of the one nature or the other is a matter of construction, although the better opinion probably is that primarily at least a life policy creates a continuing risk subject to defeasance, and not merely an annual risk with a right of renewal (*h*). Where the insurance is upon the life of

(*c*) *Tarleton* v. *Staniforth* (1794), 5 T. R. 695 ; *Simpson* v. *Accidental Death* (1857), 2 C. B. (N. S.) 257.

(*d*) *Salvin* v. *James* (1805), 6 East, 571 ; *M'Donnell* v. *Carr* (1833), Hayes & J. 256.

(*e*) *Salvin* v. *James* (1805), 6 East, 571.

(*f*) Willes, J., in *Pritchard* v. *The Merchants' Life* (1858), 3 C. B. (N. S.) 622, 643 ; Collins, M.R., in *Stuart* v. *Freeman*, [1903] 1 K. B. 47.

(*g*) *Stuart* v. *Freeman*, [1903] 1 K. B. 47 ; *New York* v. *Statham* (1876), 93 U. S. 24 ; *Manufacturers' Life* v. *Gordon* (1893), 20 Ont. A. R. 309.

(*h*) *Supra*, p. 245.

the assured, and is expressed to be conditional upon the payment of the premiums by him, the inference may be that payment by his executors after his death does not satisfy the condition (*i*). This, however, would not appear to affect the case if the risk be construed as a continuing risk subject to forfeiture, because the insurers are liable until forfeiture, and no subsequent tender or payment of premium is necessary, as it would be if it was a question of renewal. The rights of the parties become fixed at death, and the insurers are liable for the insurance moneys less the premium which has become due (*k*). If a life policy provides expressly that the insurers will be liable in the event of death during the days of grace, but before payment of the premium, the matter is placed beyond doubt (*kk*). The insurers have no right as in other risks to refuse to continue the insurance, and so escape liability during the days of grace. But if the assured intimates that he does not intend to pay the premium on a life policy, this would probably relieve the insurers if the insurance was construed as an annual insurance with an option to renew, but it would not do so if it were construed as a continuing insurance subject to forfeiture, as the assured might have changed his mind before forfeiture was actually incurred (*l*).

Tarleton v. Staniforth (1794), 5 T. R. 695

Tarleton v. *Staniforth.*

A policy insured against loss or damage by fire "so long as the assured should duly pay the premium" on certain fixed days "and the company should accept the same" and the conditions on the proposal provided that "policy holders shall as long as the company agree to accept the same make payment of the premium within fifteen days" of the specified days, or forfeit the policy. A loss occurred during the days of grace, but before tender of the renewal premium. The Court held that each premium only covered the period up to the day when the next premium was due, and that the risk for the next period did not attach unless (1) the renewal premium was tendered within fifteen days, and (2) the company accepted it. Only the first of these conditions had been fulfilled, and the company were quite entitled to decline to accept the premium, even although a loss had occurred.

Salvin v. James (1805), 6 East, 571

Salvin v. *James.*

After the decision in *Tarleton* v. *Staniforth* the Sun Fire Office, while continuing to issue policies in the same form and subject to the same conditions as

(*i*) *Want* v. *Blunt* (1810), 12 East, 183; *Simpson* v. *Accidental Death* (1857), 2 C. B. (N. S.) 257.

(*k*) *Provident Savings Life* v. *Taylor* (1906), 142 Fed. Rep. 709.

(*kk*) This form of policy is now very common.

(*l*) *Master* v. *New York* (1898), 90 Fed. Rep. 40; *Provident Savings Life* v. *Taylor* (1906), 142 Fed. Rep. 709.

before, advertised that all policy holders in their office " were and always have been considered as insured for fifteen days beyond the time of the expiration of their policies." Before the expiration of the original term on one of such policies the company intimated to the assured that they would require an increased premium as a condition of renewal. The assured expressly declined to pay any increase of premium. During the days of grace and before any premium had been paid or tendered a loss occurred and the assured then tendered the full amount of the increased premium demanded. The Court held that there was no liability on the company. Reading the policy and advertisement together, they held that the effect of the contract was that after the days of grace had begun to run and a loss had occurred the company could not refuse to accept a renewal premium. They could, however, terminate the policy at the expiration of the original term by electing to do so before that date, and in effect that was done in this case, because the company declined to continue the existing insurance and offered instead an insurance at a higher rate.

Want v. Blunt (1810), 12 East, 183

Want v. *Blunt.*

The policy of a mutual benefit society promised to pay an annuity to the widow of a member if he should pay the quarterly premiums on the quarter days during his life or within such time after those days respectively " as is or shall be allowed for that purpose by the rules of the said society." The rules of the society provided that if any member neglected to pay the quarterly premiums for fifteen days after they were due the policy should be void unless the member (continuing in as good health as when the policy expired) paid up arrears within six months and 5*s.* per month extra. A quarterly payment due on December 20 was not paid on December 25, when the assured died. The premium was tendered by the executors on December 27, but refused. The Court held that there was only an insurance up to the end of the quarter, and that the condition of renewal was payment by the assured within fifteen days and payment by the executors was not equivalent, and Lord Ellenborough said that it was observable that throughout the policy the words " executors and administrators " were only used once, namely, in the covenant of the defendants, where they covenanted with the said Want, his executors and administrators, to pay the annuity to his widow after his death. In every other act to be done it was expressed as being to be done by Want without any other words indicating an intention that it should be any other than the personal act or neglect of the assured.

M'Donnell v. Carr (1833), Hayes & J. 256

M'Donnell v. *Carr.*

A policy of fire insurance, after reciting a proposal to effect a policy for a period commencing March 25, 1830, and ending March 25, 1831, and renewable from time to time if the committee should think proper to renew the same, provided that if during the continuance of the policy the property should be burnt the company would indemnify the assured subject to the conditions of the policy. One condition provided that " no policy will be considered valid for more than fifteen days after the expiration of the period limited therein, unless the premium and duty for the renewal of such policy shall have been paid within that time and the printed office receipt given. On assurance

for a less period than a year the premium will be as moderate as possible, and only a proportionable part of the duty charged, but in those cases the insurances will terminate at six o'clock in the evening of the day specified in the policy without the allowance of fifteen days." A fire occurred on March 31, 1831, and the renewal premium was unpaid. The Court of Exchequer in Ireland held that the assured was entitled to recover, and in giving judgment they said: "The agreement is that if 'during the continuance of the policy' the loss occurred the insurers would pay. The question, then, is when did the policy expire? There is nothing which could originally have limited the insurers to one year, and they have not limited themselves by the contract. We think that, looking at the policy and indorsement, the insurance has been actually effected for one year and fifteen days. The words in this policy are materially different from those in *Tarleton* v. *Staniforth*."

Simpson v. Accidental Death (1857), 2 C. B. N. S. 257

Simpson v. *Accidental Death.*

An accident policy after acknowledging receipt of the premium for one year ending January 22, 1852, proceeded: "It is hereby witnessed and declared that if the said assured shall receive or suffer bodily injury from any accident or violence on or before January 22, 1852, and subsequently thereto during the continuance of the said policy, provided he, the said assured, on or before or within twenty-one days after the 22nd day of January, which would be in the year 1852, and on or before or within twenty-one days after the 22nd day of January in every succeeding year, so long as the acting directors for the time being of the said company should accept the same, pay or cause to be paid to the company the annual premium of £12, then" the company shall pay an indemnity "subject to the several regulations and conditions printed on the back hereof." The following conditions were printed on the back: "(1) The premium on this policy is to be paid within twenty-one days from the day on which the same shall first accrue or become due; and provided the same be from time to time paid within such space of twenty-one days this policy shall not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by this policy shall according to the terms thereof be payable." (2) "If the premium on this policy be unpaid for the space of twenty-one days next after it shall first accrue or become due, then this policy shall become and be absolutely void, and the person or persons entitled to the benefit of such policy shall forfeit all his, her, or their claim on the company under the same. (3) In every case where a new premium shall become payable the directors shall be at liberty to terminate the risk by refusing to accept such premium." The assured met with a fatal accident on January 27, 1856, and death followed on February 1, the renewal premium being then unpaid. On February 4 notice was given to the company by the persons named as the assured's executors. On February 5 the secretary acknowledged the notice, and sent down the company's surgeon with a blank certificate. On February 8 the secretary heard for the first time that the agent had not received the renewal premium due on January 22. He did not immediately disclose this to the claimants, but waited until February 13, when he wrote intimating that the company were not liable, but assigning no reason. It was argued for the claimants (1) there was an express contract for one year and fifteen days, whether or not the renewal premium was paid; (2) if not, payment within fifteen days

would renew; (3) the company must exercise their option to refuse renewal before the end of the year; (4) the company were estopped by their conduct and silence from denying that there was payment within fifteen days; (5) the premium should be taken as paid since it was merely a matter of adjustment and setting off against the claim; (6) as the death of the assured and the non-appointment of executors within fifteen days made it impossible to pay the premium within that time relief should be granted. The Court decided against the claimants on all these points. The condition was for payment of premium by the assured, and this would not have been satisfied by payment by his executors, but there was in fact no payment of premium within twenty-one days, and the conduct of the insurers in keeping silence was not a wilful misleading of the claimants and raised no estoppel against the insurers, and even if the premium had been tendered within twenty-one days by the assured the insurers would have been entitled to refuse renewal.

Stuart v. Freeman, [1903] 1 K. B. 47

Stuart v. *Freeman.*

A life policy on the life of the assured was dated November 18, 1899, and the premium was expressed to be as follows: "If paid annually, £404 11*s.* 8*d.* on every 18th day of November. . . . If paid quarterly, £105 on every 18th day of November, 18th day of February, 18th day of May, and 18th day of August. The policy witnessed that "in consideration of the assured having paid to the company the sum of £105 on account of the premium for one year until November 18, 1900 . . . the funds of the company shall be liable . . . in case the assured shall die before or upon that day or shall survive that day and there shall be paid to the company a like premium before, upon, or within thirty days after the day above mentioned," and contained the following condition: "provided also that this policy shall . . . be null and void and of no effect if at the time of the death of the person upon whose life this policy is granted any of the above-mentioned premiums, as well quarterly as annual, shall be more than thirty days in arrear. The assured had assigned the policy and the premium was paid by the assignee on the last day of grace, but a few hours after the death of the assured. Both the assignee and the company were alike ignorant of the fact that the assured was dead when the premium was tendered and accepted. The Court held that the assignee was entitled to recover on the policy. Collins, M.R., distinguished between this case and that of non-payment of an annual premium. Here, he said, the payment of the premium was not a question of renewal. The insurance had been effected for a year, and was liable to forfeiture if the quarterly premium was not paid within the days of grace, but the policy continued in full force during the days of grace, and would cease only upon the expiration of the days of grace while the premium was still unpaid. Romer, L.J., pointed out that this case was distinguishable from those where the policy depended on payment "by the assured" or "by the assured during his lifetime," and Mathew, L.J., was of opinion that the correct view as to the days of grace stipulated for in this policy was that if payment was made within the time mentioned it was to be deemed to have been made on the day appointed for payment, and it was to have the same effect as if made on that day. Both Romer and Mathew, L.JJ., appear to have thought that if this had been an annual renewal premium their decision would have been the same and that there was no necessary implication that the policy should be renewed during the life of the assured. All the judges distinguished

the case from that of *Pritchard* v. *The Merchants' Life* (*m*), where the premium was accepted after the expiration of the days of grace in ignorance of the fact that the life had already dropped.

Provisions for renewal of life policies after the expiration of the days of grace.

In fire, burglary, and other similar policies there is usually no provision for revival of the policy after it has lapsed by non-payment of the premiums, and expiration of the days of grace, but in life policies where forfeiture is a much more serious thing, provision is usually made for revival of the policy within a specified time, and upon the fulfilment of certain conditions such as payment of a "fine" and satisfactory proof that the life is in good health (*mm*). There can be no doubt that during the period allowed for revival the policy is entirely ineffective, and no claim can be made for a death happening before the necessary conditions for revival have been fulfilled.

Pritchard v. The Merchants' Life (1858), 3 C. B. N. S. 622

Pritchard v. *The Merchants' Life.*

A policy upon the life of a third person contained a provision for revival within three months after the expiration of the days of grace if the assured furnished satisfactory proof that the life was in good health and paid an extra premium. While the renewal premium was unpaid the life dropped upon the last of the days of grace. Two days afterwards the assured, in ignorance of the death, sent the renewal premium to the office, and it was accepted in like ignorance. In an action upon the policy the assured contended that the policy had been revived by payment and acceptance of the premium within three months, and that the insurers had waived proof of health and payment of an extra premium. The Court, however, held that the operation of the clause was subject to the implied condition that the life had not already dropped and that, although the insurers waived any inquiry as to health, the premium was paid and accepted in the common belief that the person whose life was insured was still alive, and that the intention was to revive the policy for the protection of the assured in the future and without reference to the past. The whole transaction, they said, was founded on a mistake, and was therefore ineffectual to bind the parties.

Waiver of condition that life is in good health.

Where the policy contains the condition that it may be renewed within a certain time on proof of good health, it is a question of fact, whether acceptance of the overdue premium within that time constitutes a waiver of the condition or whether it is

(*m*) (1858), 3 C. B. N. S. 622.

(*mm*) Some offices insert an even more liberal condition providing for revival of a lapsed policy without evidence of the health or the existence of the life or lives assured on payment of all arrears and a "fine" within a period either absolutely fixed or depending on the surrender value of the policy at the time of lapsing. Provision is often made for the automatic nonforfeiture of the policy by the application of the surrender value towards payment of premium until the surrender value is exhausted.

accepted provisionally and subject to the condition that the assured shall prove to be in good health (*n*).

Renewal of *ex gratia* after lapse.

Even after the expiration of the period allowed by the policy for renewal, the insurers may *ex gratia* renew the policy. On doing so they may either insist on examination of the life, or renew subject to the express condition that the life is in good health. If a lapsed policy is renewed without any express condition that the life is still in good health there is an implied condition that the life has not dropped (*o*), but none as to good health (*p*). The burden of showing that there was an unconditional renewal rests upon the assured. If the receipt given to him for payment of premium after lapse contains a condition as to good health it is not open to the assured or his representatives to say that he did not read the condition (*q*).

Where the assured had under the condition in the policy a right to be reinstated on proof of good health, and applied for such reinstatement, but the medical examiner refused to pass him unless he signed a new application which stated that there should be no contract until a policy was issued, and he signed such application and was examined and passed, but died before a new policy was issued, it was held that notwithstanding the new application the first policy was revived and the company was liable (*s*).

Section VI.—Waiver of Conditions Relating to Premium

Extension of time for payment.

Notwithstanding the provisions in the policy the insurers may extend the time for payment of the premium or waive any of the conditions precedent to the continuance of the risk, and even after the policy has lapsed the insurers may be held to have revived the insurance upon the same terms by any word or act which leads the assured to believe that the insurers have reassumed the risk (*u*).

(*n*) *Barker* v. *North British Insurance* (1831), 9 S. 869; *Horton* v. *Provincial* (1888), 16 Ont. R. 382; *Wells* v. *Supreme Court* (1889), 17 Ont. R. 317; *Aetna Insurance* v. *Smith* (1898), 88 Fed. Rep. 440; *Ronald* v. *Mutual Reserve* (1892), 132 N. Y. 378; *Rice* v. *New England* (1888), 146 Mass. 248.

(*o*) *Pritchards* v. *The Merchants' Life* (1858), 3 C. B. (N. S.) 622; *Bennecke* v. *Insurance Co.* (1881), 105 U. S. 355.

(*p*) *Insurance Co.* v. *Wolff* (1877), 95 U. S. 326.

(*q*) *Handler* v. *Mutual Reserve Fund Life* (1904), 90 L. T. 192.

(*s*) *Knight Templars* v. *Jacobus* (1897), 80 Fed. Rep. 202.

(*u*) *Kirkpatrick* v. *South Australian* (1886), 11 A. C. 177.

Stuart v. Freeman, [1903] 1 K. B. 47

Stuart v. *Freeman.*

A life policy upon the life of the assured allowed thirty days of grace for payment of the premium. The assured assigned the policy, and the insurers agreed orally with the assignee that if the original assured did not pay the premium within the thirty days it would be sufficient if the assignee paid it upon the following day. The Court held that as between the insurers and the assignee the policy must be read as if there were thirty-one days of grace instead of thirty.

A parol agreement to renew a fire policy and give credit for the premium may be binding notwithstanding the conditions in the policy (*x*), but there must be a clear waiver of the conditions since an alleged oral agreement to renew may be merely a casual conversation of a preliminary nature or an intimation of willingness to renew in accordance with the conditions of the policy (*y*). An issue of the renewal certificate or receipt for the premium without obtaining payment may be construed as a waiver of the conditions, even although it is expressly provided in the policy that the renewal insurance shall not be binding until the actual payment of the premium (*z*).

Extension of time imports waiver of conditions for suspension and forfeiture.

A subsequent agreement with regard to a life policy that it shall not be deemed void if the renewal premiums are paid within a reasonable time is a waiver of the conditions in the policy, and death occurring before a reasonable time has elapsed will be covered although the premium is unpaid (*a*).

In cases of life insurance in America where there is an express or implied extension of time for payment of the premium it has usually been construed not merely as giving time for renewal of the policy subject to the life being in existence at the time when payment is made, but as a definite waiver of suspension, or forfeiture, if payment is made within the time agreed (*b*).

Sometimes a company intimates in its prospectus that it will grant more liberal terms for the revival of lapsed policies than it has hitherto done and that those terms will apply to all existing

(*x*) *Post* v. *Aetna Insurance* (1864), 43 Barb. 351.

(*y*) *O'Reilly* v. *Corporation* (1886), 101 N. Y. 575.

(*z*) *Doherty* v. *Millers' Insurance* (1902), 4 Ont. L. R. 303 ; 6 Ont. L. R. 78 ; *Bordine* v. *Exchange Fire* (1872), 51 N. Y. 117 ; *Boehen* v. *Williamsburgh Insurance* (1866), 35 N. Y. 131 ; *Trustees of Baptist Church* v. *Brooklyn Fire* (1859), 19 N. Y. 305 ; *Wiley* v. *Fidelity Casualty* (1897), 77 Fed. Rep. 961 ; *Tennant* v. *Travellers* (1887), 31 Fed. Rep. 322.

(*a*) *Dilleber* v. *Knickerbocker Life* (1879), 76 N. Y. 567 ; *Howell* v. *Knickerbocker Life* (1871), 44 N. Y. 276 ; *Battin* v. *North-Western Mutual* (1904), 130 Fed. Rep. 874.

(*b*) *Homer* v. *Guardian Mutual* (1876), 67 N. Y. 478.

policies as well as to new policies. Such an announcement constitutes a standing offer to existing policy holders which they may accept by continuing to pay their premiums on the faith of the announcement or by claiming the benefit of it (*bb*).

Oral evidence admissible to prove a subsequent agreement varying the terms of the original contract.

In all cases where there is an extension of the time or other waiver of the conditions for punctual payment, evidence is properly admitted to prove an agreement contrary to the terms of the policy (*c*); but it must be an agreement or waiver made subsequent to the making of the original contract because evidence of an agreement made before or at the time when the original contract was made would not be admitted to contradict the written evidence in the contract itself unless the contract could be rectified on the ground of mutual mistake (*d*). Evidence would not be admitted to prove a custom to give credit contrary to the express terms of the written contract (*e*). If the insurers subsequently acted in accordance with the alleged custom their conduct might amount to a waiver, but the mere existence of the custom at the time the contract was made could not vary the express terms thereof.

Habitual acceptance of overdue premiums.

There are numerous cases in the American Courts where it has been held that the conduct of the insurers in continuing to accept without objection renewal premiums which are overdue may amount not only to a waiver of the forfeiture on each particular occasion, but to a general waiver for the future of the conditions in the policy requiring payment on a particular date (*e*). In one case it was said (*f*), "There is no room for question about the rules of law applicable. A course of dealing which justifies the assured in believing that punctuality in paying premiums is not required or will be excused will relieve him from the consequences of delay. But it must be dealing which actually creates such belief, and justifies a jury in finding its existence," and in a case in the Supreme Court the following direction to the jury was approved (*g*): "If the company by its conduct led the assured, as a reasonable and prudent business man, to believe that he could make payments

(*bb*) *Salvin* v. *James* (1805), 6 East, 571.

(*c*) *De Frece* v. *National Life* (1892), 136 N. Y. 144.

(*d*) *Union Mutual* v. *Mowry* (1877), 96 U. S. 544.

(*e*) *Whitehorn* v. *Canada Guardian Fire* (1909), 19 Ont. L. R. 535; *Modern Woodmen of America* v. *Tevis* (1901), 111 Fed. Rep. 113; *Beatty* v. *Mutual Reserve Fund Life* (1896), 75 Fed. Rep. 65; *Phœnix* v. *Doster* (1882), 106 U. S. 30.

(*f*) Butler, J., *Smith* v. *New England Mutual* (1894), 63 Fed. Rep. 769, 772.

(*g*) *Hartford Life* v. *Unsell* (1891), 144 U. S. 439.

a few days after the due date, sick or well, it cannot turn around now and say, 'You did not pay at the time.' I cannot say to you as a matter of law that one receipt after the time specified would make a waiver or that fifty would. It is not in the numbers. The question is for you to consider and determine from all of them, and from the whole course of business whether, as a prudent business man, he had a right to believe that it was immaterial whether he paid on the day or a few days later. If the course of conduct was such that he had a right to believe that he could pay only in good health then there was no waiver applicable to the case." Habitual acceptance of overdue premiums under such circumstances that the insurers are satisfied each time that the insured life is in good health can hardly justify any inference of a general waiver of the condition for punctual payment in the future (*h*); although it might be evidence of a waiver to this extent that the insurers would be bound to renew without penalty or increase of premium if the assured within a reasonable time tendered the premium, and satisfied the insurers that the life continued in good health (*i*). On the other hand, where the insurers continue to accept overdue premiums without inquiry as to the health of the assured an intention to waive strict punctuality would not be an unreasonable inference (*k*). Thus, where the company had habitually received premiums on a life policy seven to thirty days after they were due without objection or inquiry, and the final premium was paid nine days after due, and accepted by the company in ignorance of the fact that the life had dropped on the previous day it was held that the company were liable (*k*).

An occasional indulgence to the assured by accepting an overdue premium, more especially if it is accompanied by a warning of the necessity of prompt payment and danger of delay is no evidence of waiver of the right to exact punctual payment in the future (*l*).

In fire insurance and other similar risks even the habitual receipt of overdue premiums is probably no evidence of waiver. Where the policy contains the usual condition that the company

(*h*) *Thompson* v. *Insurance Co.* (1881), 104 U. S. 252; *Mutual Life* v. *Girard Life* (1882), 100 Pa. 172; *Crossman* v. *Massachusetts* (1887), 143 Mass. 435; *French* v. *Hartford* (1894), 169 Mass. 510; *Conway* v. *Phœnix Mutual* (1893), 140 N. Y. 79.

(*i*) *Girard Life* v. *Mutual* (1878), 86 Pa. 238.

(*k*) *Spoeri* v. *Massachusetts* (1889), 39 Fed. Rep. 752.

(*l*) *Redmond* v. *Canada Mutual Accident* (1891), 18 Ont. A. R. 335 *Schmertz* v. *U. S. Life* (1902), 118 Fed. Rep. 250; *Smith* v. *New England Mutual* (1894), 63 Fed. Rep. 769.

shall not be liable for any loss occurring before the premium is paid, the acceptance of an overdue premium is clearly no waiver of that condition, and even if there is no such condition the acceptance of an overdue premium where no loss has occurred does not entitle the assured to assume that it will be accepted in the future after a loss has occurred (*m*).

Incapacity to pay premiums.

The obligation to pay the premium according to the terms of the contract is *primâ facie* absolute, and no sickness or infirmity will be accepted as an excuse for non-payment so as to avoid a forfeiture (*n*). Even where the assured becomes insane, and is incapable of attending to any business, the incapacity is no excuse (*o*). The conditions of the policy, however, may be such as to prevent the insurers insisting on a forfeiture, where non-payment was due to ill-health. Thus, where the condition in the policy of a mutual benefit society was that "the policy shall lapse on failure to pay assessments, but for valid reasons given to officers of the association (such as failure to receive notice of assessment) he may be reinstated by paying assessment arrearages," and the assured had, before the assessment was due or notified, become unconscious, and the assessment was not paid, it was held that the society were bound to reinstate after death (*p*).

No equitable relief against forfeiture for non-payment.

Equity will not grant any relief against forfeiture of a policy for non-payment of the premium within the time limited. Relief against a penalty or forfeiture will only be granted when the Court can do it with proper regard for the interests of the other party. If the Court cannot put him in as good condition as if the agreement had been performed it will not grant relief (*q*). Applying this rule to contracts of life insurance, Woods, J., in the Supreme Court of the United States, said (*r*), "If the payment of the premiums and their payment on the day they fall due is of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality on the part of its patrons."

(*m*) *Washington Mutual Fire* v. *Rosenberger* (1877), 84 Pa. 373.

(*n*) *Thompson* v. *Insurance Co.* (1881), 104 U. S. 252.

(*o*) *Klein* v. *Insurance* (1881), 104 U. S. 88; *Wheeler* v. *Connecticut Mutual Life* (1880), 82 N. Y. 543; *Hawkshaw* v. *Supreme Lodge* (1886), 29 Fed. Rep. 770; *McCuaig* v. *Independent Order* (1909), 19 Ont. L. R. 613.

(*p*) *Dennis* v. *Massachusetts Benefit* (1890), 120 N. Y. 496.

(*q*) *Rose* v. *Rose* (1756), Amb. 331, 332.

(*r*) *Klein* v. *Insurance Co.* (1881), 104 U. S. 88.

Default in payment induced by the conduct of the insurers.

The insurers cannot rely upon unpunctuality of payment induced by their own conduct. The general principle is thus stated in an American case (*s*): "One, who by the terms of a contract is entitled to a forfeiture thereof to his own benefit on the occurrence of a certain act or omission which may be prevented by action taken in time by the other party, may not intentionally so act as to put the other party off his guard and induce him to refrain from preventive action. A forfeiture so induced will not prevail if the party in technical default with reasonable speed performs or offers to perform the omitted act. . . . Even if there be no primary hostile purpose in the action of one who may in a certain event become entitled to a forfeiture or other right arising from the non-performance of a condition, if by his act he has induced another to omit strict performance, he may not take the benefit or exact forfeiture."

Insurers not bound to give notice when premium is due,

Primarily the insurer is not bound to give notice to the assured that the premium is due or that if unpaid a forfeiture will be incurred (*t*). Thus, in *Simpson* v. *Accidental Death* (*u*), where the assured met with a fatal accident, while the premium was unpaid but during the days of grace, it was held that, even if payment by the assured's executors would have revived the policy, there was no duty upon the insurers to intimate to them that the premium was unpaid, but that they might intentionally keep silence until the days of grace had expired, and then claim a forfeiture. Most insurance companies are in the habit of sending a notice to each insurer before his renewal premium falls due, but the assured is not entitled to rely upon this act of courtesy being continued and, if for some reason or other a renewal notice is not sent or received, the assured cannot rely upon the omission as an excuse for unpunctuality in paying the premium (*x*).

unless the amount payable is uncertain,

Where, however, the assured was entitled to dividends as a shareholder, and the practice of the company was to apply the dividend for each year in part-payment of the premium and send a note of the balance due, it was held that there was no default on the part of the assured until the usual note of the balance had been

(*s*) *Leslie* v. *Knickerbocker Life* (1875), 63 N. Y. 27; and see *Knight* v. *Rowe* (1826), 2 Car. & P. 246; *West* v. *Blakeway* (1841), 2 Man. & G. 729, 750.

(*t*) *Windus* v. *Tredegar* (1866), 15 L. T. (N. S.) 108; *Tredegar* v. *Windus* (1875), L. R. 19 Eq. 607.

(*u*) (1857), 2 C. B. (N. S.) 257.

(*x*) *Thompson* v. *Insurance Co.* (1881), 104 U. S. 252.

sent to him (*y*). If the insurers have expressly promised to give notice when the premium is due, the assured is entitled to rely upon their doing so (*z*). Thus, where an assured inquired of an agent when the premium was due, and the agent said he would let him know, but no notice was ever sent, it was held that the insurers were estopped from claiming a forfeiture. There was evidence upon which the jury might find that the agent had authority to promise that the general custom of the company would be kept up, and that notice would be given (*a*). But where it was alleged that a promise to give notice of the due date of the renewal premiums was made by the agent at the time when the assured made his application, but the policy contained no such undertaking, it was held that the alleged promise was inconsistent with the terms of the written contract, and that the assured was attempting to vary that contract by parol evidence. Evidence of the promise was therefore inadmissible, and failure to give notice was no excuse for non-payment of the premium (*b*). Where an assignee held a policy as security for a debt and the company promised to give him notice of the default of the assignor and an opportunity to pay the overdue premium it was held that there could be no forfeiture, even of the assignor's interest, until the assignee had after due notice failed to pay within a reasonable time (*c*). In one case where the insurers were in the habit of giving notice and of collecting the premiums by personal call, but suddenly, with the deliberate object of obtaining a forfeiture, omitted to give notice or call, it was held that they could not take advantage of their own trickery (*d*). Where an insurance company had from time to time given the insured notice of the place where the premiums could be paid and the receipts obtained, but on one occasion, having changed its agency, omitted to send the usual notice, it was held that the company was estopped from refusing to receive a premium tendered within a reasonable time after the due date (*e*). If a company discontinues an agency where the assured has been

or they have expressly promised to give notice,

or have otherwise induced the assured to rely on notice being given.

(*y*) *Phœnix* v. *Doster* (1882), 106 U. S. 30.

(*z*) *Selvage* v. *Hancock* (1882), 12 Fed. Rep. 603.

(*a*) *Leslie* v. *Knickerbocker Life* (1875), 63 N. Y. 27.

(*b*) *Union Mutual* v. *Mowry* (1877), 96 U. S. 544.

(*c*) *Mutual Reserve Fund Life* v. *Cleveland Woollen Mills* (1897), 82 Fed. Rep. 508.

(*d*) *Union Central* v. *Pottker* (1878), 33 Ohio 459.

(*e*) *Insurance Co.* v. *Eggleston* (1877), 96 U. S. 572; *Seaman's* v. *N. W. Mutual* 1880), 3 Fed. Rep. 325.

in the habit of paying renewal premiums, he should, in the absence of notice, have a reasonable time after the due date to make inquiries and pay the premium (*f*). Where a company notified the assured that the receipt for the annual premium was at a specified bank, and that payment might be made there, but before the time for payment arrived withdrew the receipt from the bank, it was held that it was estopped from claiming forfeiture for unpunctual payment of premium (*g*). Under the Collecting Societies and Industrial Assurance Companies Act, 1896 (*h*), section 3, a forfeiture shall not be incurred by any member or person insured in a collecting society or industrial assurance company by reason of any default in paying any contribution until after (i) notice stating the amount due by him, and informing him that in case of default of payment by him within a reasonable time, not being less than fourteen days, and at a place to be specified in the notice his interest or benefit will be forfeited, has been served upon him by or on behalf of the society or company, and (ii) default has been made by him in paying his contribution in accordance with that notice.

Notice under the Collecting Societies Act.

Whether insolvency of insurers is an excuse for non-payment of premium.

In America the question has been raised whether the insolvency of an insurance company affords a legal excuse to the assured for non-payment of a premium which has fallen due, and it has been held that it is not so unless the company has actually suspended business, or proceedings have been instituted against it for a winding-up order (*i*).

Waiver of forfeiture by acceptance of overdue premium.

Forfeiture of a policy on the ground of non-payment of premium may be waived by subsequent demand for or acceptance of the premium under such circumstances as would naturally lead the assured to believe that the company intended to treat the policy as subsisting (*k*). Where a demand for premium is made, the assured will have a reasonable time to comply with it, but if he refuses to comply, or after a reasonable time fails to comply, the policy will again lapse (*l*). If a premium has been earned, in that the insurers have been actually on the risk during the whole or part of the period in respect of which it is payable, the acceptance of such premium does not necessarily waive a forfeiture incurred

(*f*) *Briggs* v. *National Life* (1882), 11 Fed. Rep. 458.

(*g*) *Provident Saving Life* v. *Duncan* (1902), 115 Fed. Rep. 277.

(*h*) 59 & 60 Vict. c. 26.

(*i*) *People* v. *Globe Mutual* (1884), 32 Hun. 147.

(*k*) *Kirkpatrick* v. *South Australian* (1886), 11 A. C. 177; *Supple* v. *Cann* (1858), 9 Ir. C. L. R. 1.

(*l*) *Edge* v. *Duke* (1849), 18 L.J.Ch. 183.

by reason of non-payment (*m*). And on this principle where a premium note is taken for the whole or part of a premium on condition that if the note is not paid at maturity the policy shall be null and void, a demand for payment of an overdue note does not necessarily revive the policy (*n*), but it may be made in such a way, or in such circumstances, as to induce the assured to believe that the policy would be valid if he complied with the request, and if so, the insurers will be estopped from relying on non-payment as a forfeiture (*o*). Similarly an extension of the time for payment of an overdue note may be (*p*), but is not necessarily, a waiver of the forfeiture (*q*). In the case of mutual societies where the policy of the member is conditional on the punctual payment of assessments or death dues a forfeiture for non-payment is not *primâ facie* waived by demand for assessments which have fallen due before the forfeiture was incurred (*r*), but a demand for assessments which have fallen due subsequently is *primâ facie* a waiver of the forfeiture (*s*).

No waiver unless insurers have knowledge of the forfeiture.

As a general rule a forfeiture for non-payment of premium cannot be waived by any word or deed on the part of the insurers unless they knew, or ought to have known, that a forfeiture had in fact been incurred (*t*). Thus, in *Busteed* v. *West of England* (*u*) where the insurance company's agent had, without either actual or apparent authority, given the assured credit for premiums, but included them in his own monthly account with the company, it was held that the acceptance of the premiums by the company could not be construed as a waiver of an irregularity of which they had no notice. But where the insurers are put upon inquiry by the fact that the agent has not forwarded the premiums to them in due course they cannot plead entire ignorance of the irregularity (*x*). And if the company, having

(*m*) *McGeachie* v. *North American Life* (1894), 23 Can. S. C. 148.

(*n*) *McGeachie* v. *North American Life* (1894), 23 Can. S. C. 148; *Manufacturers' Life* v. *Gordon* (1893), 20 Ont. A. R. 309; *Duncan* v. *Missouri State Life* (1908), 160 Fed. Rep. 646.

(*o*) *Hodsdon* v. *Guardian Life* (1867), 97 Mass. 144; *Palmer* v. *Phœnix* (1881), 84 N. Y. 63.

(*p*) *Insurance Co.* v. *Norton* (1877), 96 U. S. 234.

(*q*) *Wall* v. *Home Insurance* (1867), 36 N. Y. 157.

(*r*) *Mandego* v. *Centennial Mutual* (1884), 64 Iowa, 134; *Crawford County* v. *Cochran* (1878), 88 Pa. 230; *Rice* v. *Grand Lodge* (1894), 92 Iowa, 417; *Garbutt* v. *Citizens' Life* (1892), 84 Iowa, 293; *Lycoming County* v. *Schollenberger* (1863), 44 Pa. 259.

(*s*) *Knights of Pythias* v. *Kalinski* (1895), 163 U. S. 289; *Beatty* v. *Mutual Reserve* (1896), 75 Fed. Rep. 65.

(*t*) *Bennecke* v. *Insurance Co.* (1881), 105 U. S. 355; *McConnell* v. *Provident Savings Life* (1899), 92 Fed. Rep. 769.

(*u*) (1857), 5 Ir. Ch. R. 553.

(*x*) *Hodsdon* v. *Guardian Life* (1867), 97 Mass. 144.

received a premium in ignorance of a forfeiture, does not, on becoming aware of the forfeiture, immediately return the premium, it may be bound (*y*).

If the company has knowledge of the forfeiture, but accepts a premium through inadvertence it may probably return it and insist on the forfeiture if it does so promptly and before the assured has, by reliance on the company's act, changed his position for the worse. Thus, in *Kelly* v. *Solari* (*z*), an insurance company paid a loss in forgetfulness of the fact that the policy had lapsed for non-payment of premium, and it was held that they could recover the money so paid by mistake ; but in Canada where a mutual company having cancelled a fire policy in their books for non-payment of assessments subsequently in forgetfulness called for and received an assessment from the assured it was held that there was a waiver of the forfeiture (*a*). In an American case a life policy was issued to a man in favour of his wife. After the premium was in arrear the wife called at the company's office and stated that she had come to attend to the premium. The secretary looked in his books and said the premium had been paid. Subsequently the wife discovered that the premium had not been paid, and tendered it, but it was refused. It was held that the statement of the agent created no waiver or estoppel. There could be no waiver where there was no knowledge of the fact that the premium had not been paid, and, as the policy was already forfeited at the time, the assured was in no way prejudiced by the delay so as to create an estoppel against the company (*b*).

Section VII.—Authority of Agents to Waive Conditions Relating to Premium

Authority to accept premiums otherwise than in cash.

Agents of an insurance company, not being general agents with full contractual powers, have *primâ facie* no authority to give credit for premiums (*c*), or accept bills or notes (*d*), or other

(*y*) *Busteed* v. *West of England* (1857), 5 Ir. Ch. R. 553, 570.

(*z*) (1841), 11 L. J. Ex. 10.

(*a*) *Smith* v. *Mutual Insurance* (1877), 27 U. C. C. P. 441 ; *Lyon* v. *Globe* (1877), 27 U. C. C. P. 567.

(*b*) *Robertson* v. *Metropolitan* (1882), 88 N. Y. 541.

(*c*) *Acey v. Fernie* (1840), 7 M. & W. 151 ; *Busteed* v. *West of England* (1857), 5 Ir. Ch. R. 553 ; *Western Assurance* v. *Provincial* (1880), 5 Ont. A. R. 190 ; *Miller* v. *Life Insurance Co.* (1870), 12 Wall. 285 ; *Supreme Court* v. *Taylor* (1903), 121 Fed. Rep. 66 ; *Union Central Life* v. *Berlin* (1898), 90 Fed. Rep. 779 ; *Merserau* v. *Phœnix* (1876), 66 N. Y. 274 ; and see *contra*, *Baker* v. *Commercial Union* (1894), 162 Mass. 358 ; *Farnum* v. *Phœnix* (1890), 83 Cal. 246 ; *Insurance Co.* v. *Colt* (1874), 20 Wall. 560.

(*d*) *Conway* v. *Phœnix* (1893), 140

consideration (*e*) in lieu of cash payment. Where an agent was entitled to retain as his commission sixty-five per cent. of the first premium on a life policy, and gave the assured credit as to that part only it was held that he had no authority to do so, and the policy was void for non-payment of the premium (*f*). Where the agent has actually funds of the assured in his hands an agreement by the agent to apply such funds or part of them towards payment of premium is a sufficient payment (*g*).

Authority to give credit.

An agent would probably be presumed to have authority to receive a cheque as conditional but not as absolute payment of the premium (*h*). Authority to give credit or accept bills for premium may be inferred from a previous course of dealing on the part of the agent known to and recognised by the company (*i*) or from a local custom generally recognised by those carrying on the business of insurance in the particular county or district in question (*k*). Authority to give credit for premiums may also be inferred from the terms of the instructions given to the agent by the company. In *Acey* v. *Fernie* (*l*) the instructions were that if the premiums on a life policy were not paid within fifteen days the agent was "to give immediate notice to the office of such fact, and in the event of your omitting to do so your account will be debited for the amount after the fifteen days are expired, and you will be held responsible to the directors for the same." It was held that this gave no authority to the agent to give credit to the assured, it merely prescribed the penalty if he exceeded his authority; but in an American case (*m*) where the instructions were as follows, "Agents crediting premiums not actually received

N. Y. 79; *Canadian Fire* v. *Robinson* (1901), 31 Can. S. C. 488; *Union Central Life* v. *Robinson* (1906), 148 Fed. Rep. 358; *Smith* v. *New England Mutual* (1894), 63 Fed. Rep. 769.

(*e*) *Tiernan* v. *People's Life* (1896), 23 Ont. A. R. 342; *Hoffman* v. *Hancock Mutual* (1875), 92 U. S. 161.

(*f*) *Mutual Reserve Fund* v. *Simmons* (1901), 107 Fed. Rep. 418; *Union Central Life* v. *Robinson* (1906), 148 Fed. Rep. 358.

(*g*) *Chickering* v. *Globe Mutual* (1874), 116 Mass. 321.

(*h*) *Aetna Life* v. *Green* (1876), 38 U. C. Q. B. 459; *Taylor* v. *Merchants' Fire* (1850), 9 How. 390.

(*i*) *Miller* v. *Life Insurance Co.* (1870), 12 Wall. 285; *White* v. *Connecticut* (1876), 120 Mass. 330; *O'Brien* v. *Union* (1884), 22 Fed. Rep. 586; *Mutual Life* v. *Logan* (1898), 87 Fed. Rep. 637; *Dean* v. *Aetna Life* (1875), 62 N. Y. 642; *Marcus* v. *St. Louis* (1876), 68 N. Y. 625; *Tennant* v. *Travellers* (1887), 31 Fed. Rep. 322; *Church* v. *La Fayette* (1876), 66 N. Y. 222; *Payne* v. *Mutual Life* (1905), 141 Fed. Rep. 339.

(*k*) *Manufacturers' Association* v. *Pudsey* (1897), 27 Can. S. C. 374; *Moffat* v. *Reliance* (1881), 45 U. C. Q. B. 561; *Conway* v. *Phœnix* (1893), 140 N. Y. 79.

(*l*) (1840), 7 M. & W. 151.

(*m*) *Smith* v. *Provident Savings Life* (1895), 65 Fed. Rep. 765; see *Paine* v. *Pacific Mutual Life* (1892), 51 Fed. Rep. 689.

do so at their own risk, and must look to the policy holder for reimbursement. The society does not ask or desire you to take this risk," it was held that there was an implied authority to give credit and waive the condition requiring prepayment of the premium. Where the usual course of business was to transmit the renewal receipt to the agent and charge him with the premium, it was held that, if the agent delivered the receipt to the assured without receiving payment of the premium, the punctual payment of the premium was waived (*n*).

Authority to revive lapsed policies.

Similarly an agent has not, *primâ facie*, authority to waive forfeitures and revive lapsed policies unless he be a general agent with authority to contract on behalf of the company (*o*); but authority to waive forfeitures may be implied from a course of previous dealing recognised by the company (*p*).

Condition that agents are not authorised to waive forfeiture

In order to protect themselves from liability arising out of the unauthorised acts of their agents a condition is frequently inserted in the policy to the effect that agents are "not authorised to make, alter, or discharge contracts or waive forfeitures," or that "nothing less than a distinct agreement indorsed on the policy shall be construed as a waiver." Such conditions are valuable in that they give notice to the assured of a definite restriction on the agent's authority, and may prevent the company being bound by acts which would otherwise be within the agent's apparent authority (*q*), but, like all other conditions in the policy, they may be waived by the subsequent conduct of the company or of the company's agent recognised and permitted by the company. In the Supreme Court of the United States, Bradley, J. (*r*), said, with reference to such a condition, "The policy contained an express declaration that the agents of the company were not authorised to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favour. The company was not bound to insist upon a forfeiture though incurred, but

may be waived by subsequent conduct of insurers.

(*n*) *Fidelity and Casualty* v. *Willey* (1897), 80 Fed. Rep. 497.

(*o*) *Post* v. *Aetna Insurance* (1864), 43 Barb. 351.

(*p*) *Campbell* v. *National Life* (1874), 24 U. C. C. P. 133; *Aetna Insurance* v. *Smith* (1898), 88 Fed. Rep. 440; *Insurance* v. *Wolff* (1877), 95 U. S. 326; *Mutual Reserve* v. *Cleveland* (1897), 82 Fed. Rep. 508; *Wyman* v. *Phœnix* (1890), 119 N. Y. 274; *Insurance Co.* v. *Norton* (1877), 96 U. S. 234.

(*q*) *Marvin* v. *Universal Life* (1881), 85 N. Y. 278.

(*r*) *Insurance Co.* v. *Norton* (1877), 96 U. S. 234, 240.

might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might at any time at its option give them such power. The declaration was only tantamount to notice to the assured which the company could waive and disregard at pleasure." Conditions, therefore, may be waived by an agent, notwithstanding the provisions of the policy if subsequent to the granting of the policy, the words or conduct of the agent known to and acquiesced in by the company have been such as to induce the assured to believe that a forfeiture will not be insisted in or that other conditions in the policy will be waived (*s*).

(*s*) *Miller* v. *Life Insurance Co.* (1870), 12 Wall. 285; *White* v. *Connecticut* (1876), 120 Mass. 330; *O'Brien* v. *Union* (1884), 22 Fed. Rep. 586; *Dean* v. *Aetna Life* (1875), 62 N. Y. 642; *Tennant* v. *Travellers* (1887), 31 Fed. Rep. 322; *Marcus* v. *St. Louis* (1876), 68 N. Y. 625; *Campbell* v. *National Life* (1874), 24 U. C. C. P. 133; *Mutual Reserve* v. *Cleveland* (1897), 82 Fed. Rep. 508; *Wyman* v. *Phœnix* (1890), 119 N. Y. 274.

CHAPTER V

VOIDABLE POLICIES

Section I.—Generally

Grounds for avoiding the contract.

A CONTRACT of insurance may be void or voidable on one of these four grounds (*aa*) :—

breach of warranty ;
misrepresentation ;
non-disclosure ;
mistake.

Breach of warranty.

A warranty is what in other contracts is known as a condition of the contract. The liability of the insurer depends upon the existence of the fact or thing warranted (*a*). If in a fire risk there is a warranty that the premises are slate roofed, the insurer would be absolutely discharged if they were not so in fact, or if there is a warranty that a night watchman shall be kept on the assured's premises, the insurer would be discharged if the assured ceased to employ a night watchman. The essential characteristics of a warranty are briefly these :—

It must be part of the written contract.
The matter warranted need not be material to the risk.
It must be literally fulfilled.
A breach discharges the insurer notwithstanding
that the loss has no connexion with the breach,
that the breach has been subsequently remedied.

False representation.

A warranty must firstly be distinguished from a representation. A representation is not part of the contract, but is something stated by the one party as an inducement to the other party to make the contract. It may be made before or at the time the

(*aa*) The avoiding of the policy on the ground of want of insurable interest or illegality of object is dealt with in Chapter II., *supra*, p. 103.

(*a*) *Hambrough* v. *The Mutual* (1895), 72 L. T. 140 ; *Barnard* v. *Faber*, [1893] 1 Q. B. 340.

contract is concluded, and may be oral or in writing, and if the latter may be separate from or written upon the same paper as the contract itself. The essential characteristics of a representation are that it makes the contract voidable if it is

substantially false,
material to the risk, and
an operative inducement to the contract.

The case commonly cited on the elementary distinction between a warranty and a representation is that of *Pawson* v. *Watson* (*b*), before Lord Mansfield. On a marine policy the insured vessel was warranted to carry twelve carriage guns and twenty men, and it was held that the warranty must be literally fulfilled, and that it would not do to carry ten carriage guns and nine swivel guns and sixteen men and eleven boys, even although the latter might be the stronger force. "If there is a warranty," said Lord Mansfield, "nothing tantamount will do or answer the purpose; it must be strictly performed as being part of the agreement." And in another case (*c*) the same judge said, "There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered, but a warranty must be strictly complied with. . . . A warranty in a contract of insurance is a condition or contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with."

Non-disclosure.

Whereas all contracts are voidable on the ground of false representation of material facts, it is only certain classes of contracts which are voidable on the ground of non-disclosure of material facts. The general rule is that each party to a contract is entitled to make the best bargain he can, and although he must not make any false statement, he is, on the other hand, not bound to draw the attention of the other party to everything that might influence his judgment. But in certain classes of contracts the knowledge is almost exclusively on one side, and with regard to them the rule has been established that in order to make fair dealing possible, the party in possession of all the information must make a full disclosure, so that the other may be in a position to make some reasonable estimate of what he is undertaking.

(*b*) (1778), Cowp. 785.
(*c*) *De Hahn* v. *Hartley* (1786), 1 T. R. 343, 345.

Contracts of insurance have always been considered as contracts of this nature, and the rule has been laid down over and over again in the most emphatic manner, that no policy of insurance can stand where the assured has not made a complete disclosure of everything which was material for the insurer to know in order to judge (1) whether he should accept the risk ; (2) what premium he should charge (*d*).

Mistake or error *in essentialibus.*

Contracts of insurance are void when there is a mistake as to some matter which must be tacitly understood to be the basis of the whole contract. When the mistake is as to a fact upon which the whole contract necessarily depends, the aggrieved party need not show that his mistake was induced by the misrepresentation or non-disclosure of the other party, nor need he show that there was an express warranty relating thereto. The contract cannot stand if the facts upon the supposed existence of which it was based are found to be non-existent.

In *Pritchard* v. *Merchants' Life* (*e*) an insurance company obtained a policy by way of reinsurance upon a life which they had insured. They allowed the premium to remain unpaid for more than thirty days, and under the conditions of the policy were only entitled to reinstatement on payment of a fine and satisfactory proof of health. The reinsurers subsequently accepted the overdue premium unconditionally, but unknown to either party the life had dropped two days before the overdue premium was paid. It was held that the transaction for renewal was void, since the whole transaction was founded on the mutual assumption that the life was still in being.

In *Strickland* v. *Turner* (*f*) it was held that a contract for the purchase of an annuity was void if at the time the contract was made the annuitant had died. The basis of the contract was the continued existence of the annuity.

In *Attorney-General* v. *Ray* (*g*) a grant of an annuity made by the Commissioners for the Reduction of the National Debt under 10 Geo. 4, c. 24, to a life insurance company, was held to be void on the ground that the age of the annuitant had been erroneously certified by the company. The mistake, which was entirely innocent on the part of the directors, was only discovered after the death of

(*d*) *Lynch* v. *Hamilton* (1810), 3 Taunt 37.
(*e*) (1858) 3 C. B. (N. S.) 622.
(*f*) (1852), 7 Exch. 208.
(*g*) (1874), L. R. 9 Ch. 397.

the annuitant. The contract was declared void on the ground that the age of the annuitant was necessarily the basis of a contract to pay an annuity. In this case there was a misrepresentation by the grantee, but it is conceived that the innocent misrepresentation would not have been sufficient to avoid the contract when the parties could not be restored *in integrum*, unless the matter misrepresented had been matter going to the root of the contract, and that the true ground of the decision was mistake or error *in essentialibus*.

In *Hemming* v. *Sceptre Life* (*h*), Kekewich, J., held that a life policy issued upon the basis of the assured being 41 years old, could be repudiated by the insurance company upon discovering that the assured was in fact 44 years old.

Effect of mistake.

The consequence of mistake as to essential facts is to render the contract void, and not merely voidable. The contract without its essential subtratum can have no existence, and the Court will not make a new contract for the parties (*i*). The premium or other consideration for the contract is returnable as money paid upon a mistake of fact (*i*).

Effect of misrepresentation or non-disclosure,

The consequence of false representation, or non-disclosure, is to make the contract voidable. The party aggrieved, usually the insurer, has the right, when the matter comes to his knowledge, to elect whether or not he shall continue bound by the contract (*k*); but unless and until he makes his election and by word or act repudiates the contract, it remains as valid and binding as if it had not been tainted at all (*l*).

as a defence to a claim.

If the insurer has done nothing to affirm the contract after he became aware of the true facts, he may plead either false representation, or non-disclosure, as a defence to an action upon the policy (*m*). On the other hand, if after full knowledge of the facts, the insurer by his acts treats the contract as a subsisting contract, he cannot afterwards repudiate it in consequence of facts which were then known to him (*n*) : as, for instance, where the insurers, after knowledge of a misrepresentation

(*h*) [1905] 1 Ch. 365.

(*i*) *Attorney-General* v. *Ray* (1874), L. R. 9 Ch. 397.

(*k*) *Morrison* v. *Universal Marine* (1872), L. R. 8 Ex. 40, 197.

(*l*) *United Shoe Co.* v. *Brunet*, [1909] A. C. 330, 339, and cases there cited.

(*m*) *Adreveno* v. *Mutual Reserve Life* (1889), 38 Fed. Rep. 806.

(*n*) *Holdsworth* v. *Lancashire and Yorkshire Insurance* (1907), 23 T. L.R. 521.

as to age in a proposal for a life policy, subsequently accepted two premiums (*o*).

Misrepresentation and non-disclosure as ground for cancellation.

In the case of false representation and non-disclosure, the contract may be set aside *in toto*, and therefore the insurer may call upon the Court to exercise its equitable jurisdiction and, even before any claim has arisen upon the policy (*p*), to make an order for its cancellation and delivery up (*q*). After a claim has arisen the company has still the same right to cancellation and delivery up of the policy, but the propercourse for the company is not to take proceedings for cancellation, but to repudiate the contract at the first opportunity and wait for an action to be brought on the policy, and plead the misrepresentation or non-disclosure as a defence and counterclaim for cancellation (*r*). The company could not, by bringing an action in the Chancery Division for cancellation, deprive the assured of the right to bring an action in the King's Bench Division and have the issue of misrepresentation or concealment tried by jury (*s*).

Effect of breach of warranty.

The consequence of breach of warranty is to discharge the insurers from liability as from the date of the breach but without prejudice to any liability incurred by them before that date. Breach of warranty does not entitle the insurer to have the policy cancelled and delivered up (*t*). The contract still subsists although the insurers are discharged from liability. If a long time may elapse before a claim can be made on the policy, as in the case of a life policy which is forfeited early in life by some breach of warranty, and there is danger of evidence being lost, the only immediate remedy available to the insurers is an action to perpetuate testimony (*u*). The Court will not make a declaration that the policy has been forfeited (*u*). When, however, the statements made by the assured before the contract is made are warranted, the policy may be cancelled on the ground of misrepresentation

(*o*) *Hemmings* v. *Sceptre Life Ass., Ltd.*, [1905] 1 Ch. 365.

(*p*) *Fenn* v. *Craig* (1838), 3 Y. & C. Ex. 216; *Traill* v. *Baring* (1864), 4 De G. J. & S. 318; *Brooking* v. *Mandslay* (1888), 38 Ch. D. 636; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363; *British Equitable* v. *Musgrave* (1887), 3 T. L. R. 630.

(*q*) *Barker* v. *Walters* (1844), 8 Beav. 96; *Prince of Wales* v. *Palmer* (1858), 25 Beav. 605; *French* v. *Connelly* (1794), 2 Anstr. 454.

(*r*) *Griesa* v. *Mutual Life* (1909), 169 Fed. Rep. 509.

(*s*) *Hoare* v. *Bremridge* (1872), L. R. 8 Ch. 22; *Life Ass. of Scotland* v. *McBlain* (1875), Ir. R. 9 Eq. 176.

(*t*) *Thornton* v. *Knight* (1849), 16 Sim. 509; *Brooking* v. *Mandslay* (1888), 38 Ch. D. 636. See *India and London Life* v. *Dalby* (1851), 15 Jur. 982.

(*u*) *Brooking* v. *Mandslay* (1888), 38 Ch. D. 636.

notwithstanding that the misrepresentation also amounts to a breach of warranty (*v*).

Repudiation of contract by insurers.

Where the insurers during the currency of a policy repudiate it on the ground of want of insurable interest, breach of warranty, misrepresentation or mistake, the assured is not entitled to come immediately to the Court for a declaration that the policy is a valid and subsisting insurance. The assured has the option of treating the company's repudiation as a final breach, and bringing an action for damages upon which he could recover the then surrender value of the policy, if any, or of treating the contract as still subsisting, and continuing to tender the premiums until the time of payment arrives (*w*).

Honour v. Equitable Life U.S.A., [1900] 1 Ch. 852

Honour v. *Equitable Life U.S.A.*

Upon tender of the third semi-annual premium on a life policy the company repudiated the policy on the ground of want of insurable interest and fraudulent misrepresentations. The assured brought an action for a declaration that the policy was valid and subsisting. The Court was prepared to dismiss the action upon the company undertaking that they would not subsequently rely upon non-payment of the premiums upon the due dates as a defence to the claim. The Company, however, intimated that they were prepared to waive their objection to the form of the action if the plaintiff's counsel would put his client in the witness-box. This was done, and upon cross-examination of the plaintiff and evidence of witnesses for the defendants the court declared the policy void, and gave judgment for the defendants on the claim and upon the counterclaim for delivery up and cancellation.

Warranties distinguished from other terms of contract.

Warranties are distinguished from representations in that the latter are not part of the contract, but warranties must also be distinguished from certain other terms which are part of the contract, but the breach of which does not entirely vitiate the whole insurance.

Collateral promise.

A term in the policy may be merely a collateral promise to do some act without making the assured's right to recover dependent upon his fulfilment of the promise (*x*). Here the remedy of the insurers is by way of counterclaim for damages, and although the Court will not readily infer that the intention of the insurers was to limit the effect of a proviso so as to make it practically futile, yet the careless wording of a condition may have this result.

(*v*) *Smith* v. *Grand Orange Lodge* (1903), 6 Ont. L. R. 588.

(*w*) See *Supreme Council* v. *Lippincote* (1904), 134 Fed. Rep. 824.

(*x*) *London Guarantee* v. *Fearnley* (1880), 5 A. C. 911, 916; *Cowell* v. *Yorkshire Provident* (1901), 17 T. L. R. 452.

Thus in *Bradley* v. *Essex and Suffolk Accident* (*y*) a condition in an employer's liability policy that the assured should keep a proper wages book was held not to be a condition precedent to liability but merely a collateral condition relating to the adjustment of premium, and in *Stoneham* v. *Ocean Railway* (*yy*) where the condition " in case of fatal accident notice must be given to the company within seven days " was held not to be a condition precedent to recovery, but merely a term imposing an obligation upon the assured's representatives to reimburse the company for any extra expense which they might incur from having to investigate the circumstances of an accident at a long interval after its occurrence.

Suspensive conditions.

A warranty must also be distinguished from a merely suspensive condition. An absolute warranty must be completely satisfied, and if there is a breach for however short a period, the insurer is discharged, and remains so even after the breach has been remedied (*z*). For instance, if a fire policy warrants that no naphtha or kerosene shall be kept on the premises, the keeping of either of those articles involves a forfeiture, even although it has been removed before the fire, whereas if the policy had provided that the insurer should not be responsible in case of fire while any naphtha or kerosene was kept on the premises, the operation of the policy would be merely suspended to take effect again when the prohibited article was removed (*a*).

Exceptions.

Other conditions take the form of exceptions from the general risk described in the policy, as, for instance, " not to cover loss arising from explosion of gunpowder." Here the contract is neither avoided nor suspended, but the general risk described in the policy is limited by certain classes of loss being excluded.

Conditions precedent to recovery.

Lastly, there are conditions which neither avoid the policy nor limit the risk, but impose certain obligations to be performed by the assured after loss and before recovery can be had. These are conditions precedent to recovery, such as giving notice of loss, proof of loss, reference to arbitration, and the like.

Whether policy voidable against assignee.

When a policy is void or voidable or the insurers are discharged from liability as against the original assured an assignee takes no better title unless the company has entered into an

(*y*) (1911), 27 T. L. R. 455.

(*yy*) (1887), 19 Q. B. D. 237.

(*z*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow. 255; *Kyte* v. *Commercial* (1889), 149 Mass. 116.

(*a*) *Putnam* v. *Commonwealth Insurance* (1880), 18 Blatchf. 368.

independent contract with him or there is a condition in the policy saving the rights of assignees (*aa*).

Section II.—Fraud and Misrepresentation

Fraud is proved when it is shown that a false representation has been made (*b*) Fraud.

(1) Knowingly, or

(2) Without belief in its truth, or

(3) Recklessly without care whether it be true or false.

It is fraud if a man takes it upon himself to make a statement of fact as to the accuracy of which he knows that he is entirely ignorant (*c*). There is no fraud if a false statement is made merely through want of care in investigating or stating the facts. It may be that such a statement affords good ground for avoiding the contract, but it does not amount to fraud, at any rate according to the common law view of what fraud is. The Court of Chancery undoubtedly took a wider view of fraud, and it will be considered below how far the equitable rule went beyond the rule of the common law; but "fraud" must now be always interpreted according to the strict limitations laid down in *Derry* v. *Peek*, and if there is a condition that the policy cannot be disputed except on the ground of fraud, it will probably have to be shown that there is fraud in that sense, and not merely that carelessness in making statements which the Court of Chancery considered sufficient ground for rescission, and sometimes called "legal fraud."

It has been said that a contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo* (*d*); but this does not mean that he must be placed in as good a position as he was in at the time the contract was made, and it is probably sufficient if the aggrieved party can return the actual consideration which he has received. Thus a merchant who has been induced by fraud to purchase goods may rescind the contract As ground for rescission.

(*aa*) *North British and Mercantile* v. *Tourville* (1895), 25 Can. S. C. 177. Oral statements made by the assured to third persons as to his health and habits were held admissible against an assignee of the policy to prove the inaccuracy of statements in the proposal. *Hews* v. *Equitable Life* (1906), 143 Fed. Rep. 850.

(*b*) *Derry* v. *Peek* (1889), 14 A.C.337.

(*c*) *Bree* v. *Holbech* (1781), 2 Dougl. 654; *Pawson* v. *Watson* (1778), Cowp. 785; *Evans* v. *Edmonds* (1853), 13 C. B. 777. And see cases cited in Lord Herschell's judgment in *Derry* v. *Peek* (1889), 14 A. C. at p. 359.

(*d*) *Sheffield Nickel Co.* v. *Unwin* (1877), 2 Q. B. D. 214, 223; *Clarke* v. *Dickson* (1858), E. B. & E. 148.

if he can restore the goods, but the fact that the market value has fallen does not entitle the vendor to resist the claim for rescission on the ground that he cannot be restored to his *status quo*. In *Kettlewell* v. *Refuge* (*e*) the assured on a weekly policy was induced to continue the payment of premiums by the fraudulent statement of the company's agent, to the effect that if she continued to pay the premiums for five years, she would get a free policy. On ascertaining that the company would not grant a free policy, the assured claimed rescission of her policy and return of the premiums paid. The Court of Appeal were unanimous in the opinion that she was entitled to a return of the premiums, but Buckley, L.J., so held on the ground that a principal could not retain profits made through the fraud of his agent and he thought that the contract could not be rescinded, because the assured had had the benefit of the company being on the risk, and that benefit could not be restored. Alverstone, L.C.J., and Sir Gorell Barnes, P., thought that the contract could be rescinded, and that there was no such performance of the contract by the company as would prevent rescission. It is submitted that this latter opinion is right. The assured had never had any actual benefit from the contract, and the chance of benefit, which she had from the company being on the risk, is very similar to the chance which a purchaser of goods or shares would have of the contract turning out for his benefit if the market rose. Where there is fraud, the party defrauded may elect to affirm the contract if it has proved beneficial to his interest, but this chance of benefit does not deprive him of the right to rescind if the contract has not proved beneficial (*ee*). Where the insurer seeks to rescind the policy, on the ground of fraud, it would seem that, contrary to the rule applicable to other contracts, he is not even bound to restore the consideration which he has received, and that he may elect to cancel the policy without offering to return the premiums (*f*), and certainly he is entitled to resist any claim upon a policy which has been obtained by fraud, and is not bound to return the premiums (*g*).

(*e*) [1908] 1 K. B. 545. Affirmed in the House of Lords without opinion, [1909] A. C. 243.

(*ee*) In the case of *Mutual Reserve Life* v. *Foster* (1904), 20 T. L. R. in the House of Lords the assured obtained a decree for rescission and return of premiums on the ground of the company's misrepresentation, and this after the policy had been six years in force.

(*f*) *British Equitable* v. *Musgrave* (1887), 3 T. L. R. 630.

(*g*) *Hambrough* v. *Mutual Life* (1895), 72 L. T. 140.

Misrepresentation not amounting to Fraud.

When misrepresentation falls short of fraud, it may either be (1) carelessly made by some mistake or forgetfulness; (2) made without any reasonable grounds for believing it to be true; or (3) made under a misapprehension, but without carelessness and with good grounds for believing in the truth of the statement made. In each of these cases there is an honest belief in the truth of the representation, and therefore no fraud; but in (1) and (2) the party who makes the statement is not altogether free from blame, whereas in (3) he is absolutely innocent. Now there is no doubt that before the Judicature Act, the Court of Chancery would have set aside a contract in cases where, although there was no fraud, yet there was fault (*h*), and, therefore, such ground ought still to be sufficient for rescission, just as much as where there is fraud in the strict legal sense. Whether or not the Court of Chancery ever granted rescission of a contract on the ground of absolutely innocent and blameless misrepresentation, is very doubtful (*i*). The Court would not decree specific performance where there was any material misrepresentation (*k*); but the reported cases where rescission was granted may be summed up under four heads, (1) cases where there was no honest belief in the statement made; (2) cases where there was some carelessness or forgetfulness in ascertaining or stating the facts (*l*); (3) cases where the representation had been made a term in the contract; and (4) cases where the representation was of some fact which was essentially the basis

Practice of the Chancery Courts.

(*h*) *Pulsford* v. *Richards* (1853), 17 Beav. 96; see Romilly, M.R., at p. 94; *Burrowes* v. *Locke* (1805), 10 Ves. 470; *Slim* v. *Croucher* (1860), 1 De G. J. & F. 518; *Reese River* v. *Smith* (1869), L. R. 4 H. L. 64; *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304.

(*i*) The judgment of Romilly, M.R., in *Pulsford* v. *Richards* shows clearly that the Court of Chancery would grant relief where no action for deceit would have lain at common law, and, on the other hand, that case and many others such as *Rawlins* v. *Wickham* show that equity judges about the middle of last century, including Romilly, M.R., Knight Bruce, and Turner, L.JJ., thought that they must find something in the nature of fault or neglect before they could order rescission.

(*k*) *Wilde* v. *Gibson* (1848), 1 H. L. C. 605, 633; *Mortlock* v. *Buller* (1804), 10 Ves. 307; *Attwood* v. *Small* (1838), 6 Cl. & F. 232; *Brownlie* v. *Campbell* (1880), 5 A. C. 935; *Smith* v. *Kay* (1859), 7 H. L. C. 750, 775.

(*l*) *Burrowes* v. *Locke* (1805), 10 Ves. 470; *Legge* v. *Croker* (1811), 1 Ball & Beaty, 506; *Edwards* v. *McLeay* (1818), 2 Swanst. 287; *Price* v. *Macaulay* (1852), 2 De G. M. & G. 345; *Pulsford* v. *Richards* (1853), 17 Beav. 96; see Romilly, M.R., at p. 94; *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304; *Slim* v. *Croucher* (1860), 1 De G. J. & F. 518; *Higgins* v. *Samels* (1862), 2 J. & H. 460; *Charlesworth* v. *Jennings* (1864), 34 Beav. 96; *Ship's Case* (1865), 2 De G. J. & S. 544; *Smith's Case* (1867) L. R. 2 Ch. 604; *Reese River* v. *Smith* (1869), L. R. 4 H. L. 64; *Central Railway of Venezuela* v. *Kisch* (1867), L. R. 2 H. L. 99, 118; *Hart* v. *Swaine* (1877), 7 Ch. D. 42; *Brett* v. *Clowser* (1880), 5 C. P. D. 376; *Joliffe* v. *Baker* (1883), 11 Q. B. D. 255; *Jennings* v. *Broughton* (1853), 17 Beav. 234.

of the contract (*m*). Now the first of these cases is fraud in the strict legal sense; the second is the class of case where the Courts of equity granted rescission on the ground that there was fault if not fraud; the third is where the representation, by being made a term in the contract, has been given the force of a condition precedent or warranty; and the fourth is the class of case where the contract is void on the ground of mistake or error *in essentialibus*. But although there may be no definite authority in the old Chancery reports, it appears to be now settled by modern decisions (*n*) that absolutely innocent misrepresentation is sufficient ground for rescinding a contract provided, (1) that the contract has not been completely executed (*o*); (2) that the party who made the misrepresentation can be restored substantially to the same position as if the contract had never been made (*p*). The aggrieved party is entitled to have the contract set aside, and to an indemnity against such obligations as he may have incurred under the contract (*q*); but not to recover damages so as to be put in precisely the same position as if the contract had never been made (*r*). Applying the principle of these decisions to the contract of insurance, an insurer would not be entitled after a loss had occurred to rescind the policy on the ground of the assured's innocent misrepresentation, but before loss he would probably be entitled to rescind if the assured was still in a position to effect insurance elsewhere on terms as favourable as he could have obtained at the time the insurance was effected. In the case of innocent misrepresentation by the insurer the assured would, at any time, be entitled to rescind and claim return of premiums (*s*). In all applications for rescission on the ground of misrepresentation the application must be made without undue delay after the misrepresentation complained of has been discovered (*ss*).

Modern doctrine as to innocent misrepresentation.

(*m*) *Stewart* v. *Alliston* (1815), 1 Mer. 26; *Madeley* v. *Booth* (1848), 2 De G. & Sm. 718; *Durham* v. *Legard* (1865), 34 Beav. 612; *Aberaman Iron Works* v. *Wickens* (1868), 4 Ch. 101.

(*n*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 12; *Derry* v. *Peek* (1889), 14 A. C. 337, 347, 359; *Wauton* v. *Coppard*, [1899] 1 Ch. 92.

(*o*) *Seddon* v. *North Eastern*, [1905] 1 Ch. 335.

(*p*) *Hindle* v. *Brown* (1907), 98 L. T. 44.

(*q*) *Newbigging* v. *Adam* (1886), 34 Ch. D. 582.

(*r*) *Whittington* v. *Seale-Hayne* (1900), 82 L. T. 49.

(*s*) *Kettlewell* v. *Refuge*, [1908] 1 K. B. 545; *Foster* v. *Mutual Reserve Life* (1904), 20 T. L. R. 715; *Cross* v. *Mutual Reserve Life* (1905), 21 T. L. R. 15; *Merino* v. *Mutual Reserve Life* (1905), 21 T. L. R. 167; *Molloy* v. *Mutual Reserve Life* (1905), 22 T. L. R. 59; *Duffell* v. *Wilson* (1808), 1 Camp. 401; *Carter* v. *Boehm* (1766), 3 Burr. 1905, 1909; *contra*, *Angers* v. *Mutual Reserve Life* (1904), 35 Can. S. C. 330.

(*ss*) *Foster* v. *Mutual Reserve Life* (1904), 20 T. L. R. 715.

Innocent misrepresentation and policies of marine insurance.

The contract of marine insurance was always treated as an exception from the common law rule that innocent misrepresentation did not affect the validity of a contract. It was recognised at an early date that misrepresentation, short of fraud, was a good defence to an action on the policy (*t*), and although the decisions were originally based on various unsatisfactory reasons, such as " legal fraud," it was ultimately recognised that the proper *ratio decidendi* was that there is in every marine policy an implied condition or warranty that no material misrepresentation has been made in or about the procuring of the policy (*u*). In the absence of any definite authority, it is doubtful whether this principle would be extended to insurance contracts other than on marine risks (*x*). In *Wheelton* v. *Hardisty* (*y*) the Exchequer Chamber declined to extend it to life insurance, and held that an innocent misrepresentation was not sufficient to vitiate a life policy. In *Anderson* v. *Fitzgerald* (*z*), too, Lord Cranworth said, with reference to life insurance, " a misrepresentation, even if material, but there is no fraud in it, and it forms no part of the contract, cannot vitiate the right of the party to recover." On the other hand, in the same case, Lord St. Leonards seems to have thought an innocent misstatement was sufficient to vitiate the policy, although not disentitling the assured to recover back his premiums. The bulk of authority, however, is to the effect that this rule is peculiar to the contract of marine insurance (*a*). In Canada and America misrepresentation, although entirely innocent, has been held to afford a good defence to an action on a life policy (*b*).

Uberrima fides prohibits negligent misrepresentation.

Recent decisions appear to ignore the distinction between fraud as interpreted by the common law courts, and fraud as interpreted by the Court of Chancery, and in the case of most contracts representations which are not fraudulent, in the strict

(*t*) *Fitzherbert* v. *Mather* (1785), 1 T. R. 12 ; *Macdowall* v. *Fraser* (1779), 1 Dougl. 260 ; *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358, 379 ; *Dennistoun* v. *Lillie* (1821), 3 Bligh. 202 ; *Anderson* v. *Thornton* (1853), 8 Ex. 425 ; *Anderson* v. *Pacific* (1872), L. R. 7 C. P. 65, 68 ; *Ionides* v. *Pacific* (1871), L. R. 6 Q. B. 674, 683.

(*u*) *Blackburn* v. *Vigors* (1886), 17 Q. B. D. 553, 578, 583.

(*x*) *Davies* v. *National Fire and Marine*, [1891] A. C. 485.

(*y*) (1857), 8 E. & B. 232, 235.

(*z*) (1853), 4 H. L. C. 484, 504, 508.

(*a*) *Hambrough* v. *Mutual* (1895), 72 L. T. 140, 141 ; *Fowkes* v. *Manchester* (1863), 3 B. & S. 917, 929 ; *Behn* v. *Burness* (1863), 3 B. & S. 751, 753 ; *Ducket* v. *Williams* (1834), 2 Crom. & M. 348, 351 ; *Byrne* v. *Muzio* (1881), 8 L. R. Ir. 396 ; *North British Insurance* v. *Lloyd* (1854), 10 Ex. 523 ; *Fisher* v. *Crescent Insurance* (1887), 33 Fed. Rep. 544.

(*b*) *Jordan* v. *Provincial Provident* (1898), 28 Can. S. C. 554 ; *Carrollton Furniture Co.* v. *American Indemnity* (1902), 115 Fed. Rep. 77.

legal sense as defined in *Derry* v. *Peek*, must be treated as entirely innocent, and affording no ground for rescission, unless there can be full restitution. But contracts of insurance call for *uberrima fides* on the part of the assured. The contract is voidable on the ground of non-disclosure of material facts, as well as on the ground of misrepresentation, and innocent non-disclosure is just as fatal as fraudulent non-disclosure. Carelessness and forgetfulness afford no excuse. It seems to follow that a misrepresentation, due to carelessness, although not fraudulent, would be a breach of the *uberrima fides*, and ought to afford a sufficient defence to an action upon a contract of insurance, although it might not be a defence to an action upon other contracts (*c*).

Effect of misrepresentation summed up.

The right of the insurer to avoid the risk on the ground of misrepresentation by the assured may, therefore, be summed up as follows :—

1. Fraudulent, careless or negligent misrepresentation
   (*a*) is ground for rescission at any time,
   (*b*) affords a good defence to any claim.
2. Absolutely innocent misrepresentation
   (*a*) is ground for rescission at any time before loss, provided the assured is not so prejudiced by lapse of time as to be unable to insure elsewhere on the same terms as he could have obtained when the insurance in question was effected,
   (*b*) does not afford a good defence to a claim which has arisen before the insurer exercised his right of rescission.

The assured may, at any time, rescind the contract and claim return of premiums on the ground of misrepresentation by the insurer whether fraudulent, careless, or absolutely innocent.

Onus of proof.

If the insurers rely on misrepresentation as ground for avoiding the contract of insurance, the onus is on them to prove clearly that a false representation was made to them by or on behalf of the assured (*d*). The representation relied on may have been made in writing, either in the proposal form or elsewhere, or by word of mouth or even by significant action. If it is proved

(*c*) *Thomson* v. *Weems* (1884), 9 A. C. 671, 682; *Traill* v. *Baring* (1864), 33 L. J. Ch. 521, 524 ; *Jordan* v. *Provincial* (1898), 28 Can. Sup. Ct. 554 ; *Campbell* v. *New England Life* (1867), 98 Mass. 381 ; *Carpenter* v. *American* (1839), 1 Story 57 ; *Imperial Fire* v. *Murray* (1873), 73 Pa. 13.

(*d*) *Davies* v. *National Fire Marine*, [1891] A. C. 485, 489 ; *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863.

that the assured has by his words or deeds in any manner conveyed a substantially erroneous version of material facts to the insurer there is a misrepresentation.

Ambiguous statements.

An assured cannot, by making use of ambiguous expressions, lead the insurers into error, and then turn round and say that the insurers put a wrong construction on the words used, and that in their proper sense, they were accurate representations of the facts. If through the fault of the assured a statement is capable of more than one interpretation, it is open to the insurers to say that they understood it in a certain sense, and that in that sense it was false; but if they understood it in one sense, and in that sense it was accurate, they cannot be heard to say that in reality it meant something else, and that in that other sense it was false. It is only where the insurer has understood an ambiguous expression in a false sense that he can possibly say he has been misled (*e*), and if the representation is so obviously ambiguous that no reasonable person would accept it without inquiry, the duty of the insurers is to ask for an explanation before acting upon it (*f*).

Suggestio falsi.

It is obvious that a false impression can be conveyed by the assured to the insurers without any definitely false statement having been made, but the effect on the insurers may be the same as if a false statement had been made in plain terms, and the law considers the one a misrepresentation just as much as the other. It is not, therefore, necessary that the insurers should be able to put their fingers on any single statement and prove that that is false, it is enough if they can show that the language taken as a whole, and reasonably interpreted by them, gave them a false impression as to what the real facts were. In reference to representations of this kind, Lord Halsbury has said, "It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed—by what trick or device or ambiguous language, all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If, by a number of statements you intentionally give a false impression, and induce a person to act upon it, it is not the less false, although

(*e*) Jessel, M.R., in *Smith* v. *Chadwick* (1882), 20 Ch. D. at p. 45.

(*f*) *Lebanon Ins.* v. *Kepler* (1884), 106 Pa. 28.

if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue " (*g*).

Suppressio veri.

The omission of a material fact may amount not only to non-disclosure, but to actual misrepresentation, as where the truth, but not the whole truth, is told about any particular fact, or set of facts, thus impliedly representing that there is nothing more to tell (*h*).

When the statement made is apparently complete.

If among the questions put to an applicant for life insurance, was the question, " How often has medical attendance been required ? " and the answer was " Two years ago for a disordered stomach," and, in fact, the assured had had a serious illness, and was attended by two doctors within a year of the proposal, there would, in substance, be an absolutely false statement, although it might have been literally true that two years before he was attended for a disordered stomach (*i*). Where an applicant for life insurance was asked whether he had made any previous proposals to any other office or offices, and whether they had been accepted or refused, answered simply that he had been accepted by two offices, whereas, in fact, he had also been refused by five others, the answer was false, for although literally a true statement in so far as it went, it carried with it the inference that he had never been declined, which was false (*k*). And so where the question was whether the risk was insured elsewhere, and in what offices, and the answer mentioned three only out of four offices in which the assured was insured, it was held that the answer was not accurate (*l*), and similarly a statement that the tenants of a building were A, B, and C, whereas there was also D, was held to be untrue (*m*).

When the statement made is obviously incomplete.

In all the cases just referred to the answer given was, on the face of it, a complete answer to the question asked. Different principles apply where the answer is, on the face of it, incomplete. Thus, in *Perrins* v. *Marine and General Travellers* (*n*), the applicant for

(*g*) Lord Halsbury, L.C., in *Aarons Reefs* v. *Twiss*, [1896] A. C. 273, 281, and see Lord Colonsay in *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 400.

(*h*) *Dimmock* v. *Hallet* (1866), L. R. 2 Ch. 21, 27, 28 ; *Pulsford* v. *Richards* (1853), 17 Beav. 87, 96.

(*i*) *Cazenove* v. *British Equitable* (1859), 6 C. B. (N. S.) 437 ; see *Dilleber* v. *Home Life* (1877), 69 N. Y. 256.

(*k*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 371 ; *Scottish Provident* v. *Boddam* (1893), 9 T. L. R. 385 ; *Re General Provincial Life* (1870), 18 W. R. 396.

(*l*) *Penn. Mutual* v. *Mechanics* (1896), 72 Fed. 413.

(*m*) *Abbott* v. *Shawmut Mutual* (1861), 85 Mass. 213.

(*n*) (1859), 2 E. & E. 317.

insurance on his own life was required to state the "name, residence, profession or occupation of the person whose life is proposed to be insured," and he filled in the blank as follows: "I. T. P. Esquire, Saltley Hall, Warwickshire." He did not disclose that he was by occupation an ironmonger. As the answers were warranted accurate, the question arose whether this statement was inaccurate or merely incomplete, and the Court held that there was no inaccuracy, and that the policy could only be avoided on the ground of non-disclosure if the jury found that the concealment of the fact that the applicant was an ironmonger was material to the risk. Where an answer is obviously incomplete, the acceptance of the incomplete answer without making further inquiry, may operate as a waiver of further information on the subject (*o*). Thus in a case in the Supreme Court of the United States (*p*), the following question and answer appeared on the proposal: "*Q.* Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? *A.* $10,000 Equitable Life Assurance Society." In fact there had been an unsuccessful application for additional insurance which was intentionally concealed; but it was held that the acceptance of the incomplete answer was a waiver of the right of the insurers to set up that the omission to disclose such application was material.

Questions on proposal form unanswered.

Where a question in the proposal is left entirely unanswered, the issue of the policy, without further inquiry, has been held to be a waiver of information (*q*), and it would seem that the omission to answer a question cannot be regarded as a misstatement of fact (*r*), unless the obvious inference is that the applicant intended the blank to represent a negative answer (*s*).

Importance of distinguishing misrepresentation from non-disclosure.

The case of *Perrin* v. *Marine and General Travellers* (*ss*) shows that the distinction between a misstatement and non-disclosure may be of the utmost importance. If the accuracy of the answer is warranted, and the omission amounts to a misstatement, the insurers may, without further proof, avoid the policy, whereas if

(*o*) *Gates* v. *The Madison Mutual* (1851), 5 N. Y. 469.

(*p*) *Phœnix Life* v. *Raddin* (1887), 120 U. S. 183.

(*q*) *Armenia Fire* v. *Paul* (1879), 91 Pa. 520.

(*r*) *Connecticut Mutual* v. *Luchs* (1882), 108 U. S. 498; *London and Lancashire* v. *Honey* (1876), 2 Vict. Law, 7; *Brown* v. *Greenfield Life* (1899), 172 Mass. 498.

(*s*) *Fitzrandolph* v. *Mutual Relief* (1890), 17 Can. S. C. 333.

(*ss*) (1859), 2 E. & E. 317.

the omission is a mere non-disclosure, it cannot affect the validity of the policy unless it was material to the risk.

Representation must be material.

Apart from warranty, a false statement does not affect the contract unless it is material to the risk. It is not, however, necessary for the insurers to prove that the fact misrepresented was one that was essential to the proper calculation of the risk. It is sufficient if they can show that the fact was one which would have influenced the judgment of a rational insurer governing himself by the principles and calculations on which insurers of his particular class do in practice act (*t*). Thus, statements as to whether a risk has or has not been proposed to other insurers are undoubtedly material (*u*). If the assured were to state that the same risk was insured in some well-known company at a certain premium, that does not affect the calculation of the actual risk, for the risk would be the same whether he was insured elsewhere or not; but such a statement does affect the mind of every reasonable insurer, and companies are often influenced in their decisions by knowing that some other company has or has not accepted the same risk. In a marine insurance case where, in order to obtain an insurance at a certain rate, the assured falsely represented that the same risk had been effected at Lloyd's at eight guineas per cent., the insurance was held to be vitiated, and Lord Eldon said, "The Courts in this country would say that this was a fraud, not on the ground that the misrepresentation affected the nature of risk, but because it induced a confidence without which the party would not have acted" (*x*). Thus, where a company, on applying to reinsure part of a life risk, said they intended to retain one-third of the risk, but before the reinsurance was completed had got rid of the whole risk, it was held that there had been a misrepresentation of material fact, and the insurance was set aside (*y*). The proper test, therefore, of materiality in questions of misrepresentation appears to be not, "Was the misrepresentation material to the risk?" but rather, "Was the misrepresentation material to the inducement?" (*z*) that is to say, would a reasonable insurer have been influenced thereby?

(*t*) Blackburn, J., in *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531, 538; *Quin* v. *National* (1839), Jones & Carey, 316, 331.

(*u*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 370; *Marshall* v. *Scottish Employers* (1902), 85 L.T.757.

(*x*) *Sibbald* v. *Hill* (1814), 2 Dow. 263, 266.

(*y*) *Traill* v. *Baring* (1864), 4 De G. J. & S. 318.

(*z*) *Gordon* v. *Street*, [1899] 2 Q. B. 641, 645.

Questions and answers relating to previous losses (*a*), or to incumbrances on property insured (*b*), are undoubtedly material.

Question for the jury.

The question as to whether a fact misrepresented is or is not material, is one for the jury, under a proper direction of law (*c*), and with the assistance, if necessary, of expert evidence (*d*).

Trivial misrepresentations.

It is clear that all matters which substantially affect the nature of the risk are material; but, on the other hand, a misstatement may be so trivial that the Court will be of opinion that it could not have affected the mind of the insurers at all, or induced them to enter into the contract (*e*). In the case of *In re Universal Non-Tariff Fire Company* (*f*), a fire policy was subject to a condition that any material misdescription of the property would render the policy void. The premises were described as roofed with slate, whereas a small portion of them was roofed with felt. Malins, V.C., held that the misdescription was not material, and said, "The principle applicable to this case is, I think, that stated in Smith's Mercantile Law: 'If the description of the property be substantially correct, and a more accurate statement would not have varied the premium, the error is not material.'"

Premium a test of materiality.

If the effect of the misrepresentation is such that the risk was taken at a smaller premium, than would have been the case if the insurers had known the truth, then the representation must have been material (*h*); but proof that the facts misrepresented would not have varied the premium is not conclusive proof of their immateriality, since there may be circumstances where the insurers might have declined the risk, although, if they had taken it they would have taken it at the same premium.

Questions and answers made the basis of the contract.

Where there are misstatements in answer to questions in the proposal form, and the proposal form and answers are made the basis of the contract, the Court will assume that the answers to these questions are material, and neither party can be heard to say that they are not (*k*).

(*a*) *Life and Health* v. *Yule* (1904), 6 F. 437.

(*b*) *Connecticut Fire* v. *Manning* (1908), 160 Fed. Rep. 382.

(*c*) *Scanlan* v. *Sceales* (1849), 13 Ir. L. R. 71, 79; *Wainwright* v. *Bland* (1835), 1 Mood. & Rob. 481, 488.

(*d*) *Quin* v. *National* (1839), Jones & Carey, 316, 333; *Penn. Mutual Life* v. *Mechanics* (1896), 72 Fed. Rep. 413.

(*e*) Jessel, M.R., in *Smith* v. *Chadwick* (1882), 20 Ch. D. 45, 46.

(*f*) (1875), L. R. 19 Eq. 485, 496.

(*h*) *Columbian Insurance* v. *Lawrence* (1836), 10 Pet. 507, 516.

(*k*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 371; *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484; *Marshall* v. *Scottish Employers* (1902), 85 L. T. 757; *Jeffries* v. *Life Insurance Co.* (1874), 22 Wall. 47; *Campbell* v. *New England Mutual* (1867), 98 Mass. 381; *Mutual Benefit Life* v. *Wise* (1871), 34 Md. 582; *Miller* v.

Questions and answers not made the basis of the contract.

Where questions and answers in the proposal form or in the medical officer's report in the case of life insurance, are not expressly stated to be the basis of the contract, their materiality is an open question for the jury (*l*), although the fact that the same or similar questions may be asked by practically every insurer is very strong evidence that they are material.

Substantial accuracy is sufficient.

But even although a particular question and the answer thereto are deemed to be material, it does not follow that the slightest inaccuracy in the answer is material, and unless the answers are warranted accurate, an immaterial inaccuracy will not affect the contract (*m*). For instance, although a question as to the age of an applicant for life insurance is undoubtedly material, an inaccuracy of only four days in stating the age would not be material, unless the difference would have taken the life past a birthday and so involved an additional premium (*n*). In *Craig* v. *Imperial Union* (*o*) an applicant for accident insurance was asked, "Have you ever been insured with any accident company?" and answered, "Insured for twelve years with P.C." In fact he had also been insured with another company, and this was not disclosed. It was held that the inaccuracy or omission was not material and, therefore, did not affect the contract. This merely illustrates the rule that whereas a warranty must be strictly performed, a representation need only be substantially complied with.

Representations made to another insurer on the same risk.

In marine insurance the rule has been established that representations made to the first underwriter on the policy must be deemed to have been made to all the other underwriters, and therefore, if the first underwriter has been induced by a false statement to accept the risk, all the underwriters may plead such false statement as a defence to any action on the policy (*p*). Lord Ellenborough refused to extend this rule to representations made to any underwriter other than the first, and intimated that the rule as to the first underwriter depended rather upon precedent than reason (*q*). The rule, therefore, is not likely to be extended to

Mutual Benefit (1871), 31 Iowa, 216; *Stott* v. *London and Lancashire Fire* (1891), 21 Ont. 312; *Carollton Furniture Co.* v. *American Indemnity* (1903), 124 Fed. Rep. 25.

(*l*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863.

(*m*) *Campbell* v. *New England Mutual* (1867), 98 Mass. 381; *Phœnix Life* v. *Raddin* (1887), 120 U. S. 183; *Missouri Trust* v. *German Bank* (1896), 77 Fed. 117: *Carollton Furniture Co.* v. *American Indemnity* (1903), 124 Fed. Rep. 25.

(*n*) *Mutual Relief* v. *Webster* (1889), 16 Can. Sup. Ct. 718.

(*o*) (1896), 1 Scots L. T. 646.

(*p*) *Bell* v. *Carstairs* (1810), 2 Camp. 543.

(*q*) 2 Camp. 543.

other classes of insurance, or to insurances by different companies on their own policies. In a Canadian case, however, where an applicant for fire insurance upon his vessel, stated to an agent for B and C companies, that he desired to insure £3000 distributed between three companies and subsequently informed the agent that he had placed £1000 with A company, whereupon he was accepted by B and C companies for £1000 each, it was held that the aggregate insurance was in effect one insurance, and that false and fraudulent misrepresentation to A company was a defence to an action against B and C companies (*s*).

Decoy policies.

When an insurance obtained by fraud or a collusive insurance is put forward as a decoy to induce other insurers to accept the same risk, the policy obtained by means of such representation, is voidable. In a case in New South Wales an applicant, in answer to the usual question, stated that he was insured elsewhere, but the insurances mentioned had been obtained by fraud, and the policy obtained upon the faith of the representation that there was other insurance was set aside (*t*). In an early English case, an applicant for life insurance induced one insurer to underwrite a policy as a decoy, and thereby other insurers were drawn in to underwrite the policy. The whole policy was cancelled on the ground of fraud (*u*).

The representation must induce the contract.

Apart from the possible effect of special conditions it would appear that, however fraudulent or wicked a misrepresentation may be, it has no effect upon the validity of a policy unless it operated on the minds of the insurers as an inducement to them to accept the risk (*x*). Romilly, M.R., speaking of misrepresentation, says (*y*), "There must be a representation *dans locum contractui* that is a representation giving occasion to the contract; the proper interpretation of which appears to me to be, the assertion of a fact upon which the person entering into the contract relied, and in the absence of which it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether," and Lord Wensleydale says (*z*), "Now I take it to be perfectly clear that, in order to

(*s*) *Grant* v. *Ætna Fire* (1860), 11 Low Can. R. 128.

(*t*) *Hanley* v. *Pacific Fire* (1893), 14 N. S. W. R. (Law) 224.

(*u*) *Whittingham* v. *Thornburgh* (1690), 2 Vern. 206.

(*x*) *Flinn* v. *Headlam* (1829), 9 B. & C. 693.

(*y*) *Pulsford* v. *Richards* (1853), 17 Beav. 96.

(*z*) *Smith* v. *Kay* (1859), 7 H. L. C. 750.

set aside a deed on the ground of fraud, there must be moral fraud, and fraud causing the contract, *dolus dans causum contractui;* not necessarily a fraud which is the sole cause of the contract, but a fraud without which the contract never would have been made."

Inducement presumed.

It would, however, in most cases be extremely difficult for an insurance company to prove definitely that any particular statement in any particular application was, in fact, relied on by them and operated as part of the inducement to accept the contract, and, therefore, it is presumed as a fair inference of fact that, where a material misrepresentation is made and a policy is issued, the insurers acted upon the misrepresentation, and were misled by it (*a*). Jessel, M.R., in *Smith* v. *Chadwick* (*b*), says, "Again, on the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, so that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may show, in fact, that he did not so act in one of two ways either by showing that he knew the truth before he entered into the contract, and therefore could not rely on the misstatements; or else by showing that he avowedly did not rely on them, whether he knew the facts or not" (*c*). It is obvious that a misrepresentation is rarely, if ever, the sole inducement to the insurers to enter into the contract. All the facts are taken into consideration, and it is impossible to analyse the mental impressions created by each particular statement on, say, a board of directors who accepted the risk perhaps many years before. The only practical way, therefore, of determining whether they were misled or not is to assume that they were, if the fact misstated is one which would have influenced ordinary and reasonable insurers, in considering a similar risk, and then the assured, in order to recover, must show that the insurers were not in fact influenced by the misstatement, that is to say, they must clearly prove that even if the misrepresentation

(*a*) *Traill* v. *Baring* (1864), 4 De G. J. & S. 318, 330.
(*b*) (1882), 20 Ch. D. 27, 44.
(*c*) 20 Ch. D. at p. 44, cited and approved by Lord Halsbury, L.C., in *Arnison* v. *Smith* (1889), 41 Ch. D. 348, at p. 368; and see *Smith* v. *Kay* (1859), 7 H. L. C. 750, 759, 770.

had not been made, the insurers would have accepted the risk on the same terms (*d*).

Presumption may be rebutted

The assured who has made a misrepresentation may prove that it did not influence the insurers by showing (i) that it was never communicated to them ; or (ii) that they were aware of the truth ; or (iii) that they acted on their own investigation without reliance on the representation.

if the representation was never communicated to the insurer,

It is clear that if the insurers accept a proposal in ignorance of a misrepresentation which has been made by the assured, they cannot afterwards say that they were misled by such misrepresentation. Thus a misrepresentation made to an agent of an insurance company cannot affect the validity of the policy unless it has been communicated by the agent to the directors or unless the directors have acted upon the agent's report, which but for the representation might have been unfavourable.

if the insurer knew the truth *aliunde*,

Neither can the insurers be misled if they knew the truth. When, however, the assured has made a false statement, it will not do for him to say that the insurers had the means of discovering the truth for themselves if they had taken the trouble to do so (*e*). The effect of a false representation is not to be got rid of on the ground that the person to whom it was made was guilty of negligence (*f*). Thus if the assured shows to the insurer papers or plans relating to the risk, and at the same time states what is contained in them, he cannot say afterwards that the insurers ought to have verified his statement by an examination of the documents. So, too, the insurers may once have known the truth and forgotten it, but that does not entitle the assured who has made a statement to say that the insurers ought to have remembered the truth and known that the statement was false. When the facts are known to the company's agent and his knowledge can be properly imputed to the company, that is where it was the agent's duty to have communicated them to the company but he has not done so, the company cannot plead ignorance (*g*).

(*d*) See Lord Cranworth in *Smith* v. *Kay* (1859), 7 H. L. C. 750, at p. 770 ; and Lord Chelmsford, L.C., in the came case, at p. 758 ; *Marshall* v. *Scottish Employers* (1902), 85 L. T. 757.

(*e*) *Mackintosh* v. *Marshall* (1843), 11 M. & W. 116 ; *Scottish Equitable* v. *Buist* (1876), 3 R. 1078.

(*f*) Jessel, M.R., in *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1.

(*g*) *Bawden* v. *The London, Edinburgh and Glasgow*, [1892] 2 Q. B. 534 ; *Holdsworth* v. *Lancashire and Yorkshire Insurance* (1907), 23 T. L. R. 521 ; *Reddick* v. *Saugeen Mutual* (1888), 15 Ont. A. R. 363 ; *John*

if the insurer relied solely on his own investigation.

If the assured can prove that the insurers, instead of relying on the false statement which was made to them, investigated the facts for themselves, and acted on the result of that investigation, then, whether they have actually discovered the truth or not, the false statement becomes immaterial, for the insurers disregarded it and acted on their own inquiry (*h*). But it must be shown clearly that the insurers both investigated the facts and relied solely on their own investigation. It is not sufficient to show that they investigated the facts carelessly and inefficiently, for their imperfect investigation may have been due to faith in the definite statement made by the assured. The test is not whether the insurers investigated the facts for themselves, but whether it is to be inferred from their manner of doing so that they intended to rely upon that investigation and not upon the statement of the assured (*i*). Where the agent of the insurers examines the premises proposed for a fire risk, it may probably be assumed that the insurers act upon the result of their agent's examination rather than upon the representations of the assured upon matters which must have been obvious to the agent when he examined the premises (*k*).

Whether fraudulent representation must be material.

It is sometimes said that if a representation is fraudulent, there is no necessity to prove that the false statement was material (*l*). In *The Bedouin* (*m*), a marine insurance case, Lord Esher, M.R., said, " The assured is bound to tell the underwriter not every fact, but the material facts ; and his obligation is this, that if he is asked a question—whether a material fact or not—by the underwriters, he must answer it truly. If he answers it falsely, with intent to deceive, though it may not be a material fact, it will vitiate the policy." If the insurers were influenced by the fraudulent statement, no doubt the assured, who had practised deception with a view to a particular end which had been attained would not be permitted to say that the statement was not material (*n*), but it is doubtful whether insurers could rely

Hancock Mutual v. *Houpt* (1901), 113 Fed. Rep. 572 ; *Queen Insurance* v. *Union Bank* (1901), 111 Fed. Rep. 697.

(*h*) *Sweeney* v. *Promoter Life* (1863), 14 Ir. C. L. R. 476.

(*i*) Jessel, M.R., in *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 15, 17 ; *Attwood* v. *Small* (1838), 6 Cl. & F. 232, 344, 497.

(*k*) *Cumberland Valley Mutual* v. *Schell* (1857), 29 Pa. 31.

(*l*) *Valton* v. *National Fund* (1859), 20 N. Y. 32 ; *Fidelity and Casualty* v. *Bank* (1905), 139 Fed. Rep. 101.

(*m*) [1894] P. 1, 12.

(*n*) *Gordon* v. *Street*, [1899] 2 Q. B. 641, 646.

upon a fraudulent statement which was not material, and which did not influence them in their acceptance of the risk (*o*).

A statement *de futuro*

Strictly speaking there can be no representation as to facts *in futuro*, and, therefore, a statement relating to such facts must be either (1) a promise; (2) a statement of intention; or (3) a statement of belief or expectation.

may constitute a promise,

If a statement relating to the future is tantamount to a promise, it must be included in the policy so as to become a term in the contract and cannot be binding as a promise or warranty unless it is found in the written instrument. It is sometimes said that there can be a promissory representation, which, although not part of the contract, yet, having operated as an inducement to the contract, must be fulfilled or the contract will be voidable. In *Dennistoun* v. *Lillie* (*p*), a marine insurance case, the House of Lords held that where the underwriters accepted the risk on the faith of a statement that the ship would sail on a certain date, even although there was no warranty or term in the policy to that effect, the policy became voidable on the ground of misrepresentation if the ship did not sail on the date stated. This may be sufficient authority for saying that, in marine insurance, there is now a rule that a representation as to the future must be fulfilled, although not warranted; but the general rule in the law of contract is that promises *de futuro*, if binding at all, must be so as part of the contract. Mellish, L.J., thus states the law as to contracts in general, "I should remark that there is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything it is a contract or promise" (*q*). As *Dennistoun* v. *Lillie* has never been followed, except in marine insurance cases, it may be confidently asserted that the theory of "promissory representations" will not now be applied to fire and life insurance contracts, so as to make them voidable on the ground of non-fulfilment of a promise which has not been made part of the contract, but is alleged to have been an inducement to the insurers to accept the

(*o*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484. *Vide infra*, pp. 315, 316

(*p*) (1821), 3 Bligh, 202.

(*q*) Lord Selborne, L.C., in *Maddison* v. *Alderson* (1883), 8 A. C. 467, at p. 473.

risk (*r*). Such a promise, however, or even an expression of intention may be good ground for refusing specific performance although not for cancellation. Lord Cairns said of a promise of this kind in a contract for the sale of house property, "I quite agree that this representation was not a guarantee. It was not introduced into the agreement on the face of it, and the result of that is that in all probability the plaintiff could not sue in a court of law for a breach of any such guarantee or undertaking, and very probably he could not maintain a suit in a court of equity to cancel the agreement on the ground of misrepresentation. At the same time, if the representation was made, and if that representation has not been, and cannot be, fulfilled, it appears to me upon all the authorities that it is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled" (*s*). Therefore, if, for instance, an applicant for a fire insurance policy promised or expressed an intention to have some alterations made on the premises so as to minimise the risk of fire, and the company thereupon accepted the proposal, they would not be bound to issue a policy until the promised or intended alterations had been made; but if they issued a policy without insisting on the alterations and without any promise or warranty in the policy, they could not afterwards resist a claim on the ground that the representation was not fulfilled, even although the loss arose directly by reason of its non-fulfilment.

may be merely an expression of intention

If the assured makes a representation *de futuro* relating to something which is or may be within his control, if it is not a promise or warranty, it must be a mere expression of his intention made without prejudice and without any undertaking that it will be realised, and therefore strictly it is not a representation as to the future at all, but a representation of the assured's present intention. The statement of intention must be in accordance with his actual intention at the time the contract is concluded (*t*), and if it is so a subsequent change of intention or acts done contrary to the expressed intention will not defeat the policy. Thus, in an American life case (*u*), where in the proposal form the applicant

(*r*) See *Whitlaw* v. *Phœnix* (1877), 28 U. C. C. P. 53; *Kimball* v. *Aetna* (1865), 91 Mass. 540.

(*s*) Lord Cairns in *Lamare* v. *Dixon* (1873), L. R. 6 H. L. 414, 428; and see *Myers* v. *Watson* (1851), 1 Sim. (N. S.) 523, 529; *Chappell* v. *Gregory* (1863), 34 Beav. 250.

(*t*) *Traill* v. *Baring* (1864), 4 De G. J. & S. 318.

(*u*) *Knecht* v. *Mutual Life* (1879), 90 Pa. 118.

declared "that he does not now nor will he practise any pernicious habit which obviously tends to shorten life," and the condition in the policy was that if any of the statements or declarations made in the proposal should be found in any respect untrue, the policy should be void, it was held that there was no promise or warranty as to future habits, and that if the declaration was made in good faith, the policy could not be set aside on the ground of subsequent intemperance. Similarly a representation *de futuro* relating to something which is not within the control of the assured, if not a warranty must be an expression of belief or expectation, and amounts to nothing more than a representation of the existing state of the assured's mind. These, then, are not representations as to the future, but as to the present, and will be considered as such.

or expectation.

A representation therefore must be as to past or present facts in order to entitle the insurer to avoid the contract on the ground of the representation being inaccurate. The state of a man's mind, however, is as much a fact as anything else (*x*), and therefore when a man states not that such and such a thing is so, but that he believes it is so, or expects or intends it to be so, he is still stating a fact, although a different fact from that which he would have stated if he had said the thing was so. In each case the fact stated may be proved to be false, in the first by showing that the thing was not so, and in the second by showing that the man did not believe or expect or intend it to be so (*y*), and it is immaterial whether the want of belief arises from a knowledge that the facts are not in accordance with the statements made or from entire ignorance of the subject matter.

Representation must be as to past or present facts.

The form of a statement may be sometimes that of a positive statement of fact, and yet the subject or context may show that the assured was only stating his belief or expectation. Thus a statement as to matters on which the assured cannot have any accurate knowledge will, if not in the express form of a warranty, be most readily construed, not as a statement of fact, but as a statement of belief (*z*). Certain matters, too, are obviously matters as to which a man can only state his opinion, such as questions

Representation of belief, opinion, or expectation.

(*x*) Bowen, L.J., in *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483.

(*y*) *Pawson* v. *Watson* (1778), Cowp. 785; *Flinn* v. *Tobin* (1829), Moo. & Mal. 367.

(*z*) *Hubbard* v. *Glover* (1812), 3 Camp. 313; *Brine* v. *Featherstone* (1813), 4 Taunt. 869; *Bowden* v. *Vaughan* (1809), 10 East, 415.

of valuation (*a*) or statements as to health (*b*). Where, therefore, in substance a statement is one not of positive fact, but of the assured's belief, opinion, or expectation as to the facts, the only thing that the assured has to show is that he stated his belief, opinion, or expectation honestly; in other words, that he accurately represented the state of his mind (*c*). Where the assured has dishonestly stated that his belief or intention is what it is not, there is good ground for rescission (*d*), and where the assured has honestly stated his belief (*e*) or intention (*f*), but changes his belief or intention before the contract is concluded, he must communicate his change of belief or intention, or the insurance will be set aside. In a Canadian case a statement in the company's circular as to future benefits from a reserve fund was held to be merely a statement of the manager's expectation, and did not entitle the assured to cancellation and return of premiums on the ground that the statements proved to be untrue (*g*).

A representation in the form of an expression of opinion may be tantamount to a statement of fact as where the assured said that "he thought" the ship insured under the name "Socrates" was a Norwegian ship of that name, and the Court held that the policy was issued on that basis (*h*).

Representations as to law.

If the assured has made a representation as to a matter of law, the insurance cannot be set aside on the ground that it was erroneous if it was honestly made. All are supposed to know the general law of the land, and, therefore, it must be presumed that the insurers could not have been misled by an erroneous statement as to matters on which they must be taken to be as well informed as the assured (*i*). But if the assured has made a

(*a*) *Dacey* v. *Agricultural* (1880), 21 Hun. 84; *Williamson* v. *Commercial Union* (1876), 26 Can. C. P. 591; *Redford* v. *Mutual Fire* (1876), 38 U. C. Q. B. 538; *Franklin Fire* v. *Vaughan* (1875), 92 U. S. 516; *Harrington* v. *Fitchburg Mutual* (1878), 124 Mass. 126.

(*b*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863; *Life Association* v. *Foster* (1873), 11 M. 351; *Delahaye* v. *British Empire Mutual Life* (1897), 13 L. T. R. 245.

(*c*) *Jones* v. *Provincial* (1857), 3 C. B. (N. S.) 65; *Glasgow Assurance, &c.* v. *Symondson* (1911), 16 Com. Cas. 109.

(*d*) As when property was wilfully over-valued, *Riach* v. *Niagara District* (1871), 21 U. C. C. P. 464; *Hercules* v. *Hunter* (1837), 15 S. 800; and a gross over-valuation is strong evidence of wilful over-valuation: *Shannon* v. *Hastings* (1875), 25 U. C. C. P. 470; *Sly* v. *Ottawa* (1879), 29 U. C. C. P. 28, 557; *Dickson* v. *Equitable Fire* (1859), 18 U. C. Q. B. 246; and see *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 483.

(*e*) *Davies* v. *London Provincial Marine* (1878), 8 Ch. D. 469.

(*f*) *Traill* v. *Baring* (1864), 4 De G. J. & S. 318.

(*g*) *Angers* v. *Mutual Reserve Fund* (1904), 35 Can. S. C. 330.

(*h*) *Ionides* v. *Pacific Insurance* (1871), L. R. 6 Q. B. 674, 683.

(*i*) *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750, 754; *Beattie* v. *Lord Ebury*

wilful misstatement as to the law or as to the effect of any deeds or other documents, the policy is probably voidable (*k*) either on the ground that in equity fraud would override the legal presumption of knowledge of the law or else on the ground that there was a false representation of the assured's opinion or belief, on which the insurers relied rather than on their own opinion. And if a representation as to the law contains any direct or implied representations of fact there may be sufficient ground for setting aside the policy if the facts are incorrectly stated, whether innocently or fraudulently. Thus, a representation by the assured that he has certain rights under certain deeds is a representation of fact, *i.e.* that those deeds give him certain rights (*l*), although if he were merely to indicate certain clauses in a document, and state their legal effect that would be a statement of law. So, too, a statement that a man is the owner of certain property is a representation of fact, although it may be the result also of matter of law (*m*).

As to the meaning and effect of the contract.

The assured may be induced to insure or continue an insurance by the misrepresentation of the company or its agent as to the meaning and effect of the contract. Where the company, by its advertisements, prospectus, or proposal form, represents to the assured that the contract offered by it is different from the contract contained in its policy, the assured may obtain rectification of the policy on the ground that the policy as issued did not contain the real contract made between the parties, but the question then is not what representations were made to induce the party to contract, but what was the actual contract made? (*n*). Where similar representations are made by an agent of the company the question is whether he had authority to make such representations? If he had, the company will be bound to rectify the policy so as to conform to the contract in fact made by the agent. If he had not, there is no contract at all, unless the company elects to ratify the act of its agent, and, if it does not, the assured will

(1872), L. R. 7 Ch. 777, 802; *Eaglesfield* v. *Marquis of Londonderry* (1876), 4 Ch. D. 693, 709. A statement as to the law of a foreign country (including Scotland if the contract is made in England) is a statement of fact and not a statement of law within the meaning of this paragraph.

(*k*) *Hirschfield* v. *London, Brighton, and South Coast Ry.* (1876), 2 Q. B. D. 1, 5; *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360; Bowen, L.J., at p. 362.

(*l*) *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, 363.

(*m*) *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, 170.

(*n*) *Wood* v. *Dwarris* (1856), 11 Ex. 493; *Anstey* v. *British Natural Premium Life* (1908), 24 T. L. R. 871.

be entitled to a return of premiums paid. But where the representation of the company or its agent merely goes to explain the meaning of the written conditions in the company's proposal forms or policy, the assured can have no relief either by way of rescission or rectification, unless there has been fraud (*o*). If the representation of the agent has been fraudulent, the assured is entitled to rescind the contract and claim a return of premiums paid (*p*). If the representation is not as to the meaning of the written contract, but as to the practice of the company independently of its contractual obligation, as, for instance, if a representation is made to the effect that the company will grant a free policy after so many years, or will pay certain bonuses, the assured, although unable to prove that such representation formed part of the contract, might obtain rescission of the contract and return of premiums if the representation as to the practice of the company was untrue, even although innocently made (*q*).

Time when the representation must be true.

Representations and warranties as to present facts must be read as continuing up to the time when a binding contract is concluded between the parties. In marine insurance, the material time is the issuing of the slip (*r*), and no change in the circumstances occurring after that date need be notified to the insurers, the reason being that the insurer who has issued a slip is in honour bound to issue a policy. In other classes of insurance there is no such rule of practice, and the insurer is in no sense bound to the assured until he has made a contract legally complete. This, then, must be the material time for representation and disclosure, and if after a statement has been made the circumstances alter before the contract is completed, and that fact is not disclosed. the original statement becomes untrue, and the applicant is guilty not only of non-disclosure, but of misrepresentation (*s*). Thus, where a life had been "accepted," but was seriously injured before the policy was issued, the representations as to health became untrue (*t*). A declaration in the proposal form that the applicant was not insured elsewhere became untrue when the applicant

(*o*) *Wheelton* v. *Hardisty* (1858), 8 E. & B. 232.

(*p*) *Kettlewell* v. *The Refuge*, [1908] 1 K. B. 545.

(*q*) *Kettlewell* v. *The Refuge*, [1908] 1 K. B. 545.

(*r*) *Lishman* v. *Northern Maritime* (1875), L. R. 10 C. P. 179.

(*s*) *Davies* v. *London and Provincial Marine* (1878), 8 Ch. D. 469; *Barnes* v. *Fidelity Mutual* (1899), 191 Pa. 618; *Equitable Life* v. *McElroy* (1897), 83 Fed. Rep. 631; *Piedmont and Arlington Life* v. *Ewing* (1875), 92 U. S. 377; *Cable* v. *U. S. Life* (1901), 111 Fed. Rep. 19.

(*t*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727.

did insure elsewhere before the issue of the policy (*u*). And so where an applicant for life insurance, who had been medically examined and "accepted," subsequently became alarmed about his health and consulted a specialist, the statement in the proposal form that he ordinarily enjoyed good health became untrue (*x*). And where in an application for reinsurance on a life policy, the applicant company stated that it intended to retain a certain proportion of the risk, but the directors changed their minds before the contract of reinsurance was concluded, there was a misrepresentation as to their intention (*y*).

A representation made in the course of some previous negotiations and not with relation to the particular insurance in question cannot be relied on by the insurer as a continuing representation so as to affect the contract (*z*).

In cases of reinsurance.

In cases of reinsurance the question may be whether the company seeking reinsurance adopts the statement of the original assured, and so becomes responsible for their accuracy as at the date of reinsurance, or whether it merely presents these statements as the statements of the assured made at the time of the original insurance.

Foster v. Mentor Life (1854), 3 E. & B. 48

Foster v. *Mentor Life.*

B company insured the life of Count D'Orsay, and some six years afterwards desired a reinsurance of part of the risk. They applied to M company, sending them the original application form and declarations made by and on behalf of the assured. M then sent to B a blank proposal form adapted for an original insurance on the life of a third party containing questions to be answered and a declaration to be signed by the life that the answers to the questions were true and a declaration to be signed by the assured accepting the declaration of the life as the basis of the contract. The manager of B bracketed the questions and wrote opposite to them this direction, "For these particulars, see B papers attached." He also filled in the name of O as the life and B as the assured in the declaration. The manager of B signed this form opposite the bracket and direction, but did not sign the declaration. The original application contained certain statements as to the health of O, which were true when made, but had ceased to be true at the date of reinsurance, although this was unknown to either party. The policy contained a recitation that B had caused to be delivered into the office of M a declaration or statement . . . setting forth the age and the past and present state of health of the life . . . and a proviso that if anything in the said declaration should be untrue the policy should

(*u*) *Marshall* v. *Scottish Employers* (1902), 85 L. T. 757.

(*x*) *British Equitable* v. *Great Western* (1869), 38 L. J. Ch. 314.

(*y*) *Traill* v. *Baring* (1864), 4 De G. J. & S. 318.

(*z*) *Dawson* v. *Atty* (1806), 7 East, 367.

be null and void. In an action on the policy it was admitted by the plaintiffs that if the signature of their manager related to the declaration at the foot of the proposal form, then there was a breach of warranty since the declaration clearly referred to the present state of health, but they contended that the signature was only appended to part of the form, viz. the reference to the original papers, and that that reference confined the answers to the conditions existing when the original proposal was made. The jury found a general verdict for the plaintiff, and on a motion for a new trial the Court were equally divided. Wightman and Erle, JJ., thought that the recital in the policy *primâ facie* excluded the plaintiffs from denying the construction then put upon the contract, although it was not an absolute estoppel if they could explain their acceptance of the policy and their acquiescence in its terms. Campbell, C.J., and Coleridge, J., thought that the recital did not in any way estop the plaintiff, but was merely evidence in favour of the defendants' construction, and it was a question for the jury to say whether the signature of the plaintiff's manager was intended to do anything more than refer the insurers to the original statements of the assured. The verdict for the plaintiffs was accordingly allowed to stand.

When one policy is issued in lieu of another.

When one policy is issued to supersede another which is thereupon surrendered, the representations made with reference to the first policy will, in the absence of some express provision, be equally the basis of the second (*b*). The usual practice in such cases is to insert a specific recital in the substituted policy. If there is no increase of sum assured or immediate benefit, nor any reduction of premium unaccompanied by reduction of sum assured, but only a rearrangement of benefits leaving the insurers' risk no greater than it was before, the substituted policy is expressly stated to be based on the original proposal and declaration. If the insurers' risk is in any way increased a new declaration is required.

When the policy is renewed.

In fire policies and similar risks where the insurers may decline to renew the policy at the expiration of the original period, each renewal is made on the faith of the continued truth of the original representations, and if there has been any change, that must be disclosed when the renewal premium is tendered (*d*).

Conditions relating to misrepresentation.

As we have seen, no condition in the policy is necessary to render it voidable on the ground of misrepresentation (*e*). But the conditions in the policy may either limit or extend the consequences of misrepresentation. Thus, the consequences may be limited where there is a condition in the policy declaring it void if there

(*b*) *Martin* v. *Home Insurance* (1870), 20 U. C. C. P. 447; *Cahan* v. *Continental* (1877), 69 N. Y. 300.

(*d*) *Hanley* v. *Pacific Fire* (1893), 14 N. S. W. R. (Law) 224; *Pim* v. *Reid* (1843), 6 Man. & Gr. 1, 25.

(*e*) *Huguenin* v. *Rayley* (1815), 6 Taunt. 186; *Abbott* v. *Howard* (1832), Hayes, 381; *Moens* v. *Heyworth* (1842), 10 M. & W. 147, 157.

has been fraudulent misrepresentation. Innocent misrepresentations might under certain circumstances vitiate the policy, if there were no conditions, but a clause of this kind excludes innocent misrepresentation from having any effect (*f*).

Indisputable policies.

Where a policy is made "indisputable," either from the commencement or after it has been in force for a specified time, it cannot be challenged on the ground of misrepresentation, unless the policy was procured by fraud (*g*).

Anstey v. British Natural Premium Life (1908), 24 T. L. R. 871

Anstey v. *British Natural Premium Life.*

The answers of the assured were warranted accurate, but the policy contained the condition that it "will be indisputable from any cause (except fraud) after it shall have been continuously in force for two years." One of the answers was not accurate, but there was no fraud, and more than two years had elapsed since the policy was effected. The company argued that as there had been a misrepresentation and breach of warranty at the time the contract was effected, it never came into force at all, and therefore the indisputable condition did not apply. The Court of Appeal held that such a construction would reduce the condition to sheer nonsense, and that its obvious meaning was that after the lapse of two years neither misrepresentation nor breach of warranty could be advanced as a defence unless there was fraud.

Even where a policy is declared in general terms to be indisputable and there is no express exception of fraud it would seem that, under the general rule of law that no person can take advantage of his own fraud, neither the assured nor his representatives could recover. And by reason of the same principle fraud would probably vitiate the contract even in the hands of an innocent assignee for value, since unless he was a party to the contract in his own right he could take no better title than his assignor. Where the insurance is on the life of a person not the assured and the policy is stated in general terms to be indisputable, even fraudulent misrepresentation on the part of the life will not vitiate the contract (*h*).

Statements warranted.

On the other hand, the effect of misrepresentation may be enlarged by the express conditions of the policy, as where facts stated are warranted to be accurate or are made the basis of the

(*f*) *Fowkes* v. *Manchester and London* (1863), 3 B. & S. 917; *Scottish Provident* v. *Boddam* (1893), 9 T. L. R. 385; *Reid and Co.* v. *Employers' Accident* (1899), 36 S. L. R. 825.

(*g*) *Anstey* v. *British Natural Premium Life* (1908), 24 T. L. R. 871; *General Provincial Life* (1870), 18 W. R. 396.

(*h*) *Vide infra*, p. 350.

contract (*i*). When the condition states that if any misrepresentation be made, in the proposal form or otherwise, in effecting the insurance the policy shall be void, it is probably not a warranty of accuracy, but merely a statement of the general rule of law (*k*).

Section III.—Non-disclosure

General principles stated by Lord Mansfield.

The general principles upon which the assured is required to disclose all material facts within his knowledge, are clearly stated by Lord Mansfield in *Carter* v. *Boehm* (*l*). This well-known leading case in the law of insurance was an action on a policy for the benefit of George Carter, the Governor of Fort Marlborough, against the loss of Fort Marlborough in the island of Sumatra in the East Indies by its being taken by a foreign enemy. It was alleged that the weakness of the fort and the probability of its being attacked by the French ought to have been disclosed. The jury found a verdict for the plaintiff, and on a motion for a new trial, which was refused, Lord Mansfield said, " Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only ; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance, in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void ; because the *risque* run is really different from the *risque* understood and intended to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed. . . . Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary " (*m*).

Full disclosure required in all classes of insurance.

It must be observed that *Carter* v. *Boehm* was not a marine insurance case, but more in the nature of a fire or burglary insurance than an insurance against the perils of the sea. The law

(*i*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484 ; *Thomson* v. *Weems* (1884), 9 A. C. 671.

(*k*) *Campbell* v. *New England Mutual* (1867), 98 Mass. 381 ; 73 Pa. 381 ; but see *Hutton* v. *Waterloo Life* (1859), 1 F. & F. 735.

(*l*) (1766), 3 Burr. 1905, 1909.

(*m*) 3 Burr. 1909, 1910.

too, is laid down by Lord Mansfield generally as applicable to all classes of insurance. It has been contended, however, in subsequent cases, that the rule of disclosure does not apply to certain kinds of insurance; but this contention has been repudiated over and over again, and the rule has been stated as applicable to insurances of all kinds (*n*). It is well known, and acted on in marine insurance (*o*), where it is undoubtedly of peculiar importance, but it has been applied also to life and guarantee policies, and there is not the least doubt that it is applicable also to fire, burglary, and accident insurance. In *Lindenau* v. *Desborough* (*p*), a life insurance case, Bayley, J., said, "I think in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance." And Littledale, J., in the same case said, "It is the duty of the assured to disclose all material facts within their knowledge. In cases of life insurance, certain specific questions are proposed as to points affecting in general all mankind. But there may be circumstances also affecting particular individuals, which are not likely to be known to the assurers, and which, had they been known, would no doubt have been made the subject of specific inquiries." In *Wheelton* v. *Hardisty* (*q*), Lord Campbell, C.J., said, "The *uberrima fides* is to be observed with respect to life insurances as well as marine. The assured is always bound not only to make a true answer to the questions put to him, but spontaneously to disclose any fact exclusively within his knowledge, which it is material for the assurer to know," and Jessel, M.R., in *London Assurance* v. *Mansel* (*r*), said, "The first question to be decided is, what is the principle on which the Court acts in setting aside contracts of assurance? As regards the general principle, I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances from the peculiar nature of marine insurance, which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle

(*n*) *Brownlie* v. *Campbell* (1880), 5 A. C. 925, 954; *Moens* v. *Heyworth* (1842), 10 M. & W. 147, 157; *Dalglish* v. *Jarvie* (1850), 2 Mac. & G. 231, 243.

(*o*) *Lynch* v. *Hamilton* (1810), 3 Taunt. 37, 44.

(*p*) (1828), 8 B. & C. 586, 592.

(*q*) (1857), 8 E. & B. 232, 270.

(*r*) (1879), 11 Ch. D. 363, 367.

than a distinction in principle." The above dicta were cited with approval, and acted upon by the Court of Appeal in *Joel* v. *Law Union and Crown* (*s*). This was a life case, and Vaughan Williams, L.J., based the duty of disclosure on "the implied contract, by an applicant for a policy, to make full disclosure of all facts material to the risk."

Non-disclosure in guarantee insurance.

Guarantee insurance requires full disclosure, just as much as any other class of insurance (*t*). But guarantee insurance must be distinguished from the ordinary contract of guarantee. Where a man goes to an insurer and asks him to insure the solvency of his debtor, he must disclose the whole circumstances relating to the risk, but where a debtor asks some one to become surety for him, and the latter consents, that places no obligation on the creditor to make any disclosure to the surety (*u*).

Seaton v. Heath, [1899] 1 Q. B. 782

Seaton v. *Heath.*

A policy was underwritten at Lloyd's guaranteeing the solvency of a person who was surety for the repayment of a debt due to the assured. The defence was non-disclosure of material facts, and it was argued on behalf of the assured that the contract was one of suretyship, and not of insurance, that in contracts of guarantee no disclosure was required, and further that, even if this was an insurance, the duty of disclosure was one founded on mercantile custom, and, as it had never been applied to insurances other than marine life and fire, the Courts would not now extend it to insurances of this kind. The Court of Appeal held, on the authority of *Carter* v. *Boehm* (*x*), that the principle was applicable to all insurances, and that the contract was a contract of insurance, and not merely a contract of guarantee. Romer, L.J., pointed out (*y*) that in general contracts of guarantee are between persons who occupy or ultimately assume the positions of creditor, debtor, and surety, and thereby the surety becomes bound to pay the debt or make good the default of the debtor. In general the creditor does not himself go to the surety or represent or explain to the surety the risk run. The surety often takes the position from motives of friendship to the debtor and generally not as the result of any direct bargaining between him and the creditor or in consideration of any remuneration passing to him from the creditor. The risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what the risk was. But a guarantee may be an entirely different thing, not involving the ordinary relations of creditor, debtor, and surety, but being in

(*s*) [1908] 2 K. B. 341.
(*t*) *Seaton* v. *Heath*, [1899] 1 Q. B. 782.
(*u*) *Davies* v. *London and Provincial Marine* (1878), 8 Ch. D. 469; *North British Insurance* v. *Lloyd* (1854), 10 Ex. 523; *Railton* v. *Matthews* (1844), 10 Cl. & F. 934; *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482.
(*x*) (1766), 3 Burr. 1905.
(*y*) At p. 792.

substance an insurance at a fixed premium against a loss which it is anticipated may result from the failure of a debtor to pay his debt, or from the dishonesty of servants or other persons. Here are all the attributes of any other kind of insurance. The insured puts the risk before the insurer as a business transaction, and the insurer on the risk stated fixes a proper price to remunerate him for the risk to be undertaken; and the insurer engages to pay the loss incurred by the insured in the event of certain specified contingencies occurring. There is no reason why there should not be full disclosure here as in other contracts of insurance, and on the same principle that the person desiring to be insured has means of knowledge as to the risk and the insurer has not the means or not the same means.

The Federal Courts in America have decided that in the case of fidelity bonds issued by insurance companies there is not the same necessity for full disclosure as in other classes of insurance (*z*), but since the decision in *Seaton* v. *Heath* (*a*) it is clear that there must be full disclosure in all contracts of this nature.

Reinsurance.

The same duty of disclosure is imposed on the insurer who reinsures as on the assured on an original risk (*b*).

Applicant for life insurance.

The duty of an applicant for life insurance is not confined to answering the questions put to him in the proposal form or by the medical examiner. There may be something outside the range of the questions which it is material that the assured should know, and this must be disclosed (*c*).

Huguenin v. Rayley (1815), 6 Taunt. 186

Huguenin v. *Rayley.*

The assured did not disclose the fact that she was in gaol for debt at the time the insurance on her life was effected, and although there was nothing express in the terms of the policy which required the imprisonment to be stated, nor any omission or misstatement in answering the questions on the proposal form, the Court ordered a new trial on the ground that it ought to have been submitted to the jury to say whether the imprisonment was a material fact, for if it was the keeping it back would be fatal to the policy.

(*z*) *Guarantee Co.* v. *Mechanics* (1896), 80 Fed. Rep. 766.

(*a*) [1899] 1 Q. B. 782.

(*b*) *China Traders' Ins.* v. *Royal Exchange*, [1898] 2 Q. B. 187, 193.

(*c*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 431; *Piedmont and Arlington Life* v. *Ewing* (1875), 92 U. S. 377. The tendency, however, in America is to take the view that if the assured answers all the questions put to him frankly and fully he has no further duty of disclosure. This may arise partly from the fact that the questions asked in the proposal or by the medical examiner are extremely numerous and detailed as compared with the general practice in this country. *Clark* v. *Manufacturers' Ins.* (1850), 8 How. 248, 249; *Rawls* v. *American Mutual* (1863), 27 N. Y. 282; *Supreme Council* v. *Fidelity* (1894), 63 Fed. 48; *Penn. Mutual* v. *Mechanics* (1896), 72 Fed. 413.

Morrison v. Muspratt (1827), 4 Bing, 60

Morrison v. *Muspratt.*

The assured proposed her life for insurance, and was examined by a medical man on behalf of the insurance company. The proposal was not accepted for some three months, and then the assured was again examined on behalf of the insurance company. Between the dates of the two examinations the assured had been troubled with a cough and become emaciated, and had consulted and been attended by a doctor, who, however, thought there was no disease of structure. Nothing of this was disclosed to the insurance company. A verdict was returned for the plaintiff, but the Court ordered a new trial on the ground that it was not left to the jury to say whether the illness and attendance of the doctor was a material fact which ought to have been disclosed.

Lindenau v. Desborough (1828), 8 B. & C. 586

Lindenau v. *Desborough.*

An insurance was effected by the plaintiff on the life of the Duke of Saxe Gotha. The company, through their agent in Germany, submitted questions to the duke's physicians. These, although answering the questions accurately, did not disclose the fact that the duke had lost the use of his speech and mental faculties. Lord Tenterden at the trial proposed to leave it to the jury to say whether that fact was material, and, if it was, to direct them that the policy was void. The plaintiff elected to be nonsuited, and moved for a new trial, which was refused and the direction held to be good.

Abbott v. Howard (1832), Hayes, 381

Abbott v. *Howard.*

The assured answered fully and correctly the questions put to him, but did not disclose the fact that some years previously he had been operated on for a tumor. According to the medical evidence, such a tumor indicated a debilitated constitution. It was argued for the assured that the Court could not travel outside the written contract and that therefore if the answers made to the questions were in themselves correct and there was no breach of warranty, the policy could not be avoided except on the ground of fraud. One of the judges, Smith, B., adopted this view, and supported it in a long and elaborate judgment, but the majority of the Court held that it should have been left to the jury to say whether the existence of the tumor and the operation were material facts of which the insurer ought to have been informed, and that if they had found it to be so, there should have been a verdict for the defendants.

Geach v. Ingall (1845), 14 M. & W. 95

Geach v. *Ingall.*

The declaration of the assured stated *inter alia* that he had not had any spitting of blood. It was proved at the trial that the assured had on one occasion, about four years before the policy was effected, spat blood and exhibited other symptoms of consumption. The Court were of opinion that the declaration referred to the disease called spitting of blood, and might therefore be true; but in any case the assured ought to have disclosed the fact that he spat blood if even on only one occasion, since that would have put the insurers on inquiry as to the cause of it.

Intemperate habits.

Non-disclosure of intemperate habits may, even although no question is asked, be sufficient ground for avoiding the policy (*f*).

Threats of murder.

In an American case it was left to the jury to say whether the fact that the assured's life had been threatened was material, and ought to have been disclosed (*g*).

Applicant for fire insurance.

Similarly in fire insurance the insured, even although he may have accurately answered all questions put to him, must disclose anything else within his knowledge which is material.

Buse v. Turner (1815), 6 Taunt. 338

Buse v. *Turner.*

Application was made for insurance upon a warehouse without disclosing that there had been a fire the same evening in a house nearly adjoining, and that there was danger of it breaking out again. In fact, after the insurance was effected the fire did break out again, and the warehouse was burned. In an action on the policy to recover the loss the jury, although they acquitted the plaintiff of any fraudulent intention, found a verdict for the defendants, and the Court refused to set the verdict aside.

Previous fires or incendiary threats.

It has been held that an applicant for fire insurance ought to disclose the fact that there have been previous fires on the same premises, whether the question is asked or not (*h*). The fact that there have been attempts made to set the premises on fire, or that there have been threats of incendiarism should undoubtedly be disclosed (*i*), although if the threats are of an apparently trivial nature, and likely to occasion no serious apprehension in the mind of a reasonable man, they may be disregarded as immaterial (*k*).

Questions put or conditions of the contract may modify the duty of disclosure.

But although the usual series of questions which are put to the applicant for insurance does not entitle him to conceal all material facts as to which there is no interrogation, yet the form and nature of the questions or the declaration by the assured, or the conditions in the policy may substantially modify the duty of disclosure. It may frequently be inferred that, when certain matters are not inquired into, nor made the subject of warranty, and other kindred matters are expressly dealt with, the intention of the insurers is to invite information on these matters which they deem material, and waive information as to other matters

(*f*) *Rawlins* v. *Desborough* (1840), 2 Mood. & Rob. 328, 333.

(*g*) *Connecticut Mutual* v. *M'Whirter* (1896), 73 Fed. 444.

(*h*) *Hanley* v. *The Pacific Fire* (1893), 14 N. S. W. R. (Law) 224.

(*i*) *Watt* v. *Union* (1884), 5 N. S. W. R. (Law) 48.

(*k*) *Curry* v. *Sun Fire* (1893), 155 Pa. 467.

which they deem immaterial (*l*). Thus, if the question were put whether any of the assured's parents, brothers or sisters, had died of consumption, or been afflicted with insanity, there is an obvious waiver of similar information with regard to more remote relations, and the insurers could not avoid the policy on the ground that an uncle or aunt had died of consumption or been insane.

So, too, the insurers may, by asking the applicant whether he believes there is anything else material to be disclosed, limit their right to disclosure, and make the assured the judge of materiality instead of the jury.

Jones v. Provincial Insurance (1857), 3 C. B. (N. S.) 65

Jones v. *Provincial Insurance.*

The assured, on applying for a policy on his life, signed a declaration to the effect that he had not had certain specified diseases, and that "he was not aware of any disorder or circumstance tending to shorten life or to render an insurance on his life more than usually hazardous." The assured had had severe bilious attacks shortly before the insurance, which, however, he did not disclose. Medical opinion differed as to whether such attacks tended to shorten life. The judge told the jury that if the assured honestly believed at the time he made the declaration that the bilious attacks had no effect upon his health and did not tend to shorten life or to render an insurance upon it more than usually hazardous, the fact that he was aware that he had had those attacks, even though (without his knowledge) they had such a tendency, would not defeat the policy. This direction was upheld upon appeal, and Cresswell, J. in delivering the judgment of the Court, distinguished the case from *Lindenau* v *Desborough* (*n*), and while admitting that the general rule was that the assured must disclose all material facts, and that it was a question for the jury whether any particular fact was material, yet, he said, "it was equally clear that the underwriters may in any particular case limit their right in this respect to that of being informed of what is in the knowledge of the assured not only as to its existence in point of fact, but also as to its materiality" (*o*).

The duty to disclose will be still more restricted if the policy is declared to be indisputable, except on the ground of fraud. When such is the case, or if it is declared that the policy shall be voidable if there is any "fraudulent concealment," a non-disclosure will not affect the policy unless it is made with intent to deceive (*p*).

Absolute duty to disclose

Apart, however, from such modifications introduced by the

(*l*) *Rawls* v. *American Mutual* (1863), 27 N. Y. 282; *Penn. Mutual Life* v. *Mechanics* (1896), 72 Fed. Rep. 413.
(*n*) (1828), 8 B. & C. 586.
(*o*) 3 C. B. (N. S.), at p. 86.
(*p*) *Fowkes* v. *Manchester and London* (1863), 3 B. & S. 917; *Scottish Provident* v. *Boddam* (1893), 9 T. L. R. 385; *Naughter* v. *Ottawa Agricultural* (1878), 43 U. C. Q. B. 121.

special contract, the duty is an absolute duty to disclose everything within the knowledge of the proposer or his agent, which would affect the judgment of a rational insurer governing himself by the principles and calculations on which insurers do in practice act(*q*), and which might induce such an insurer either to refuse the insurance altogether, or not to effect it except at a larger premium (*r*). On the one hand, he may have to disclose more than is actually relevant to the estimate of the risk, and on the other hand, he is not bound to disclose everything which might influence the mind of the particular insurer with whom he is dealing.

all facts which might influence a rational insurer.

In *Ionides* v. *Pender* (*s*), there was a valued policy insuring goods against marine risks. The valuation was much in excess of the real value of the goods, and this fact was not disclosed. The evidence showed that where there is excessive valuation, underwriters at Lloyd's consider the risk speculative, and that may induce them to refuse the risk, although, of course, in a valued policy the fact of over-valuation does not affect the actual risk run. This principle is equally applicable to fire, life, and other insurances. Anything which although extraneous to the actual risk is usually a matter for consideration by insurers, must be disclosed. Thus it has been held that where the assured had, with reference to previous insurances with the same underwriters, acted fraudulently by undervaluing their shipments declared under open marine policies, this fact ought to have been disclosed on their making application for further open policies (*t*). This is a strong case, but perhaps it is hardly sufficient authority for saying that a man is bound, on applying for insurance, to disclose any fraud which he may have previously resorted to in obtaining insurance policies from or in making claims against the same or other insurers. No doubt such matters are taken into consideration by insurers in considering applications, and if they knew, for instance, that the applicant had previously made a fraudulent claim against some other insurers, it is most probable that they would decline the risk. On principle, therefore, it would seem that such things ought to be disclosed. In America, however, it has been said that a man cannot be bound to, nor could it be expected that he should, speak evil of himself (*u*). "Good manners," said

Over-valuation in valued policy.

Previous insurance frauds.

Assured's bad character.

(*q*) *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531; *Stribley* v. *Imperial Marine* (1876), 1 Q. B. D. 507.

(*r*) *Elton* v. *Larkins* (1832), 5 C. & P. 385, 392.

(*s*) (1874), L. R. 9 Q. B. 531.

(*t*) *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. 222.

(*u*) *New York Bowery Fire* v. *New York Fire* (1837), 17 Wend. N. Y. 359,

a New York judge, "on the part of the underwriter, and self-respect on the part of the applicant, would forbid a conversation on the subject of character. If the underwriter wished information on that point, he would naturally seek it from some other source." The Supreme Court, however, held that in a case of reinsurance, the character of the original assured was material, and if known to be bad, this ought to be disclosed (*x*). In that case, a fire insurance company, having taken a fire risk on dry goods and clothing, reinsured part of their risk in another company. Previous to the reinsurance they heard that their assured had a bad character with insurance offices, that he had been twice burned out, and had difficulties with his claims. This they did not communicate on applying for reinsurance, and it was held that the reinsurance policy was voidable on that ground.

In case of reinsurance.

Previous refusals.

It would seem that in marine insurance it is not necessary, as a rule, to disclose the fact that the risk has been refused elsewhere (*y*). But probably in life policies and all other risks except marine, the fact of a previous refusal ought to be disclosed, although no questions are asked (*z*). Jessel, M.R., took this view in *London Assurance* v. *Mansel* (*a*), but the case itself is not an authority on the point, because the question was asked, and imperfectly answered, and the Court held that the answer was untrue. In another case, Malins, V.C., said that he did not think the Court would oblige a person to say, without being questioned, by what offices he had been refused (*b*). The fact, however, that there has been a refusal is undoubtedly material (*c*), and is always taken into consideration by insurance offices when known, and on principle, therefore, it would seem that it is a material fact which ought to be disclosed. In New South Wales it was held that where the assured had made proposals to other companies, and withdrawn them, there was no obligation on him spontaneously to disclose such incomplete negotiations (*d*).

Retirement from business.

In a Scottish case an insurance was effected on the life of a

366, 367; *Sun Mutual* v. *Ocean* (1882), 107 U. S. 485, 510; *Penn. Mutual Life* v. *Mechanics* (1896), 72 Fed. 413.

(*x*) *New York Bowery Fire* v. *New York Fire* (1837), 17 Wend. N. Y. 359.

(*y*) *Lebon* v. *Straits Insurance* (1894), 10 T. L. R. 517; *Glasgow Assurance* v. *Symondson* (1911), 16 Com. Cas. 109, 119.

(*z*) *Moore* v. *Citizens' Fire* (1888), 14 Ont. A. R. 582; *Parsons* v. *Citizens* (1878), 43 U. C. Q. B. 261.

(*a*) (1879), 11 Ch. D. 363, 371.

(*b*) *General Provincial, In re* (1870), 18 W. R. 396.

(*c*) *Sibbald* v. *Hill* (1814), 2 Dow, 263, 266.

(*d*) *Watt* v. *Union Insurance* (1884), 5 N. S. W. R. 48.

commercial agent then resident in Iceland. Before the issue of the policy the assured resigned the agency at three months' notice. It was held that the fact of resignation was not material, and that there was no obligation to disclose it (*e*).

Other insurance.

It has been held that the assured is not bound to disclose the fact that he is insured elsewhere, unless the question is asked or it is made a condition of the policy (*f*).

Facts only relevant to subrogation.

Matters affecting the insurers' right to subrogation ought probably to be disclosed, for, if the assured has so placed himself that the insurers will be deprived of their right to make good their loss by proceeding against third parties, the ultimate risk is undoubtedly increased.

Tate v. Hyslop (1885), 15 Q. B. D. 368

Tate v. *Hyslop.*

The insurers advertised two rates of premiums upon marine insurances, which included risks of loading and unloading, the lower rate to be charged when the insurers had a remedy over against the lightermen, and the higher rate when they had no recourse against the lightermen. The assured knew that the insurers charged these different rates, but they accepted a policy at the lower rate without disclosing the fact that they had contracted with the lightermen on the terms that they should be liable only for negligence. The Court held that there was concealment of a material fact, and that the policy was vitiated. The judgments of the Court lay stress upon the fact that the insurers had decided to charge a higher premium when there was no recourse, and that this was known to the assured. Brett, M.R., says, "If they had kept this resolution in their own breasts it would have had no effect upon the matter which is here in question, as it would only have affected salvage, and would not therefore have been material." Bowen, L.J., does not place quite so much reliance on the fact that the assured knew of the different rates. He says, "It is impossible to say that the existence of such an arrangement was not material, that is to say, a fact which a prudent and experienced underwriter would have taken into consideration in estimating the premium. It is not necessary to discuss the question whether what would merely lessen the salvage is a matter which ought to be disclosed, nor to enter into the nature of the arrangement between the plaintiffs and the lightermen. What I found my judgment upon is this, that at the time of effecting these policies there was an arrangement which was intended by the assured to be acted upon and which, as found by the jury, was a material fact affecting underwriters in estimating the premium."

In America the tendency is to follow the dictum of Brett, M.R., in the above case, and so it has been held that there is no obligation on the assured to disclose arrangements, whereby others

(*e*) *Turnbull* v. *Scottish Provident* (1876), 34 Scots L. R. 146.

(*f*) *Parsons* v. *Citizens* (1878), 43 U. C. Q. B. 261; *M'Donell* v. *Beacon* (1858), 7 U. C. C. P. 308.

may be relieved from liability and get the benefit of the insurance, unless (1) the assured knows that it would affect the premium if known to the underwriters; or (2) there is a condition in the policy specifically subrogating the insurers to all rights of the assured against third persons responsible for the loss (*g*). If in any particular class of risk it is known that insurers do not, in fact, consider their right of subrogation as an element in estimating the risk, there would clearly be no duty to disclose the fact that third persons had been released from liability (*h*). And where it is the usual course of any particular business to contract on the terms that one of the parties shall be relieved entirely, or in part, from his common law liability, the insurers are deemed to be acquainted with such course of business and therefore to have knowledge of the usual terms of contract. In a New South Wales case certain concurrent insurances were specified in the policy, and it was held there was no duty to communicate the fact that during the currency of the policy these had been allowed to lapse (*i*).

Nature or extent of interest in the subject matter.

It would seem that, apart from special questions or conditions, the assured is not bound to disclose either the nature or extent of his interest in the subject matter of the insurance (*k*). In an early American case (*l*), Story, J., pointed out how important a question the interest of the assured might be. The smaller his interest the less likely was he to use the necessary precautions to avoid the calamity insured against, and Story, J., thought that it was a matter which ought to be communicated. But the protection of full insurance will probably make the assured as careless as the man whose original interest is small, and therefore the nature or extent of the assured's interest, so long as it is a substantial insurable interest, is not likely to affect the insurer's estimate of the risk, and the authorities show that it is not as a rule a material fact which ought to be disclosed in the absence of inquiry (*m*).

(*g*) *Phœnix* v. *Eric Transportation* (1886), 117 U. S. 312; *Jackson* v. *Boylston Mutual* (1885), 139 Mass. 508; *British and Foreign Marine* v. *Gulf* (1885), 63 Tex. 475; *Fayerweather* v. *Phœnix* (1890), 118 N. Y. 324; *Lett* v. *Guardian Fire* (1889), 52 Hun. 570.

(*h*) *Pelzer Manufacturing Co.* v. *St. Paul* (1890), 41 Fed. Rep. 271.

(*i*) *Hordern* v. *Commercial Union* (1884), 5 N. S. W. L. R. (Law) 309.

(*k*) *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478, 485; *Mackenzie* v. *Whitworth* (1875), 1 Ex. Div. 36.

(*l*) *Columbian Insurance* v. *Lawrence* (1836), 10 Pet. 507.

(*m*) *Reddick* v. *Saugeen Mutual* (1888), 15 Ont. A. R. 363; *Klein* v. *Union Fire* (1883), 3 Ont. R. 234; *Clement* v. *British American* (1886), 141 Mass. 298; *Cumberland Valley Mutual* v. *Mitchell* (1864), 48 Pa. 374.

From this it follows that it is unnecessary for the assured spontaneously to disclose his title to the property insured (*n*). He need not disclose that he has merely an equitable title (*o*), such as that of a vendee before completion (*p*). If he holds the legal title, as in the case of a mortgagee or trustee, and insures for the full value, he need not disclose the fact that he is not beneficially interested to the full amount (*q*). It was held in a Canadian case that, even although no questions were asked, an applicant for fire insurance in a mutual company, was bound to disclose the fact that the premises were mortgaged (*r*). This is, however, a somewhat special case, as the mutual insurance company had a statutory lien on all property insured with it, and it was therefore of more than ordinary importance for the company to know the state of the title. In ordinary cases an applicant is not bound, apart from special inquiry or condition, to disclose incumbrances on the property insured (*s*). Where questions are asked as to title interest, or incumbrances, a correct and full answer must be given (*t*).

Title to property.

Incumbrances.

The assured must not only disclose facts of which he has actual knowledge, but if he hears any rumour or receives any opinion or information as to material facts, he must disclose all that has reached him (*u*). And even although he may not himself believe the rumour to be true, or the opinion to be sound, that is no answer to a charge of non-disclosure (*x*). He must communicate it to the insurer for what it is worth, so that he may exercise his own judgment upon it. And even if a rumour should ultimately turn out to be false, or an opinion unsound, the insurance may be avoided on the ground that it was not communicated (*y*).

Rumours and opinions must be disclosed.

British Equitable v. Great Western (1869), 38 L. J. Ch. 314

Prior to the insurance of his life the assured had consulted a specialist, who told him he was in a very dangerous state of health. His own physician said

British Equitable v. Great Western.

(*n*) *Kernochan* v. *New York Bowery* (1858), 17 N. Y. 428; *Clement* v. *British American* (1886), 141 Mass. 298; *Klein* v. *Union* (1883) 3 Ont. R. 234.

(*o*) *Gilman* v. *Dwelling House* (1889), 81 Me. 488.

(*p*) *Rumsey* v. *Phœnix* (1880), 17 Blatchf. 527.

(*q*) *Provincial Ins.* v. *Reesor* (1874), 21 Grant, 296.

(*r*) *Bleakley* v. *Niagara District* (1869), 16 Grant, 198, 201; *Coulter* v. *Equity Fire Insurance* (1904), 9 Ont. L. R. 35; *Reddick* v. *Saugeen Mutual* (1888), 15 Ont. A. R. 363.

(*s*) *Klein* v. *Union Fire* (1883), 3 Ont. R. 234; *Cumberland Valley Mutual* v. *Mitchell* (1864), 48 Pa. 374.

(*t*) *Parsons* v. *Bignold* (1846), 15 L. J. Ch. 379.

(*u*) *Durrell* v. *Bederley* (1816), Holt, N. P. 283, 285; *De Costa* v. *Scandret* (1723), 2 Peere Williams, 170.

(*x*) *Morrison* v. *Universal Marine* (1872), L. R. 8 Ex. 40, 197, at p. 53; *Shirley* v. *Wilkinson* (1781), 3 Dougl. 41.

(*y*) *Lynch* v. *Hamilton* (1810), 3 Taunt. 37, 45.

the specialist was wrong, and the assured did not disclose the matter to th office. The policy was rescinded. The opinion of the specialist, even although wrong, was a material fact which ought to have been disclosed.

Sources of possible information need not be disclosed.

Probably there is no duty to disclose information which is not itself material, but which might lead to the discovery of important facts. In *Joel* v. *Law Union* (*a*), Buckley, L.J., said that the fact that the assured was attended by a brain specialist was not in itself a material fact. If the specialist attended on the advice of a family doctor, and the assured had no suspicion of brain trouble, and was not told that there was anything seriously wrong, the mere attendance was not material. The name of the specialist was merely a source of information which might or might not prove material.

Test of materiality.

In order to show that a fact is material and should have been disclosed, it is not necessary for the insurers to prove that they would have acted differently if the facts concealed had been disclosed, it is quite sufficient for them to say that these facts might have induced reasonable insurers to decline the risk or increase the premium.

Traill v. Baring (1884), 4 De G J. & S. 318

Traill v. *Baring.*

An insurance company making an application to another company for reinsurance stated that they intended to retain a portion of the risk. Subsequently, before the reinsurance was completed, they changed their minds and reinsured the whole balance of the risk with other insurers. It was argued that the change of intention was not material to the risk. Turner, L.J. (*b*), said that this argument was entirely beside the question. "Had this representation of what had occurred and of the change of intention on the part of the defendants been communicated to the plaintiffs it is impossible to say what course the plaintiffs would have pursued—whether they would or would not have accepted the policy. They might have done so, but it is equally clear that they might not; and we cannot say whether they would or would not. But it was to them the communication should have been made in order that they might exercise their option upon the subject."

Innocent omission or mistake does not excuse the assured.

The duty on the part of the assured to disclose all material facts within the knowledge of himself or his agents is absolute, and although he may have had no fraudulent intention to keep anything back, if he has in fact done so, the insurance may be avoided by the insurers (*c*). It is no answer for the assured to say that he

(*a*) [1908] 2 K B. 863.
(*b*) At p. 330.
(*c*) Lord Mansfield in *Carter* v. *Boehm* (1766), 3 Burr. 1905, at p. 1909; Blackburn, J., in *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531;

made a mistake (*d*). "It is well-established law," said Cockburn, C.J., in *Bates* v. *Hewitt* (*e*), "that it is immaterial whether the omission to communicate a material fact arises from intention or indifference or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known." The policy may be void on the ground of non-disclosure, notwithstanding that the assured may have acted with perfect good faith and honesty of intention (*f*).

Assured's opinion as to materiality is unimportant.

The opinion of the assured as to the materiality of a fact will not as a rule be considered, and he cannot plead in answer to the defence of non-disclosure that he did not know that the fact was one material to be disclosed (*g*). The question is whether any particular circumstance was in fact material, and not whether the party believed it to be so (*h*).

Application of this rule to symptons of disease.

Care, however, must be used in applying this rule to disclosures as to health by applicants for life insurance (*i*). It is obvious that a man may have some slight symptom, and be aware of its presence, and yet think it so entirely trivial that it would never cross his mind to mention it to any one. But a physician would detect in the same symptom the incipient stage of a fatal disease, and therefore it might be said that the fact was one which ought to have been disclosed and that the assured's opinion as to the triviality of the symptom was immaterial. To place such an obligation upon every applicant for life insurance would be an obvious absurdity, and indeed the argument which would impose such obligation is based upon a fallacy. The assured is only bound to disclose what he knows. If all he knew was that he had a slight discomfort that was a fact which was not material. It could only become material by the addition of the further fact that in the opinion of medical men this particular discomfort was a

Abbott v. *Howard* (1832), Hayes, 381; Lord Campbell, C.J., in *Wheelton* v. *Hardisty* (1858), 8 E. & B. 232, at p. 255; Best, C.J., in *Morrison* v. *Muspratt* (1827), 5 L. J. (O. S.) C. P. 63, 65; *Joel* v. *Law Union*, [1908] 2 K. B. 863. The dictum of Lopes, L.J., in *Hambrough* v. *Mutual Life* (1895), 72 L. T. 140, to the effect that in the absence of fraud mere silence is no ground for rescission is contrary to authority, and is expressly disapproved in *Joel* v. *Law Union*, [1908] 2 K. B. 431.

(*d*) Lord Mansfield, C.J., in *Carter* v. *Boehm* (1766), 3 Burr. 1905, at p. 1909; *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; *Traill* v. *Baring* (1864), 4 De G. J. & S. 318, 328.

(*e*) (1867), L. R. 2 Q. B. 595, at p. 607.

(*f*) Willes, J., in *Anderson* v. *Pacific* (1872), L. R. 7 C. P. 65, at p. 68.

(*g*) *Lindenau* v. *Desborough* (1828), 8 B. & C. 586, 592; Rolfe, B., in *Dalglish* v. *Jarvie* (1850), 2 Mac. & G. 231, 243.

(*h*) Bayley, J., 8 B. & C. p. 592.

(*i*) *Swete* v. *Fairlie* (1833), 6 C. & P. 1.

serious symptom of disease, and if that additional fact is not known to the assured there is no obligation to disclose.

Life Association of Scotland v. Foster (1873), 11 M. 351

Life Association of Scotland v. *Foster.*

At the time of effecting an insurance on her life the assured had a slight swelling in her groin. It gave her no pain or uneasiness of any kind, and, since she attached no importance to it whatsoever, she did not mention it to the company's doctor. To a medical man this swelling would have indicated the presence of a rupture which might become dangerous to life, and it was therefore argued that there had been a non-disclosure of a material fact. The Court refused to adopt this view, and in giving judgment for the representatives of the assured Lord President Inglis thus stated the law as to non-disclosure (*l*): "Contracts of insurance are in this, among other particulars, exceptional, that they require on both sides *uberrima fides*. Hence, without any fraudulent intent and even *bonâ fide*, the insured may fail in the duty of disclosure. His duty is carefully and diligently to review all the facts known to himself bearing on the risk proposed to the insurers, and to state every circumstance which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract. . . . The fact undisclosed may not have appeared to the insured at the time to be material, and yet if it turn out to be material, and in the opinion of the jury was a fact that a reasonable and cautious man proposing insurance would think material and proper to be disclosed, its non-disclosure will constitute such negligence on the part of the insured as to void the contract. The only question, therefore, is whether the existence of the swelling in Mrs. Foster's groin was such a fact, and that question in the present case we are to decide as jurymen. My opinion is, upon a consideration of the whole circumstance as disclosed in the evidence that the swelling which is proved to have existed at the date of the contract of insurance has not been shown to be such a fact as a reasonable and cautious person unskilled in medical science and with no special knowledge of the law and practice of insurance would believe to be of any materiality or in any way calculated to influence the insurers in considering and deciding on the risk."

Fletcher Moulton, L.J., in *Joel* v. *Law Union and Crown.*

In *Joel* v. *Law Union and Crown,* Fletcher Moulton, L.J., states the extent of the applicant's obligation to disclose the presence of any physical symptom of disease.

"The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends upon the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognised that the knowledge in question was material to disclose, it is no excuse that you did not recognise it. But the question always is, Was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with almost all of us, occasionally a headache. It may be that a particular one of those headaches would have told a brain specialist of hidden mischief. But to the

(*l*) 11 M. p. 359.

man it was an ordinary headache undistinguishable from the rest. Now, no reasonable man would deem it material to tell an insurance company of all the casual headaches he had had in his life, and if he knew no more as to this particular headache than that it was an ordinary casual headache there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action."

Materiality is for the jury;

Although it may be proper for the Court to lay down the general principles upon which certain matters are or are not material, the question is ultimately one of fact to be decided by a jury (*m*). It cannot be determined purely as a matter of law (*n*). In marine insurance cases the jury are assisted by expert evidence of underwriters who speak to the practice of underwriters in giving consideration to any particular facts and circumstances (*o*). It was at one time much doubted whether such evidence was admissible, but now it is invariably received without objection (*p*); and in the case of life, fire, and other insurances similar evidence would doubtless be received (*q*).

but verdict of jury may be set aside if there is no evidence to support it.

Some facts may be so obviously material that if the evidence is undisputed a finding of the jury that they were immaterial would be perverse (*r*). In such cases the judge would be entitled to withdraw the matter from the jury, or if it were left to the jury a perverse verdict might be set aside (*s*). Thus, where there was undisputed evidence of previous insanity, constant raising of blood, or of consumption, or of equally serious matters, no reasonable men could honestly come to any other conclusion but that the facts were material. But where the question was whether the fact that the assured's parents had consumption was material, the Court, in view of the conflict of opinion among medical men as to whether consumption was hereditary, left it to the jury (*t*).

Must fraudulent conceal-

As in the case of misrepresentation so with concealment, it

(*m*) *Morrison* v. *Muspratt* (1827), 4 Bing. 60; *Rawlins* v. *Desborough* (1840), 2 Mood. & R. 333; *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; *Huguenin* v. *Rayley* (1815), 6 Taunt. 186; *Swete* v. *Fairlie* (1833), 6 C. & P. 1.

(*n*) A. L. Smith, L.J., in *Seaton* v. *Heath*, [1899] 1 Q. B. 782, 791.

(*o*) *Herring* v. *Janson* (1895), 1 Com. Cas. 177, 179.

(*p*) Arnould's Marine Insurance, 5626.

(*q*) *Quin* v. *National* (1839), Jones & Carey, 316, 333; *Penn. Mutual* v. *Mechanics' Savings Bank* (1896), 72 Fed. 413; *Hanley* v. *The Pacific Fire and Marine* (1893), 14 N. S. W. R. 224.

(*r*) *Mallory* v. *Travellers* (1871), 47 N. Y. 52; *Smith* v. *Aetna* (1872), 49 N. Y. 211.

(*s*) *Brown* v. *Greenfield Life* (1899), 172 Mass. 498.

(*t*) *Weber* v. *Metropolitan* (1895), 172 Pa. 111.

ment be also material ?

is sometimes said that if there is proof of fraud the insurance will be vitiated, whether the fact concealed was material or not (*u*). It may be doubted whether in law this is strictly accurate, but in practice it is not of much importance, since, if the jury are satisfied that the assured withheld information with intent to deceive, they will certainly find that the information was material.

Facts which need not be disclosed.

"There are many matters," said Lord Mansfield in *Carter* v. *Boehm* (*x*), "as to which the insured may be innocently silent. He need not mention what the underwriter knows: what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know: what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter need not be told what lessens the *risque* agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation, and either party may be innocently silent as to grounds open to both to exercise their judgment upon."

Facts known to the insurers,

It is obvious that the insurers cannot complain of having been deceived when from some other source they had knowledge of the facts which they say were not communicated (*y*). As Cockburn, C.J., put it in *Bates* v. *Hewitt* (*z*), the insurers cannot set up the defence of non-disclosure, not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance. Probably even if the non-disclosure by the assured was intentional and fraudulent, the insurers cannot set aside the policy when the fraud by reason of their knowledge had no influence on them, or effect in inducing the contract.

and present to their minds.

In order that the plea of knowledge may avail the assured, he must show that the facts not disclosed were present to the minds of the insurers at the time when they accepted the risk, otherwise it is the same as if they had been entirely ignorant, and the assured is not relieved of his obligation to disclose. The assured cannot say, "You, the insurers, once had the

(*u*) This was assumed to be so by Mathew, J., in the questions put to the jury in *Herring* v. *Janson* (1895), 1 Com. Cas. 177, at p. 180. *Vide supra*, p. 290.

(*x*) (1766), 3 Burr. 1906, 1911.

(*y*) *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; *Pim* v. *Lewis* (1862), 2 F. & F. 778.

(*z*) 1867), L. R. 2 Q. B. 595, 605.

knowledge of these facts, and you ought to have remembered it." It is the assured's duty to gather the facts together and present them to the insurers, and the insurers are not bound to rack their brains for forgotten information which they may previously have possessed (*a*).

Means of information is not sufficient.

It is not sufficient for the assured to say that the insurers had the means of information, and that if they had chosen to make inquiries or to examine the materials in their possession they would have ascertained the facts (*b*). This would be as much as saying that the insurers should have performed the assured's duty. It is the duty of the assured, and not of the insurers to make inquiries and examine the materials. But, on the other hand, if reasonably sufficient information has been placed before the insurers, and they choose to neglect the information, they cannot take advantage of their own blindness and negligence; if they shut their eyes to the light it is their own fault (*c*). Actual present knowledge has been said not to be essential if the insurer knew that he had the means of knowledge (*d*). That is to say if it was present to his mind that a certain matter was important, and he knew that the information was lying at his hand, or could be had for asking, it would be unfair to allow him to say afterwards that he did not know (*e*).

Knowledge means complete knowledge.

If the information of the insurer is mere rumour and report, that will not entitle the assured to say that the insurer knew the fact of which the assured had definite knowledge (*f*). If the assured has more complete knowledge of certain material facts he is bound to give the benefit of his knowledge to the insurers, even although they may have a general, but less complete, knowledge (*g*). If not disclosed the question will be whether the additional detailed information possessed by the assured was in fact material.

Where insurer has waived information.

Accepting incomplete answers.

If the insurer waives information on any particular subject he cannot afterwards say that the facts were not as he expected them to be, and complain of non-disclosure (*h*). But information

(*a*) *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595, 606.

(*b*) *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595; *Morrison* v. *Universal Marine* (1872), L. R. 8 Ex. 40, 197.

(*c*) *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595, 605.

(*d*) *Foley* v. *Tabor* (1861), 2 F. & F. 663.

(*e*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863; *Freeland* v. *Glover* (1806), 7 East, 457; *Oakeley* v. *Ooddeen* (1861), 2 F. & F. 656.

(*f*) *Lindenau* v. *Desborough* (1828), 8 B. & C. 586.

(*g*) *Sun Mutual* v. *Ocean* (1882), 107 U. S. 485.

(*h*) *Carter* v. *Boehm* (1766), 3 Burr.

is not necessarily waived by the insurers accepting without comment imperfect answers to questions which they have put to the assured (*i*). The natural inference may be that there was nothing more of any importance to communicate in answer to the question. In a Scottish case (*k*) the insurers accepted a statement where the question, "Can you give any, and what, information respecting his habits?" was left unanswered. The Court held that there was no waiver of information as to the habits of the life insured, and one of the judges said that "an implied abandonment, or waiver, does not relieve from a distinct and conscientious obligation to disclose everything material" (*l*). It is conceivable, however, that if certain questions were left unanswered the insurers might be held to have waived the information by not insisting on an answer (*m*).

Assured's own opinion.

The assured is not bound to disclose what is merely matter of inference or judgment from the facts. He is bound to supply the insurers with the facts, but he is not bound to think for them (*n*).

Legal advice.

Neither is the assured bound to provide the insurers with legal advice, and so long as he fully discloses the facts he is not bound to point out their legal consequences (*o*).

Where knowledge of insurer may be presumed.

Certain facts, too, the insurer must be presumed to have knowledge of, and he cannot be heard to say that he was ignorant. Thus, he is supposed to know all matters of public notoriety (*p*). For instance, on an insurance on a sovereign's life at the time of a coronation or other royal pageant the insurer would probably be presumed to have all such knowledge as to his health and habits as was in the possession of the public generally.

As to the ordinary attributes of a risk,

The insurer is always taken to have knowledge of the ordinary attributes of a risk. Thus, if a man insures a private dwelling house, he need not disclose the fact that he has coal or gas fires, or that the house is lit with gas or electricity. Unless specific questions directed to the particular matter are asked, nothing need be disclosed which one would ordinarily expect to find

1906, 1911; *Court* v. *Martineau* (1782), 3 Dougl 161; *Everett* v. *Desborough* (1829), 5 Bing. 503, 520.

(*i*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 367; *Forbes* v. *Edinburgh Life* (1832), 10 S. 451.

(*k*) *Forbes* v. *Edinburgh Life* (1832), 10 S. 451.

(*l*) 10 S. at p. 461.

(*m*) *Connecticut Mutual* v. *Luchs* (1882), 108 U. S. 498.

(*n*) *Carter* v. *Boehm* (1766), 3 Burr. 1906, 1911; *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595, 605; *Gandy* v. *The Adelaide Marine* (1871), L. R. 6 Q. B. 746.

(*o*) *The Bedouin*, [1894] P. 1, 12; *Crittenden* v. *Springfield Co.* (1892), 85 Iowa, 652.

(*p*) *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595.

in the premises as described. All these are inferred from the description of the risk taken. It is only unusual elements in the risk that have to be disclosed (*q*). An insurer is not bound to state whether a dwelling house insured is occupied or unoccupied, or whether it is occupied by himself or another (*r*).

and the ordinary practice and custom of any business which he insures,

The insurer is presumed also to know not only the ordinary incidents of ordinary risks, but the ordinary incidents of peculiar risks if he undertakes them (*s*). Thus, if a company insures a building where celluloid is stored, if they are informed of that fact they cannot afterwards complain that they did not know that celluloid was peculiarly inflammable; or if a company insures any premises where any specified process of manufacture is carried on the assured is not bound to explain to them what the different processes are or what their peculiar dangers are. "Every underwriter," said Lord Mansfield, "is presumed to be acquainted with the practice of the trade he insures. If he does not know it he ought to inform himself" (*t*). If, however, the assured carries on his manufactures by a more hazardous process than is usual in that particular trade he must disclose the fact.

In the insurance of risks depending on contractual rights and obligations the insurers are presumed to know the ordinary terms or conditions under which the contracts in question are usually made (*u*). Thus in insuring the honesty of servants and employees the assured is not bound to state the terms of employment, unless there is something unusual in them, and in contracts of reinsurance the original risk will be presumed to be subject to all the clauses or conditions usually inserted in policies of that particular class, and the reinsured will only have to disclose such omissions or additions as one would not expect to find in such policies (*x*).

and of all obvious risks.

In America it has been held that if an insurer insures a particular house he is presumed to know that which is obvious with regard to it, including the natural perils to which it is exposed (*y*).

(*q*) *Baxendale* v. *Harvey* (1859), 4 H. & N. 445.

(*r*) *Browning* v. *Home Insurance* (1877), 71 N. Y. 508.

(*s*) *Noble* v. *Kennoway* (1780), 2 Dougl. 510; *Stewart* v. *Bell* (1821), 5 B. & Ald. 238; *Glasgow Assurance* v. *Symondson* (1911), 16 Com. Cas. 109.

(*t*) *Noble* v. *Kennoway* (1780), 2 Dougl. 510, 512; *Western* v. *Home Insurance* (1891), 145 Pa. 346.

(*u*) *The Bedouin*, [1894] P. I.

(*x*) *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408.

(*y*) *Hey* v. *Guarantors* (1897), 181 Pa. 220; *Satterthwaite* v. *Mutual* (1850), 14 Pa. 393.

In one case it was held that the insurer ought to know the technical language of the business he insures, and that the words in the policy must be construed in the technical sense, and thus evidence was admitted to show that "room" in relation to a particular class of factory meant "storey" (*z*). In Canada it has been held that the insurer must be taken to know what goods a tradesman of the particular class insured would have in his store, and if dangerous goods were ordinarily included in such stock, it was unnecessary to disclose the fact (*a*).

Matter covered by a warranty.

Where a matter is covered by an absolute warranty it is not necessary for the assured to disclose facts which are relevant only to the matter warranted (*b*). The reason for this is that the insurer has full protection in the warranty. Thus, in a case of life insurance the life is warranted good, or there is an absolute warranty that the life is in good health. It is not, then, necessary for the protection of the insurer that he should be informed of symptoms which tend to show that the life is not in good health (*c*), for if, in fact, the life is not good, he is discharged from all liability by reason of the warranty, whereas if the life is in good health the symptoms are immaterial. If there had been no warranty that the life was in good health there would have been an obligation to disclose the symptoms, and even although ultimately they turned out to be trivial and of no importance the policy might have been avoided if they were not disclosed.

Matters, however, which actually fall within a warranty ought to be disclosed. Concealment of facts leading up to a breach of warranty are immaterial, but it has never been held that a concealment of what actually falls within a warranty is not concealment which would avoid the insurance apart from the warranty (*d*). This principle is perhaps not of much practical importance, but there might be cases where it would be better for the insurer to rely on non-disclosure than breach of warranty, as, for instance, if he desired to sue for cancellation during the currency of the risk.

Until a binding contract is made

The material date up to which full disclosure must be made is the moment when a binding contract is concluded (*e*). Any

(*z*) *Daniels* v. *Hudson River Fire* (1853), 66 Mass. 416.

(*a*) *Nicholson* v. *Phœnix* (1880), 45 U. C. Q. B. 359.

(*b*) *Haywood* v. *Rodgers* (1804), 4 East, 590, 598; *Grant* v. *Aetna Fire* (1860), 11 Low. Can. R. 128.

(*c*) *Ross* v. *Bradshaw* (1760), 1 W. Bl. 311.

(*d*) *Seymour* v. *London and Provincial* (1872), 41 L. J. (C. P.) 193.

(*e*) *Ante*, p. 206.

applicant must communicate with due diligence.

information received up to that time must be communicated to the insurer with due diligence, and by the customary methods of communication (*f*). On the one hand, the assured must not delay making the communication, but, on the other, he is not bound to make any extraordinary effort or to incur any extraordinary expense (*g*). It has been questioned whether if, say, a proposal for fire insurance is made by letter the assured is bound to telegraph any change of circumstances which may occur after the dispatch of the letter, but before the time when in due course it would be received and a cover note issued. Communication by telegraph cannot now be deemed an unusual or expensive method of communication, and the applicant would undoubtedly make use of it if his own interests depended on an early communication. On principle, therefore, it would seem that in ordinary cases he ought to telegraph any information which might influence the insurer in dealing with the risk.

Consequence of non-disclosure.

If the assured has failed in his duty of making full disclosure, the insurer may, on discovering the facts concealed, elect to rescind the contract, and he may do this either before or after a loss has occurred. In a life case it was argued that, since there could be no restitution after the life had fallen the contract could not be set aside, but it was held that the right to avoid the contract for non-disclosure does not depend on the ability to grant restitution (*h*). Probably, however, the insurer must disclaim liability on the ground of non-disclosure within a reasonable time after he discovers the facts. He cannot sit quiet and take the premiums and refuse to pay when a loss occurs.

Burden of proof on insurer.

The onus of proving non-disclosure is on the insurer. In *Joel* v. *The Law Union and Crown* (*h*) the company alleged that the assured had concealed the fact that she had suffered from nervous depression after influenza, and had been attended by a brain specialist. In support of this allegation they put in evidence the printed form containing the questions put by the medical examiner. The medical examiner was instructed to put the questions with "any necessary explanation," and to write down the answers and obtain the applicant's signature to a declaration that the answers were true. The answers were filled in and the declaration was signed by the assured. In answer to the question, "What medical

(*f*) *Wake* v. *Atty* (1812), 4 Taunt. 493.
(*g*) *Snow* v. *Mercantile Mutual* (1874), 61 N. Y. 160.
(*h*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863.

men have you consulted ? " the names of two doctors were filled in, but no mention was made of the brain specialist. The medical examiner who put the questions and filled in the answers was not called as a witness, although he was in Court at the trial. The Court held that there was no evidence of non-disclosure. The printed form and answers proved nothing because they did not know what the questions plus the explanations were, and the whole facts might have been disclosed to the medical man.

High premium evidence of disclosure.

It has been said that a high rate of premium may be evidence that the insurer had knowledge or at least waived information as to the facts alleged to be concealed (*i*). In *Lindenau* v. *Desborough* (*k*) Lord Tenterden held that the fact that a large premium had been paid was not relevant to the issue whether full disclosure had been made in the case of a life policy. It would seem, however, that the fact that a large premium has been paid is at least some evidence to go to a jury on the question of knowledge on the part of the insurers.

Section IV.—Warranties

No question of materiality.

A warranty is independent of all questions of materiality (*l*). If a warranty is not fulfilled the policy is vitiated, whether or not the fact warranted really affected the risk or in any way influenced the insurer when he accepted it. The assured cannot say to the insurer, " Although there is a variation from the terms of the warranty the risk is just the same, and you would have accepted it at the same premium." The whole object of having a warranty is to avoid the difficult position into which an insurer is put who has to satisfy a jury that a representation was not only false, but was material, and induced the risk. The insurer and assured are entitled to make a bargain that the whole contract is to depend on the existence of certain facts, and if such a bargain is made it must be adhered to, even although the thing warranted may be trivial or absurd (*m*).

In *Thomson* v. *Weems* (*n*) Lord Watson said, " When the truth of a particular statement has been made the subject of warranty

(*i*) *Court* v. *Martineau* (1782), 3 Dougl. 161.

(*k*) (1828), 3 C. & P. 353.

(*l*) *Piedmont and Arlington Life* v. *Ewing* (1875), 92 U. S. 377 ; *Aetna Life* v *France* (1875), 91 U. S. 510 ; *Imperial Fire* v. *Coos County* (1893), 151 U. S. 452 ; *Grant* v. *Aetna Insurance* (1862), 15 Moore P. C. 516.

(*m*) *Sceales* v. *Scanlan* (1843), 6 Ir. L. R. 367, 381, 401.

(*n*) (1884), 9 A. C. at p. 689.

no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point," and in *Anderson* v. *Fitzgerald* (*o*) Lord Cranworth said, " Nothing therefore can be more reasonable than that the parties entering into the contract should determine for themselves what they think to be material, and, if they choose to do so and to stipulate that unless the assured shall answer a certain question accurately the policy or contract which they are entering into shall be void, it is perfectly open for them to do so, and his false answer will then avoid the policy." Thus, where it is warranted that a man is of sober and temperate habits, the only question is whether he was so, and, if he was not, it is no answer for the representatives of the assured to say that he was a man of exceptionally strong constitution, and that the occasional intemperance to which he gave way had no effect upon his system (*p*) ; or if the assured warrants that he has not been attended by a medical man since a certain date the insurance will be vitiated, if he has in fact been attended, although a jury might think that the attendance was immaterial for the purposes of the insurance (*q*).

So in a case of fire insurance, where the risks were classified by description in the ordinary way, and there was a warranty that the premises insured came within Class 1, it was held that the policy was void if the premises did not correspond to the description of Class 1, and that it was immaterial that the variation might not have affected the risk (*r*). Lord Eldon, C., said (*s*), " There was another very material point of defence stated, that this mill which was warranted as being of the first class, with a stove pipe of two feet, was in reality of the second class, with a stove pipe exceeding two feet in length. . . . The Court of Session seems to have thought it immaterial whether it was of the first or second class. But if the mill was warranted of the first class and was in reality of the second class, the judgment of the Court below was clearly erroneous : for it is a first principle in the law of insurance on all occasions that where a representation is material it must be complied with, if immaterial that immateriality may be inquired into and shown ; but that if there is a warranty it is part of the

(*o*) (1853), 4 H. L. C. at p. 503.
(*p*) *Southcombe* v. *Merriman* (1842), Car. & Marsh. 286.
(*q*) *Cazenove* v. *British Equitable* (1859), 6 C. B. (N. S.) 437.
(*r*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow. 255.
(*s*) 3 Dow. at p. 262.

contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact. . . . If the Court of Session was of opinion that the danger and risk was not greater in mills of the second class than in those of the first class, though that were sworn to by five hundred witnesses, it would signify nothing. The only question is, 'What is the building *de facto* that I have insured?'"

Materiality may be relevant on the question whether there is a warranty or not,

But the materiality of a term in an insurance policy may be important in order to determine whether the parties intended that the matter should be the subject of a warranty or whether they intended it to be a mere representation, or to be a collateral promise the breach of which would not vitiate the entire policy, but give rise only to a cross action for damages. Thus, in *Barnard* v. *Faber* (*t*), a fire insurance policy contained the clause, "Warranted to be on same rate, terms and identical interest as V Company £800, and G Company, £700." It was maintained that this was only a collateral stipulation, the breach of which did not avoid the policy but only gave rise to a cross action for damages. It was held that it was a warranty or condition precedent, and Bowen, L.J., after saying that little or no weight could be given to the use of the word "Warranted," said, "The point turns on the materiality of this promise. It is because the promise is so material to the consideration of the risk that it seems to me to become a condition."

or whether answers warranted true are "true."

And where an answer to a question or other statement has been warranted "true" the materiality of the matter inquired into may be relevant to the issue as to whether or not the answer was "true" (*u*). If the answer to a trivial and unimportant question was substantially correct it might be "true," although if the matter had been of greater importance greater accuracy would be demanded before it could be held to be "true" (*u*).

Loss need not be connected with the breach.

If there is a distinct warranty as to a particular matter, and the warranty is not fulfilled, it is unnecessary for the insurer to show that the loss was occasioned by or in consequence of the breach of warranty (*x*). If the warranty is broken the insurer is discharged, and it is immaterial how the loss may have occurred.

(*t*) [1893] 1 Q. B. 340.

(*u*) *Fowkes* v. *Manchester* (1863), 3 B. & S. 917, 924; *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484, 512; *Grogan* v. *London and Manchester* (1885), 53 L. T. 761.

(*x*) *Imperial Fire* v. *Coos County* (1893), 151 U. S. 452; *O'Neill* v. *Ottawa Agricultural* (1879), 30 U. C. C. P. 151; *Garrett* v. *Provincial* (1860), 20 U. C. Q. B. 200; *Hill* v. *Middlesex* (1899), 174 Mass. 542.

Thus, in *Glen* v. *Lewis* (*y*) there was a warranty that "no steam engine shall be introduced." A steam engine was introduced experimentally for a few days. The Court held that the policy was thereby vitiated, and Parke, B., in delivering judgment said (*z*), "It appears to have been on the premises insured for several days, and then the fire happened, whether in consequence of the steam engine having been worked or not is quite immaterial." Similarly where there is a warranty that the assured is of sober and temperate habits the insurers may defend a claim by proving that he was not so, and it is not necessary for them to show that death was caused or accelerated by the intemperate habits (*a*).

Part-performance does not cure a breach of warranty.

In *Hambrough* v. *Mutual Life* (*b*) it was contended unsuccessfully that even if there was a condition precedent or warranty as to the truth of the statements in the proposal, payment of the premium and lapse of time was such a part-performance as would cure the breach. It is clear that part-performance cannot revive the insurer's liability which has been discharged by reason of a breach of warranty unless the insurer, having knowledge of the breach, has by his acquiescence waived the forfeiture.

Subsequent compliance with warranty does not cure the breach.

If there is a breach of warranty the breach discharges the insurer as from the date of the breach, even although the breach has been completely remedied before the loss occurs (*c*). Even where the insurance had not, owing to the non-payment of premium, become effective, a breach of warranty was held to discharge the insurer, notwithstanding that the warranty was complied with before the premium was paid (*d*). On the other hand, where the policy was antedated to the date of the proposal, and there was a breach of warranty between that date and the date when the contract became binding, and the breach was remedied before the latter date, it was held that the breach did not discharge the insurer (*e*). In a Canadian fire insurance case it was contended that, as there was a fresh contract at each payment of the renewal premium, a breach of warranty would not discharge the insurer in respect of any subsequent period of renewal, if before renewal the breach had been remedied. This contention was sustained by the Court of Appeal

(*y*) (1853), 8 Exch. 607.

(*z*) 8 Exch. p. 617.

(*a*) *Thomson* v. *Weems* (1884), 9 A. C. 671.

(*b*) (1895), 72 L. T. 140.

(*c*) *Kyte* v. *Commercial* (1889), 149 Mass. 116.

(*d*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow, 255.

(*e*) *Wainer* v. *Milford Mutual* (1891), 153 Mass. 335.

but the Supreme Court reversed the decision and held that each renewal did not make a fresh contract, and that the breach of warranty discharged the insurer absolutely (*f*). In life insurance there is clearly a continuing contract for the whole life subject to defeasance for non-payment of premium at the time specified, and therefore any breach of warranty for however short a time will discharge the insurer absolutely, notwithstanding subsequent payment of renewal premium and acceptance thereof by the insurers in ignorance of the breach.

Warranty must be found in the written contract.

As a warranty is necessarily part of the contract, it must either be found in the policy or in some other written or printed document which is incorporated by reference and made part of the policy (*g*). If the warranty was really part of the original contract, and it was omitted by mistake from the policy, the policy may be rectified, but it would require very clear evidence of mistake to induce the Court to rectify a policy in favour of the company who prepared it (*h*).

The gummed slip.

In marine insurance cases Lord Mansfield held that a separate document, although delivered with the policy, could not form part of it (*i*), and he so held even where the document was wafered on to the policy (*k*). Upon this authority the ordinary gummed slip would not be part of the contract, and a warranty contained thereon would be treated as merely a representation, and it has been so held in the United States (*l*). The following clause in a fire policy was printed on a separate piece of paper and pasted on to the policy: "It is agreed and understood to be a condition of this insurance that the assured shall keep a set of books showing a record of his or their business; warranted to be kept in an iron safe at night." The assured, whose attention had never been directed to the condition, did not keep his books in an iron safe at night. A loss occurred and the insurers disputed liability on the ground of breach of warranty. The Supreme Court of Texas held, following the decisions of Lord Mansfield, that, since

(*f*) *Agricultural Savings* v. *Liverpool, London, and Globe* (1901), 3 Ont. L. R. 127; reversed (1902), 33 Can. S. C. 94.

(*g*) *Lothian* v. *Henderson* (1803), 3 Bos. & Pul. 499, 509; *Routledge* v. *Burrell* (1789), 1 Hen. Bl. 255; *Worsley* v. *Wood* (1796), 6 T. R. 710; *Sceales* v. *Scanlan* (1843), 6 Ir. L. R. 367; *Sillem* v. *Thornton* (1854), 3 E. & B. 868, 880.

(*h*) See, however, Lord Alverstone, C.J., in *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 431, 437.

(*i*) *Pawson* v. *Barnevelt* (1779), 1 Dougl. 12 *n.*

(*k*) *Bize* v. *Fletcher* (1779), 1 Dougl. 12 *n.*

(*l*) *Goddard* v. *East* (1886), 67 Tex. 69; 60 Am. R. 1.

the clause was not part of the policy nor referred to in it, it could not contain a warranty, and that the mere physical adhesion by gum or paste was not sufficient to make it part of the policy. It is doubtful, however, whether the Court in this country would now seriously entertain the argument that the gummed slip was not part of the policy (*m*), and even if they thought they were bound by the decisions of Lord Mansfield, they could exercise their equitable jurisdiction of rectifying the policy if they thought that both parties intended to contract subject to the warranty. In a marine insurance case, *Bensaude* v. *Thames and Mersey* (*n*), it was suggested in argument that a slip pasted on was not part of the policy, but the matter was not pressed, and apparently no cases were cited. The House of Lords refused to accept the suggestion, and gave effect to the clause as a warranty.

Warranty may be written on any part of the policy.

A warranty may be written on any part of the policy, either at the top or bottom (*o*), or transversely on the margin (*p*), or even on the back. If written on the back, however, it should be referred to on the face of the policy, since if the policy is apparently complete on the face of it the assured's attention might never have been directed to the back, and he would be entitled to accept what appears on the face as the complete contract.

No technical words necessary.

Primâ facie the use of the word "warranted" in a policy of insurance imports a warranty in the strict sense, that is the thing warranted is a condition precedent to the attachment or continuation of the risk (*q*); but no technical words are necessary to create a warranty, and, except as evidence of intention, it is immaterial whether the word warranted is used or not.

Barnard v. Faber, [1893] 1 Q. B. 340

Barnard v. *Faber.*

A fire policy contained the clause "warranted to be on the same rate, terms, and identical interest as Union Insurance Company £800, and Glasgow and London £700, and to follow their settlements." The Court of Appeal held that there was a warranty, but Lindley, L.J., said, "I cannot myself think that the term 'warranted' is important, for I should construe this policy in precisely the same way, whether the word was in it or not. I do not think the policy is made clearer by the introduction of that word." And A. L. Smith,

(*m*) See *Pearce* v. *Gardner*, [1897] 1 Q. B. 688.

(*n*) [1897] A. C. 609.

(*o*) *Blackhurst* v. *Corkell* (1789), 3 T. R. 360.

(*p*) *Bean* v. *Stupart* (1778), 1 Dougl. 11; *Kenyon* v. *Berthon* (1777), 1 Dougl. 12 *n.*

(*q*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow, 255; *Hambrough* v. *Mutual* (1895), 72 L. T. 140; *Ellinger* v. *Mutual Life, New York*, [1905] 1 K. B. 31.

L.J., said, "The question is whether this clause contains a promise which goes to the root of the transaction, or whether it is merely a collateral stipulation, the non-performance of which did not avoid the defendant's obligation, but only gave him a cause of action. We must look at the business of the matter in construing the clause, and I quite agree with what has fallen from Lindley, L.J., that it is immaterial whether the word 'warranted' is in the clause or not. For the purpose of my judgment, I strike that word out. The question is, What is the promise?"

In *Sceales* v. *Scanlan* (*r*), Lefroy, B., says—

"On this question, what is a warranty as contradistinguished from a representation, I would observe that to make warranty it is not necessary the word 'warrant' or 'warranty' should be used. There was a time in the law when it was otherwise (and the old precedents of declarations on a warranty upon a sale show this), but it has been long well settled that words of affirmation affirming matter of fact on the faith of which the party contracts are as competent to make a warranty as any strict technical term."

Whether or not there is a warranty is therefore a question of intention to be ascertained by a reasonable construction of the words which are used in the policy. In *Thomson* v. *Weems* (*s*) Lord Blackburn said—

"It depends on the construction of the whole instrument. It is competent to the contracting parties if they both agree to it, and sufficiently express their intention so to agree to make the actual existence of anything a condition precedent to the inception of any contract, and if they do so the non-existence of that thing is a good defence."

All printed conditions declared to be conditions precedent.

A general statement in a policy that observance of all the printed conditions is a condition precedent to liability is not conclusive as to any particular condition. It may be obvious that some of the conditions are not and cannot be warranties. And where one part of a condition is clearly not a warranty the tendency will be to construe the condition as a whole and treat none of it as a warranty (*t*).

Statement of fact or promise in the policy is *primâ facie* a warranty.

In marine insurance every statement of fact or promise relating to the nature or extent of the risk which is introduced into the policy or incorporated therein by reference is *primâ facie* considered to be a warranty, and not merely a representation or collateral promise (*u*). In *Thomson* v. *Weems* (*x*) Lord Blackburn expresses

(*r*) (1843), 6 Ir. L. R. 367, 371.
(*s*) (1884), 9 A. C. 671.
(*t*) *Bradley* v. *Essex and Suffolk Accident* (1911), 27 T. L. R. 455.
(*u*) *Bean* v. *Stupart* (1778), 1 Dougl. 11; *De Hahn* v. *Hartley* (1786), 1 T. R. 343.
(*x*) (1884), 9 A. C. 671, 683.

an opinion that this rule does not apply to the construction of life policies, but in the Irish case of *Sceales* v. *Scanlan* (*y*) the judges followed the marine insurance cases, and were of opinion that the mere affirmation of a matter of fact which forms part of the contract by actual insertion or by reference to another instrument does make it matter of warranty. In *Barnard* v. *Faber* (*z*), Bowen, L.J., said, with reference to a fire policy, that "a term as regards the risk must be a condition," that is a warranty and in an Irish fire case, *Quin* v. *National* (*a*), Joy, C.B., expressed the same view. It is submitted that whether or not the rule may be carried as far as it is in marine insurance there is both in fire and life, and probably all other, insurance contracts at least a strong presumption that when the policy contains a representation or promise, which is obviously material to the risk, the parties intended that there should be a warranty as to the truth of the representation or the fulfilment of the promise. Other provisions in the policy may, of course, make it apparent that no warranty was intended, but it is submitted that *primâ facie* a bare affirmation or promise obviously material to the risk amounts to a warranty (*b*).

Statements of fact or promises in the application may be warranties.

Statements and promises in the application may also be warranties if they are incorporated into the contract. The application becomes part of the policy when it is expressly stated in the policy to be so, but a mere reference to the application for a further description of the risk (*c*), or a statement that the application was delivered and that the policy was issued in consideration thereof, will not incorporate it as part of the policy (*d*). If the application is incorporated all express warranties and declarations therein will have the same force as if they were contained in the body of the policy (*e*), and it is conceived that the presumption that all obviously material statements and promises are warranties applies equally to the policy, and to the application if made part of the policy (*f*).

(*y*) (1843), 6 Ir. L. R. 367, 374.

(*z*) [1893] 1 Q. B. 340, 344.

(*a*) (1839), Jones & Carey, 316, 338, 340.

(*b*) *Grant* v. *Aetna* (1862), 15 Moore, P. C. 516; *McBride* v. *Gore Dist. Mut.* (1870), 30 U. C. Q. B. 451.

(*c*) *Vilas* v. *New York* (1878), 72 N. Y. 590; *Cumberland Valley* v. *Mitchell* (1864), 48 Pa. 374.

(*d*) *Benham* v. *United Guarantee* (1852), 7 Exch. 744.

(*e*) *Hubbard* v. *Mutual* (1900), 100 Fed. Rep. 719; *Kelley* v. *Mutual* (1896), 75 Fed. Rep. 637; *American Credit* v. *Carrollton* (1899), 95 Fed. Rep. 111; *Hunt* v. *Fidelity and Casualty* (1900), 99 Fed. Rep. 242; *Murdock* v. *The Chenango Mutual* (1849), 2 N. Y. 210.

(*f*) *Battles* v. *York Co. Mutual*

If the policy has been issued and the application is not made part of it, the nominal warranties in the application have only the force of representations (*g*), and the warranty must be found if at all in the policy itself (*h*). But if the policy has not been issued, and the only record of the contract is an *interim* receipt or cover note, the insurers may rely on warranties contained in the application, although not referred to in the cover note, and for this reason, that the cover note does not purport to contain the complete contract between the parties (*i*). The policy may contain an effective warranty as to the truth of the statements in the application, even although the application is not made part of the policy, and the statements are not repeated in the policy; and it is conceived that the truth of all statements, oral or written, made in or about the effecting of the policy, may be warranted if appropriate words are used; but the expression must be clear if such a wide warranty is intended, and in an American case where the policy provided that "if the statements made by or on behalf of the assured as the basis of or in negotiation for this contract, shall be found in any respect untrue," the policy should be void, the Court held that this was merely a statement of the general rule of law applicable to misrepresentation, and that it only applied to material misrepresentation (*k*). A declaration that the answers in the application are part of the contract constitutes them warranties (*l*); but the mere recital that certain specified statements were made in the application and that the insurers thereupon undertook the proposed insurance does not give the statements the force of warranties (*m*). There seems to be some difference of opinion as to the effect of declaring the statements in the application to be the basis of the contract or that the policy was issued upon the faith thereof. On the one hand, it is said that such a declaration makes the statements warranties (*n*), but

(1856), 41 Me. 208; *Cushman* v. *U. S. Life* (1875), 63 N. Y. 404; *contra*, *Royal Arcanum* v. *Brashears* (1899), 89 Md. 624; *Columbian Insurance* v. *Cooper* (1865), 50 Pa. 331.

(*g*) *Missouri* v. *German* (1896), 77 Fed. Rep. 117; *Daniels* v. *Hudson River* (1853), 66 Mass. 416.

(*h*) *Campbell* v. *New England Mutual* (1867), 98 Mass. 381.

(*i*) *Stott* v. *London and Lancashire Fire* (1891), 21 Ont. 312.

(*k*) *Campbell* v. *New England Mutual* (1867), 73 Pa. 381; 98 Mass. 381.

(*l*) *Cushman* v. *U. S. Life* (1875), 63 N. Y. 404; *Metropolitan Life* v. *McTague* (1887), 49 N. J. Law 587; 60 Am. R. 661.

(*m*) *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232.

(*n*) *Joel* v. *Law Union*, [1908] 2 K. B. 431; *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484; *Hambrough* v. *Mutual* (1895), 72 L. T. 140; *Dougharty* v. *London Guarantee* (1880), 6 Vict. L. R. 376; *Hunt* v. *Fidelity*

perhaps the better opinion is that the declaration merely estops the assured from denying their materiality (*o*). If the declaration means no more, then substantial compliance with the statements is sufficient, whereas if it is a warranty there must be strict and literal compliance.

Warranty must be strictly complied with.

When it is said that there must be strict and literal compliance with the terms of a warranty, what is meant is that the actual thing stipulated for must be provided or done, and it is not open to the assured to say that what in fact was provided or done was, although not the same, a substantial equivalent, and that the variation was immaterial (*p*). If the assured warrants that the stove pipe is two feet long whereas it is three feet, the insurer is discharged, and it will not avail the assured to say that a three feet stove pipe is no more dangerous than a two feet pipe (*q*). And so where the answers made by an applicant for life insurance were warranted true, the fact that he stated his age as 30, whereas he was 35, was fatal and the question of materiality was not allowed to go to the jury (*r*). And where the answers in an application for a fire policy were warranted true, and in answer to a question as to incumbrances the assured stated that the property was mortgaged for £6600 whereas in fact it was mortgaged for £6684 it was held that the insurer was discharged from liability (*s*).

Warranties construed strictly against insurer.

But when it is said that a warranty must be strictly complied with it is not meant that it must be strictly construed against the assured. The rule as to construction of warranties is exactly the opposite. Warranties are to be read liberally in favour of the assured and against the insurance company. Thus, in the case of an insurance on the machinery in certain cotton mills, there was a warranty that the mills be worked by day only. The defendants pleaded a breach of warranty, viz. that a certain steam engine, being part of the said mills, was worked by night and not

Casualty (1900), 99 Fed. 242; *Macdonald* v. *Law Union* (1874), L. R. 9 Q. B. 328.

(*o*) *Phœnix Life* v. *Raddin* (1886), 120 U. S. 183; *Jeffries* v. *Life Insurance* (1874), 22 Wall. 47; *Mutual Benefit* v. *Wise* (1871), 34 Md. 582; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363; *Grogan* v. *London* (1885), 53 L. T. 761; *Hutton* v. *Waterloo Life* (1859), 1 F. & F. 735; *Hammond* v. *Citizens* (1886), 26 N. B. 371.

(*p*) *Want* v. *Blunt* (1810), 12 East, 183; *Busteed* v. *West of England* (1857), 5 Ir. Ch. R. 553; *Pawson* v. *Watson* (1778), Cowp. 785; *De Hahn* v. *Hartley* (1786), 1 T. R. 343.

(*q*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow, 255.

(*r*) *Aetna Life* v. *France* (1875), 91 U. S. 510.

(*s*) *Abbott* v. *Shawmut Mutual* (1861), 85 Mass. 213.

by day only. The Court held that the plea was bad in that the working of a single engine in the mill was not necessarily a working of the mill (*t*). Where there is doubt due to contradictory provisions or ambiguous expressions, the Court should lean against the construction that imposes the obligation of a warranty (*u*).

If the insurers desire a warranty as to a particular matter, they must take care to express it in clear terms without any ambiguity (*x*). The policy is prepared by the insurers, and if, therefore, there should be any ambiguity in it, it must be read more strongly against the persons who prepared it (*y*).

In *Baxendale* v. *Harvey* (*z*), Pollock, C.B., said—

"In cases of insurance the Courts ought to give every facility to the detection of fraud; but where the transaction is *bonâ fide* it is the duty of the insurers to establish their objection free from doubt."

In *Anderson* v. *Fitzgerald* (*a*), Lord St. Leonards said—

"A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated shall be found upon the face of it. Nothing ought to be wanting in it, the absence of which may lead to such results."

According to the reasonable meaning of the words used.

Although a warranty must be literally complied with that does not necessarily mean that it is to be construed according to the absolutely literal meaning of the words. A warranty in a contract of insurance must, like a clause in any other commercial contract, receive a reasonable interpretation and be read if necessary with such limitations and qualifications as will render it reasonable (*b*). Thus, when the assured, in a case of life insurance is asked, "Have you had any other illness, local disease or personal injury?" and answers, "No," the warranty will not be held to cover slight indispositions or trivial injuries which may have

(*t*) *Mayall* v. *Mitford* (1837), 6 A. & E. 670; *Whitehead* v. *Price* (1835), 2 Crom. M. & R. 447.

(*u*) *National Bank* v. *Insurance Co.* (1877), 95 U. S. 673; *Moulor* v. *American Life* (1884), 111 U. S. 335.

(*x*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863; *Life Association* v. *Foster* (1873), 11 M. 351.

(*y*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484, 593, 507, 514; *Thomson* v. *Weems* (1884), 9 A. C. 671, 682, 687; *Fowkes* v. *Manchester and London* (1863), 3 B. & S. 917; *Notman* v. *Anchor* (1858), 27 L. J. C. P. 275, 280; *Thompson* v. *Phœnix* (1890), 136 U. S. 287.

(*z*) (1859), 4 H. & N. 445, 451; *Stokes* v. *Cox* (1856), 1 H. & N. 320.

(*a*) (1853), 4 H. L. C. 484, 510.

(*b*) Bowen, L.J., in *Barnard* v. *Faber*, [1893] 1 Q. B. 340, at p. 344; *Hart* v. *Standard Marine* (1889), 22 Q. B. D. 499; *Bankhead* v. *Des Moines* (1886), 70 Iowa, 387.

occurred years before. The company could not reasonably expect a man of mature age to recollect and disclose every illness, however slight, or every personal injury, consisting of a contusion, or a cut or a blow, which he might have suffered in the course of his life. It is manifest that this question must be read with some limitation and qualification to render it reasonable; and that personal injury must be interpreted as one of a somewhat serious or severe character (*c*). In *Anderson* v. *Fitzgerald* (*d*) the condition was that the policy should be void if any false statement was made in the proposal for insurance. Baron Parke said that it must be understood not to include a false statement of matters to the disparagement of the applicant and tending to render his life less insurable: such a construction would be clearly absurd and in no way reconcilable with the manifest object of the proviso. So in a case of fire insurance (*e*) there was a proviso that "no claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing." The goods were insured for land transit, and a marine policy, which was not notified, was taken out for sea transit. It was maintained that the two policies overlapped as regards the risk at the port of shipment and that therefore there was a breach of the warranty. The Court held that the warranty was intended to prevent double insurance and that there was no double insurance in the proper sense of the word. Blackburn, J., said—

"I cannot think it would be a reasonable construction of the words to hold that the particulars of this marine insurance ought to have been notified to the company merely because it might happen that during the transit some loss by fire might occur which the marine policy might cover. The mere possibility of an accidental overlapping of the two policies in such a way was not, as it seems to me, what was aimed at" (*f*).

And even when a literal construction would be more in favour of the assured, the Courts will nevertheless place what they consider to be a fair and reasonable meaning on the words used (*g*). Thus, in an accident insurance policy (*h*), there was a proviso that

(*c*) *Connecticut Mutual Life* v. *Moore* (1881), 6 A. C. 644, 648; and see *Knickerbocker Life* v. *Trefy* (1881), 104 U. S. 197.

(*d*) (1853), 4 H. L. C. 484, 497.

(*e*) *The Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668.

(*f*) L. R. 10 C. P. 675.

(*g*) *Hart* v. *Standard Marine* (1889), 22 Q. B. D. 499.

(*h*) *Mair* v. *Railway Passengers' Assurance* (1877), 37 L. T. 356.

the assurance should not extend "to any death or injury happening while the assured is under the influence of intoxicating liquor or while in a state of insanity or generally occasioned by his wilfully exposing himself to any unnecessary danger or peril." Lord Coleridge, C.J., said, "I assent to the view that 'death or injury happening while the assured is under the influence of intoxicating liquor,' must in reason be read 'death or injury causing death happening while the assured is under the influence of intoxicating liquor.' The consequence would, I think, be preposterous if we held that if the death happened while he was under the influence of intoxicating liquor the company would not be liable, whereas if the injury which caused the death happened under the same circumstances but the man happened to be sober when he died under those circumstances, they would be liable under the proviso; and therefore I think the good sense of the thing is clearly with the construction which was put forward on the company's behalf" (*i*).

And the whole contract must be read together.

In construing conditions of a policy they must all be read together. Sometimes the policy contains a condition which, if it stood alone, would be an absolute warranty, but other conditions referring to the same or some cognate matter show that an absolute warranty cannot have been intended. Where there are conflicting provisions relating to the same matter, the more onerous conditions must be modified so as to correspond with the less onerous, for otherwise the policy is a mere trap for the assured (*k*). Thus, where the policy contained a condition that the insurance should be void if any of the answers in the proposal form were "untrue," this was held to be modified by the declaration in the proposal form which was incorporated into the policy whereby the assured agreed that if there was any "designedly untrue" statement in the proposal the policy should be void (*l*). And where the conditions in a policy contained numerous stipulations, to some of which the penalty of forfeiture was expressly attached, the presumption which might otherwise have given all the conditions the force of conditions precedent was rebutted, and the conditions to which the penalty of forfeiture was not attached were treated as ordinary terms which, if broken, gave rise only

(*i*) 37 L. T. at p. 375.
(*k*) *Thomson* v. *Weems* (1884), 9 A. C. 671 683.
(*l*) *Fowkes* v. *Manchester* (1863), 3 B. & S. 917.

to an action for damages (*m*). A general warranty may be modified by some specific condition as to the particular matter in question. Thus, in a Canadian fire case (*n*) there was a general proviso that the policy should be void if the assured should have made any inaccurate statement whether intentional or not. The policy also contained a condition that if the property should be over-valued in the application, the company would only be liable for such proportion of the actual value as the sum assured might bear to the application value. The Court held that over-valuation did not avoid the policy. But, on the other hand, it has been held that an express warranty is not to be modified or annulled by mere inference from statements or omissions in other parts of the policy. Thus, where the answers to questions in the proposal were declared to be the basis of the policy and to be true, and certain items were selected from the proposal form and made matter of specific warranty in the policy, it was held that the other items which were not so specifically warranted were nevertheless warranted under the general declaration that the answers were the basis of the policy and were true (*o*). The absence of any statement in the proposal form that the answers are the basis of the contract or are warranted accurate does not necessarily detract from the force of the warranty to that effect in the policy (*p*). Where a declaration in the proposal was ambiguous, but the policy recited without ambiguity that a certain declaration had been made, it was held that the construction of the declaration adopted by the policy must be accepted, unless the assured could explain the acceptance of the policy and the acquiescence in its terms (*q*).

Question whether the assured warrants the fact or merely the honesty of his statement.

Sometimes there is no doubt that there is a warranty, but it is not so clear what it is that is warranted, whether it is the existence of a present fact or merely the assured's opinion or belief that such a fact does exist, or whether it is the existence of a future fact or merely the assured's expectation or intention that such fact will exist. In each case it is entirely a question of construction. What did the parties intend the extent of the warranty to be? If the Court is of opinion that the assured only warranted that his belief or opinion, expectation or intention, was honestly expressed

(*m*) *Stoneham* v. *Ocean Railway* (1887), 19 Q. B. D. 237.

(*n*) *Williamson* v. *Commercial Union* (1876), 26 Can. C. P. 591.

(*o*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484; *Sceales* v. *Scanlan* (1843), 6 Ir. L. R. 376.

(*p*) *Macdonald* v. *Law Union* (1874), L. R. 9 Q. B. 328.

(*q*) *Foster* v. *Mentor Life* (1854), 3 El. & B. 48.

there can be no breach of warranty unless the assured has made a dishonest statement (*r*). Here the only value of the warranty is that it gets rid of any possible question as to whether or not the matter was material to the risk or induced the contract. And the warranty may be even further limited by expressly confining it to facts material to the risk, and if so confined the statements warranted have no greater force than representations (*s*), except that the insurers do not have to prove that the contract was induced by the statement alleged to be inaccurate (*t*).

Statements as to present facts.

In the case of statements as to present facts much may be inferred from the nature of the facts. Where the facts are such as are definitely ascertainable, for instance, facts relating to the construction or user of premises insured, there must be a strong presumption that a statement made with regard to such facts is intended to be an absolute warranty as to their existence. On the other hand, there are facts which do not admit of being definitely ascertained, but are necessarily more or less matters of opinion, such as statements as to value (*u*), and statements as to the health of the life (*x*). In these cases the tendency is to consider the statement rather as a statement of opinion than a statement of absolute fact, and, if there is a warranty, that it goes no further than to warrant that the opinion or belief of the assured has been honestly expressed.

Statements as to the future.

With respect to statements as to the future the presumption that the warranty is absolute is probably not so strong as in the case of statements as to present facts. The future cannot be definitely ascertained, and therefore statements with regard to it are readily susceptible of the construction that they are only statements of expectation or intention (*y*).

Benham v. United Guarantee (1852), 7 Exch. 744

Benham v. *United Guarantee.*

An application was made to the defendants for a policy guaranteeing the integrity of the plaintiff's servant. The application form contained several

(*r*) *Jones* v. *Provincial* (1857), 3 C. B. (N. S.) 65; *National Bank* v. *Insurance Co.* (1877), 95 U. S. 673.

(*s*) *Kerr* v. *Hastings Mutual* (1877), 41 U. C. Q. B. 217; *Garcelon* v. *Hampden Fire* (1862), 50 Me. 580; *Wilkins* v. *Germania Fire* (1881), 57 Iowa, 529.

(*t*) *Russell* v. *Canada Life* (1882), 32 U. C. C. P. 256.

(*u*) *Connecticut Mutual Life* v. *Luchs* (1883), 108 U. S. 498; *Riach* v. *Niagara District* (1871), 21 U. C. C. P. 464; *Chaplin* v. *Provincial* (1873), 23 U. C. C. P. 278.

(*x*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863; *Life Association* v. *Foster* (1873), 11 M. 351.

(*y*) *Herrick* v. *Union Mutual Fire* (1860), 48 Me. 558.

questions which were answered by the plaintiff as follows: Question, "Is the applicant at present in your employment, and if so, in what capacity? and has he hitherto performed the duties of his situation faithfully and to your satisfaction?" Answer, "He is Secretary to the Marylebone Literary Institution." Question, "In what capacity do you intend to employ the applicant? And with reference to this question will you state as far as circumstances will permit, (A) the nature of his intended duties and responsibilities; (C) the checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?" Answer, "(A) Mr. Weir is Secretary of the Marylebone Literary Institute, of which I am the treasurer. (C) Examined by Finance Committee every fortnight." The plaintiff signed a declaration that the above answers were true, and the policy recited that the proposal and declaration had been lodged at the office of the company as the basis of the contract, and the rules of the company, which were incorporated, provided that "any fraudulent misstatement or suppression in any declaration . . . renders the policy void from the beginning." The accounts were not in fact examined every fortnight, and the Court held that there was no warranty that they should be. Pollock, C.B., said: "The manner in which this question is put, the other questions with which it is associated, and the decisions upon policies of insurance lead me to the conclusion that the answer was not expected to be upon the part of the office or meant to be upon the part of the plaintiff anything more than a declaration of the course intended to be pursued; and if that answer was made *bonâ fide* and honestly it does not prevent the plaintiff from maintaining this action."

Towle v. National Guardian Assurance (1861), 10 W. R. 49

Towle v. National Guardian Assurance.

On an application for a fidelity insurance the assured was asked to state in the proposal form, "First, the duties and responsibilities which will devolve upon the applicant; secondly, the largest sum at any time to be held in his hands and for how long a time; thirdly, whether any stock-in-trade will be intrusted to his custody for sale, if so, its probable value and description, and how often stock will be taken by the employer; fourthly, the check used to secure accuracy in his accounts, and at what periods the employer will balance and close his cash account; fifthly, whether the balance agreed at any such period will be then paid over, or if the employment necessarily requires a balance to be carried from account to account." The assured made the following statement:—"First, to collect and account for the sums collected; secondly from £100 to £200, not longer than a week; thirdly [no answer]; fourthly, checked weekly by the surveyor of taxes; fifthly, yes." A declaration of the truth of the answers was appended, and the declaration and answers were referred to in the policy as the basis thereof. On the evidence the Court found that the answers given were untrue as regards the past course of business, and were not adhered to as regards the future, and they accordingly declared the policy void.

In the above case the Court was no doubt satisfied that the answers were not honest, and the case cannot be cited as one

where the condition was definitely construed as an absolute warranty as to the future course of business. The case of *Benham* v. *United Guarantee* (*z*) has been followed in very similar cases in the colonies (*a*), and it is only where the policy has contained an express condition that the course of business and supervision would be in accordance with the statements in the proposal that such statements have been held to be absolute warranties as to the future (*b*). In America, however, there is a greater tendency to treat the answers as promissory warranties as to the course of business which should be adopted, although not as absolute warranties that there would never be any lapse from such course of business on the part of the assured's employees (*c*). In an Australian case (*d*) the employer stated in the application the system of checks which would be adopted, and signed a declaration that the answers were true and were to be taken as the basis of the contract. The policy provided that it was "granted on condition that the business of the assured should remain in every particular in accordance with the said statements, and each of them and the said declaration." The Court held that there was a warranty as to the course of business to be employed during the risk, but not against the negligence of servants in not carrying it out.

Grant v. Aetna (1862), 15 Moore, P. C. 516

Grant v. *Aetna.*

A fire policy was effected in July, 1858, for twelve months on a steamship, which was described as "now lying in Tate's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place approved by the company." The ship never left Tate's dock, and was destroyed there by fire in June, 1859. The Privy Council thought that the words in the policy should be construed as meaning "my ship is now lying in Tate's dock; I mean to remove her for the purpose of navigation in the manner described, and if I do the policy shall still be in force; but in that case I engage to lay her up for the winter in a place to be approved by the company." There was no warranty

(*z*) (1852), 7 Exch. 744.

(*a*) *Regina* v. *National Insurance* (1887), 13 Vict. L. R. 914; *A.-G.* v. *Adelaide Life* (1888), 22 S. Aust. L. R. 5.

(*b*) *Haworth & Co.* v. *Sickness and Accident* (1891), 18 R. 563; *Harbour Commissioners* v. *The Guarantee Co.* (1893), 22 Can. S. C. 542; *Dougharty* v. *London Guarantee* (1880), 6 Vict. L. R. 376.

(*c*) *Phœnix Insurance* v. *Guarantee Co.* (1902), 115 Fed. Rep. 964; *Rice* v. *Fidelity and Deposit Co.* (1900), 103 Fed. Rep. 427; *Hunt* v. *Fidelity and Casualty* (1900), 99 Fed. Rep. 242.

(*d*) *Dougharty* v. *London Guarantee* (1880), 6 Vict. L. R. 376.

that the boat should navigate, but merely an expression of intention to do so, and incidentally a licence to do so with a provisional warranty that if the assured availed himself of the licence to navigate he would lay her up for the winter in a place approved by the company.

The steamer referred to in the above case was also insured in another company in somewhat different terms, being described as " The steamer *Malakoff* (now in Tate's Dock, Montreal), navigating the river St. Lawrence between Quebec and Hamilton, stopping at intermediate ports, including outfitting in the spring." This was held to be an express warranty that the steamer would navigate, and as she was burned while laid up in dock there was a breach of warranty (*e*). A licence to the assured to do certain things which would otherwise avoid the policy must not be construed as a warranty that such things will be done (*f*).

Notman v. Anchor (1858), 27 L. J. C. P. 275

Notman v. *Anchor.*

A life policy was endorsed with the following memorandum :—" The life assured under the policy being about to proceed to and reside at Belize in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid." The assured did not leave the United Kingdom until three years after the date of the policy, when he went to Belize and died there within a year of his going. One extra premium of twenty guineas was paid as recited in the memorandum, but no further extra premiums had been paid. The Court held that although there was an expression of intention on the part of the assured to go to Belize shortly after the date when the policy was taken out, there was no stipulation to that effect, and the one extra premium of twenty guineas gave him a licence to reside at Belize for one year, commencing at any time during the currency of the policy.

Question whether a warranty applies to the future or only to the present.

Doubts frequently arise as to whether a warranty applies only to the present or to the future as well as the present. It may be clear that the warranty only applies to the commencement of the risk, as in all warranties as to health in life insurance. Any warranty as to the assured's habits, such as a warranty that he is sober and temperate, would *primâ facie* apply to the past and present, and not to the future. But, in fire and burglary insurance,

(*e*) *Grant* v. *Equitable* (1864), 14 Low. Can. R. 493.

(*f*) *Frisbie* v. *Fayette* (1856), 27 Pa. 325.

warranties as to the nature of the premises and precautions taken against loss will *primâ facie* be presumed to apply to the whole duration of the policy. It would obviously be of little value to have a warranty that a building contained no artificial heating apparatus, or that a night watchman was kept on the premises, unless such warranties were effective to insure the subsistence of these conditions throughout the duration of the risk. Thus, the description of the premises in a fire risk imports a warranty that they shall not be altered so as to increase the risk at any time during the currency of the policy (*h*). But a warranty as to the construction or use of the premises may be limited to their condition at the commencement of the risk (*i*). In *Pim* v. *Reid* (*k*), there was a condition that if the assured should cause the premises to be described "otherwise than they really are to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they have undertaken, or are required to undertake," the insurance should be void. It was held that the subsequent introduction of a more hazardous trade without notice to the company would not avoid the policy, since the condition only applied to the circumstances existing at the commencement of the risk, and not to alterations made during the currency, and by some of the other conditions certain specified alterations were prohibited, but a change of trade was not prohibited.

No implied warranty of fitness in fire or life insurances.

In life and fire insurance contracts there is no implied warranty analogous to the implied warranty of seaworthiness in marine insurance. There is no implied warranty that the "life" is in good health or free from disease or that a house which is insured against fire is built with all proper precautions. If the assured does not know of defects in the house or that the "life" is in bad health, these facts will not affect the validity of the insurance, unless the assured has expressly warranted that the "life" is sound or the house is free from defect.

Question whether the continued existence of the life is warranted in life insurance.

It is sometimes said that there is an implied warranty in contracts of life insurance that the "life" is in being at the time the contract is made.

(*h*) *Sillem* v. *Thornton* (1854), 3 E. & B. 868.
(*i*) *Smith* v. *Mechanics' Fire* (1865), 32 N. Y. 397; *Gould* v. *York County* (1859), 47 Me. 403.
(*k*) (1843), 6 Sc. N. R. 982.

Pritchard v. Merchant Life (1858), 3 C. B. N. S. 622

Pritchard v. *Merchant Life.*

The policy contained a condition that it should be void "if the premiums were not paid within thirty days after they should respectively become due; but that the policy might be revived within three calendar months on satisfactory proof of the health of the party on whose life the insurance was made." The premium was in arrear, and the "life" died on the thirtieth day after it had become due. Two days afterwards the assured sent the premium to the company, and it was accepted, both parties being ignorant that the "life" was dead. It was held that the assured could not recover since the policy had been revived on the mutual understanding that the party insured was alive. "Both parties," said Williams, J., "were labouring under a mistake, and consequently the transaction was altogether void. . . . The whole transaction—the payment and receipt of the money—was founded upon a mistake." And Crowder, J., "It is manifest that it was of the essence of the contract that the party should be alive and in good health at the time of such revival." And Byles, J., "It may be observed that, whatever might have been the construction if the policy had been utterly silent in this respect, here it is in terms a contract or undertaking against the happening of a future event. 'Dead or alive,' which would be equivalent to 'lost or not lost' in a marine policy, seems to be excluded by the terms of the policy."

The *ratio decidendi* of the above case was that, inasmuch as the whole circumstances showed that it was of the essence of the agreement to renew that the life was still in being, there was a mutual mistake *in essentialibus* which avoided the agreement (*kk*). The judges do not base their decision on any rule of implied warranty that the life is in being. It is really a question to be determined in each particular case, whether or not the contract of insurance was made on the assumption that the life was in being (*l*). There is no doubt that the vast majority of life insurance contracts are so made. Although legally possible, original contracts of life insurance upon a "dead or alive" basis are in practice unknown, it is only in the case of agreements to reinstate a lapsed or suspended contract that a company would contemplate the acceptance of a risk upon this basis.

Breach of warranty may be waived

All conditions in the policy may be waived by the company or by such of its agents as have authority. This may be done by leave and licence given to the assured before there has been any breach of the conditions (*m*). But there may also be waiver after breach, since although the insurer is discharged from liability the contract is still in existence (*n*). When the insurer becomes

(*kk*) *Vide supra*, p. 270.

(*l*) Clifford, J., in *Insurance Co.* v. *Folsom* (1873), 18 Wall. 237, 251.

(*m*) *Reis* v. *Scottish Equitable* (1857), 2 H. & N. 19.

(*n*) *Armstrong* v. *Turquand* (1858), 9 Ir. C. L. R. 32; *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265; *Barrett* v. *Jermy* (1849), 3 Exch. 535; *Canada Landed Credit Co.* v. *Canada*

aware of the breach he may elect to affirm or avoid, but once he has made his choice in favour of affirming he can no longer disaffirm except in respect of other matters which may come to his knowledge subsequently. In order to establish a waiver after breach of warranty, it is necessary for the assured to prove

(i) that the insurer had full knowledge of the breach; and either

(ii) that the insurer expressly waived the forfeiture; or

(iii) (*a*) that the insurer made use of words or conduct justifying an inference by the assured that forfeiture would not be insisted in: and

(*b*) that the insured acted upon such inference and incurred trouble or expenditure on the faith thereof.

The general principles upon which the law of waiver is based are well stated in an American case (*o*), as follows:—

"A waiver involves the idea of assent, and assent is primarily an act of the understanding. It presupposes that the person to be affected has knowledge of his rights, but does not wish to enforce them. It is an intentional relinquishment of a known right, and is a question of fact whenever it is to be inferred from evidence adduced or is to be established from the weight of evidence. Again, it may happen that a waiver of a breach of the condition was not actually intended; but if the conduct and declaration of the insurer are of such a character as to justify the belief that a waiver was intended, and acting upon the belief the insured is induced to incur trouble and expense, and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach upon the principles of equitable estoppel" (*p*).

if the insurer has complete knowledge of the breach.

There can be no waiver without knowledge, and therefore it is necessary to prove that the insurer had full knowledge of the breach (*q*). If the insurer knows there has been a breach and waives further inquiry as to the extent of it, that will be sufficient but otherwise imperfect knowledge is not sufficient.

Scottish Equitable v. Buist (1877), 4 R. 1076

Scottish Equitable v. *Buist.*

The insurers sought to set aside the policy in the hands of an assignee on the ground that the assured had made false statements as to his health and

Agricultural (1870), 17 Grant, 418; *New York Life* v. *Baker* (1897), 83 Fed. Rep. 647.

(*o*) *Hanscom* v. *Insurance Co.* (1897), 90 Me. 333, 339.

(*p*) *Insurance Co.* v. *Eggleston* (1877), 96 U. S. 572.

(*q*) *Russell* v. *Canada Life* (1883), 8 Ont. A. R. 716; *Northern Assurance* v. *Grand View Building Co.* (1902), 183 U. S. 308; *Georgia Home Insurance* v. *Rosenfeld* (1899), 95 Fed. Rep. 358; *Home Life* v. *Myers* (1901), 112 Fed. Rep. 847; *Cable* v. *U. S.*

habits. The assignees alleged that the insurers were, during the assured's life, aware of the facts, and nevertheless continued to receive the premiums from the assignees. On the evidence, it was held that the information of the insurers amounted to nothing more than rumour and suspicion, and that they were not bound to act upon it; and Lord President Inglis said, "If after a policy has been assigned the insurance company become aware of objections to its validity so clear and conclusive that the mere statement of them is enough, I do not say that there may not then be a duty of communication to those whom the company know to be interested in the policy. It would not be consistent with good faith that they should in such circumstances go on receiving the premiums on a policy that they intended to challenge in the end. But there is nothing approaching such a case here, and therefore we need not consider the question."

In a Canadian fire case the premises were described as a "steam bending factory." On inquiry the insurers discovered that the assured intended to use it as a sash factory, but issued the policy without protest. It was held that there was no waiver of the warranty in the policy that the premises should not be used or occupied otherwise than as described, and that on being used as a sash factory the policy was voidable (*r*). The knowledge of the breach must be brought home to some servant or agent of the company who has authority and does in fact waive the breach, or to some agent whose duty it is to report the matter to the company (*s*). In an American fire case there was a condition against non-occupancy, and a proviso that in case of loss the assured should give immediate notice, stating, among other things, the occupancy of the building at the time of the loss. Oral notice of a loss and also of the fact of non-occupancy was given to an officer of the company, and the company demanded proofs of loss without taking objection. It was held that the assured could not claim a waiver. The company were entitled to formal notice of the facts relating to occupancy, and they were not bound to act upon informal oral notice to one of their officers (*t*).

Authority of agent to waive.

The act of an agent cannot be relied on as evidence of waiver unless such agent has actual or apparent authority to waive the

Life (1901), 111 Fed. Rep. 19. A waiver of a breach after loss does not operate as a waiver if the insurers were ignorant of the loss. *Bennecke* v. *Connecticut Mutual* (1881), 105 U. S. 355.

(*r*) *Howes* v. *Dominion Fire* (1882), 8 Ont. A. R. 644.

(*s*) *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265. Knowledge of a medical examiner that a statement made to him was false was held not to be the knowledge of the company. *John Hancock Mutual* v. *Houpt* (1901), 113 Fed. Rep. 572.

(*t*) *Fitchpatrick* v. *Hawkeye Insurance* (1880), 53 Iowa, 335.

breach (*u*). A local agent with power to receive premiums and issue policies, but without power to make contracts has not, independently of evidence to the contrary, any apparent authority to waive conditions which the insurers have thought so important as to incorporate them into their policy (*x*). Some additional evidence must be given, as that he had been held out by the company as possessing such authority, or that the company had so ratified similar acts, or had so conducted itself with regard to its other transactions, that the assured was justified in believing that the agent had such authority (*y*). In one American case the agent had "power to issue policies, receive premiums, consent to assignments, and attend to all other duties and business of the agency." There was a condition that the policy should be void if, without the written consent of the company first obtained, the house should become vacant (*z*). It was held that the agent had apparent authority to indorse the policy with permission to leave the premises unoccupied, and that if the premises had been left unoccupied without previous indorsement, he had authority to waive the breach, and did so by subsequent indorsement (*a*). The scope of the agent's apparent authority to waive forfeitures may be limited by notice in the application form, and in a Canadian case where the agent's authority was therein specified as being limited "to receiving proposals collecting premiums and giving the consent of the company to assignments of policies," it was held that he had no apparent authority to waive the condition of occupancy (*a*). The agent's authority to waive forfeitures may also be restricted by conditions in the policy. A common condition is that "no condition can be waived except in writing signed by the secretary." This is notice to the assured that even a general agent has no authority to waive such conditions as that of occupancy by informing the assured that it is all right (*b*). And even where the officer or other agent of the company has authority it can only be exercised in the prescribed manner. A company which has seen fit to prescribe that the

(*u*) *Northern Assurance* v. *Grand View Building Co.* (1901), 183 U. S. 308.

(*x*) *Kyte* v. *Commercial Union* (1887), 144 Mass. 43; *Garretson* v. *Merchants* (1890), 81 Iowa, 727; *West End Hotel* v. *American Fire* (1896), 74 Fed. Rep. 114; *Luckett Wake Co.* v. *Globe Fire* (1908), 171 Fed. Rep. 147.

(*y*) *Kyte* v. *Commercial Union* (1887), 144 Mass. 43.

(*z*) *Wheeler* v. *Waterton Fire* (1881), 131 Mass. 1.

(*a*) *Peck* v. *Agricultural* (1890), 19 Ont. 494.

(*b*) *O'Brien* v. *Prescott Insurance* (1892), 134 N. Y. 28.

terms and conditions of its policy shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the assured has assented to be bound (*c*). And thus, where the condition in a fire policy was that if the premises should remain unoccupied "for more than fifteen days without notice to the company, and consent indorsed hereon," and oral notice was given to the agent, who noted it in his book and said it was not necessary to indorse it on the policy, the Court held that the agent had no authority to waive the condition orally, or otherwise than in the prescribed manner (*d*). But where the policy contained a similar condition, and the agent promised to indorse the policy with a permit to remain unoccupied, and afterwards forgot to do so, it was held that the condition was waived (*e*).

Issuing the policy with knowledge of a breach.

If the insurers issue the policy with knowledge of the breach that may be construed as a waiver of the warranty (*f*), as where premises were described as "used as a storage ice house," but were in fact uncompleted and unoccupied, but were intended to be used as described (*g*), or where the policy warranted "no fireworks kept," and the agent issued the policy with knowledge that fireworks were kept (*h*). But the knowledge must be definite, and not merely a suspicion, as where the condition was that the policy should be void if more than 56 lbs. of gunpowder was kept, and the assured had a greater quantity, the policy was declared void, notwithstanding the contention of the assured that the company knew that the particular business could not be carried on without a much larger stock of gunpowder (*i*). Issue of the policy by an agent who has knowledge of the breach can only be construed as a waiver if the agent had authority to waive the breach (*k*); and therefore where a life policy warranted that the assured was of temperate habits the knowledge of the local agent

(*c*) *Kyte* v. *Commercial Union* (1887), 144 Mass. 43.

(*d*) *Walsh* v. *Hartford Fire* (1878), 73 N. Y. 5.

(*e*) *Dupuy* v. *Delaware* (1894), 63 Fed. Rep. 680.

(*f*) *Reddick* v. *Saugeen* (1888), 15 Ont. App. 363; *London & Lancashire* v. *Honey* (1876), 2 Vict. L. R. 7; *Louck* v. *Orient* (1896), 176 Pa. 638; *Woodruff* v. *Imperial* (1880), 83 N. Y. 133; *Haight* v. *Continental* (1883), 92 N. Y. 51; *McKay* v. *Norwich Union* (1895), 27 Ont. 251; *Agricultural Insurance* v. *Ansley* (1888), 15 Queb. L. R. 256.

(*g*) *McNally* v. *The Phœnix* (1893), 137 N. Y. 389.

(*h*) *Phœnix* v. *Flemming* (1898), 65 Ark. 54; 67 Am. S. R. 900.

(*i*) *McEwan* v. *Guthridge* (1860), 13 Moore, P. C. 304.

(*k*) *West End Hotel* v. *American Fire* (1896), 74 Fed. Rep. 114; *Pottsville Mutual* v. *Fromm* (1882), 100 Pa. 347; *Abbott* v. *Shawmut Mutual* (1861), 85 Mass. 213.

to the contrary was held to be immaterial (*l*). And so in a Canadian fire case, the insurers' policies contained a condition against double insurance unless notified and indorsed on the policy. The agent, being informed that the applicant held another insurance; told him that he would obtain particulars and insert them in the application form. He then issued an interim protection note, and forwarded the application to the head office without entering the particulars of other insurance. The application was accepted, and a policy issued, and it was held that the protection note was valid as the agent who had authority to make the contract had notice of the double insurance, but that the policy was void because the head office where the application was accepted had no knowledge of the double insurance (*m*).

Waiver by acceptance of renewal premium.

Similarly, if the insurer accepts a renewal premium after knowledge of a breach of warranty, the breach is waived if the premium fell due after the breach (*n*); but if the premium fell due or was earned before the breach the acceptance is not necessarily a waiver, because it is not inconsistent with the forfeiture of the policy as at the date of the breach (*o*). In one American case it was held that if the condition was that the policy should be absolutely void upon a breach of warranty it could not be revived by a mere act of waiver (*p*); but such a condition does not in law operate so as to make the whole contract void *ab initio* upon a breach of warranty, the insurer is merely discharged from liability in respect of the future, and may undoubtedly waive the provision in his favour.

By furnishing blank proofs.

Furnishing blank proofs of loss with knowledge of a breach of warranty, but without notice to the assured that a forfeiture would be claimed, has repeatedly been held to be a waiver (*q*); but if the insurer declares that there has been a forfeiture, subsequent demand for strict proof of the loss is not necessarily a waiver (*r*). And if the information of the facts from which

(*l*) *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265; *Thomson* v. *Weems* (1884), 9 A. C. 671; 11 R. 667.

(*m*) *Billington* v. *Provincial Ins.* (1877), 2 Ont. A. R. 158 (1879), 3 Can. S. C. 182; *Shannon* v. *Gore Dist. Mut.* (1878), 2 Ont. A. R. 396.

(*n*) *Supple* v. *Cann* (1858), 9 Ir. C. L. R. 1; *Phœnix Life* v. *Raddin* (1887), 120 U. S. 183; *Law* v. *Hand in Hand* (1878), 29 U. C. C. P. 1; *Fourdrinier* v. *Hartford Fire* (1865), 15 U. C. C. P. 403; *Bleakley* v. *Niagara* (1869), 16 Grant, 202; *British Industry* v. *Ward* (1856), 17 C. B. 644.

(*o*) *Farmers' Mutual* v. *Hull* (1893), 77 Md. 498.

(*p*) *Gardiner* v. *Piscataquis Mutual* (1853), 38 Me. 439.

(*q*) *McNally* v. *Phœnix* (1893), 137 N. Y. 389; *Hanscom* v. *Insurance Co.* (1897), 90 Me. 333; *Canada Landed Credit* v. *Canada* (1870), 17 Grant, 418.

(*r*) *Phœnix* v. *Flemming* (1898), 65 Ark. 54; 67 Am. S. R. 900; *Roth* v. *Mutual Reserve* (1908), 162 Fed. Rep. 282.

a breach of warranty is inferred is informal or indefinite, the insurers are entitled to ask for proofs in order to have a definite statement of the assured upon which they can act with greater certainty, and the demand of proofs for this purpose does not constitute a waiver (*s*). The insurers are not bound to disclose each separate reason for refusing payment, and if they deny liability in general terms, and invite proofs without prejudice to any defence which they may be advised to raise, there can be no waiver of a breach of warranty ; but if they specify one particular reason for refusing payment and lead the assured to believe that that alone is the issue between them they may be held to have waived other defences then open to them, and if the insurers or their authorised agents state definitely that they will not rely on a particular defence they will undoubtedly be estopped from doing so (*t*). In an American case where the action was tried a second time the company was held to be estopped from setting up technical breaches of warranty as to which they had knowledge, but did not set up the defence at the first trial (*u*).

If the conditions of the policy require any particular information to be given to the insurers it is only fair to the assured that that information should be asked for in the application form, for if it is not the condition in the policy may be overlooked ; and in an American case where the condition in the policy required that if the estate was incumbered, or if the assured was not owner in fee of his estate, it should be so stated, but no questions as to title were put in the application form, it was held that the omission was not fatal (*w*).

The doctrine of warranty as applied to contracts of insurance is the same in Scotland (*x*) and Ireland as in England.

Section V.—Fraud, Misrepresentation, and Non-disclosure by Third Parties

As a general rule in the law of contract, fraud, misrepresentation, or non-disclosure by persons who are not parties to a contract cannot affect the validity of such contract (*y*) ; although it

Generally do not affect the contract.

(*s*) *Fitchpatrick* v. *Hawkeye* (1880), 53 Iowa, 335 ; *Abrahams* v. *Agricultural* (1876), 40 U. C. Q. B. 175 ; *Ronald* v. *Mutual Reserve* (1892), 132 N. Y. 378.

(*t*) *McCormick* v. *The Royal* (1894), 163 Pa. 184.

(*u*) *Cleaver* v. *Traders' Insurance* (1889), 40 Fed. Rep. 711.

(*w*) *Dohn* v. *Farmers' Joint Stock* (1871), 5 Lans. 275.

(*x*) *Thomson* v. *Weems* (1884), 9 A. C. 671, 687.

(*y*) *Connecticut Mutual Life* v. *Luchs* (1882), 108 U. S. 498.

may be ground for proceeding against such persons for damages for deceit (*z*). This rule applies to contracts of insurance as well as to other contracts, and therefore generally it is no defence for the insurers to say that some person other than the assured or his agent made false or inaccurate statements to them or did not disclose material facts within his knowledge (*a*).

Pearl Life Assurance v. Johnson, [1909] 2 K. B. 288

Pearl Life Assurance v. *Johnson.*

In pursuance of a proposal form purporting to be signed by S. A. J., the company issued a policy under seal covenanting to pay S. A. J. a named sum upon the death of W. J. The policy recited that S. A. J. had signed a proposal form, and that such proposal was agreed to be the basis of the contract, and that if there was any untrue averment contained therein the policy should be null and void. The proposal form contained an untrue statement; but the proposal form was not in fact signed by S. A. J. nor had she any knowledge of the contents, or given any authority to make the statements. It was held that S. A. J. could recover on the policy because no proposal was made which could be said to be the basis of the contract, and the company having issued the policy and received the premiums were estopped from saying that there was no policy unless they could show that an untrue proposal was made by or with the authority of the proposer.

Misrepresentation or non-disclosure by an agent for the assured will invalidate the policy if he was (i) the general agent of the assured to effect the insurance; or (ii) the agent of the assured for some particular purpose in connexion with the effecting of the insurance; (iii) the agent of the assured in charge of the property insured.

Misrepresentation or non-disclosure by any third person will invalidate the policy where the assured has warranted that the statements of such third person are accurate or true, or that he has not concealed any material fact.

By agent to procure the insurance.

If the assured employs some one as an agent to effect an insurance for him the fraud or misrepresentation of that person in or about effecting the insurance is sufficient to vitiate the policy (*b*), even although he has made statements without the assured's authority, or even contrary to his express instructions. Such an agent must also disclose to the insurers anything material

(*z*) *Pasley* v. *Freeman* (1789), 3 T. R. 51.

(*a*) *Connecticut Mutual* v. *Luchs* (1882), 108 U. S. 498.

(*b*) *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232 (Lord Campbell, C.J., at p. 270); *Hambrough* v. *Mutual Life* (1895), 72 L. T. 140; *Cole* v. *Germania Fire* (1885), 99 N. Y. 36; *Carpenter* v. *American* (1839), 1 Story, 57.

which he knows about the risk, no matter how he has obtained that knowledge, and if he does not do so the policy is voidable, even although the assured himself was ignorant of the facts which were known to the agent (*c*). The policy will equally be voidable even if the assured has instructed his agent to disclose certain material facts to the insurers, but the agent has neglected to do so.

By agents of the assured in charge of property insured.

The assured in the case of insurance on property will probably be presumed to have not only his own personal knowledge with regard to that property, but the knowledge also of those whom he has placed in charge of it as his agents. Thus, a merchant with a large number of warehouses in different parts of the country might have little personal knowledge of the conditions affecting each one, but he would nevertheless be under an absolute duty to disclose all material facts which were known to his servant or agent in charge of the warehouse to be insured. There is, perhaps, no authority in fire insurance cases for this proposition, but it is a well-recognised principle in marine insurance (*d*), and the reason for it seems to apply equally to all insurances upon property, and perhaps to all other classes of insurance, such as guarantee or insurance on profits, where an agent in charge of the subject matter of the insurance has more intimate knowledge of material facts than the assured himself, and it is part of such agent's duty to disclose to the assured the particular facts alleged to have been concealed. The principle is laid down by Cockburn, C.J., in *Proudfoot* v. *Montefiore* (*e*), where he says—

"The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business ought to have knowledge, and that the latter will take the necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject matter of the insurance. The condition is not complied with where by the fraud or negligence of the agent the party proposing the insurance is kept in ignorance of a material fact and through such ignorance fails to disclose it" (*f*).

(*c*) *Lynch* v. *Dunsford* (1811), 14 East, 494; *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144.

(*d*) *Fitzherbert* v. *Mather* (1785), 1 T. R. 12; *Gladstone* v. *King* (1813), 1 M. & S. 35; *Proudfoot* v. *Montefiore* (1867), L. R. 2 Q. B. 511; *Blackburn* v. *Vigors* (1887), 12 A. C. 531.

(*e*) (1867), L. R. 2 Q. B. 511, 521.

(*f*) Approved by Lord Halsbury, L.C., in *Blackburn* v. *Vigors* (1887), 12 A. C. 531, 537.

Fraudulent agents.

In an American case fidelity policies were issued indemnifying a bank in respect of the defalcations of its employees. It was said that in an ordinary case such policies might be set aside on the ground that the manager of the bank had failed to disclose previous instances of infidelity on the part of his subordinates, but where the manager himself had been implicated in previous defalcations it was held that, having acted in a manner entirely opposed to the bank's interests, the bank was not responsible for his misrepresentations and concealment of the true state of affairs (*g*).

Whether innocent non-disclosure by agent of a loss avoids the policy or creates an exception.

It has been held in two marine cases (*h*) that where an agent in charge of property, acting without fraud, fails to disclose a partial loss, and the policy is effected in ignorance of that loss that the effect of the non-disclosure is not to make the contract voidable, but to create an implied exception from the risk in respect of the loss which has occurred. The soundness of these decisions has, however, been doubted (*i*), and the principle is not likely to be extended to other branches of insurance.

By "life" or referees.

It cannot be stated as a general rule of law that the misrepresentation, fraud, or non-disclosure of a life (not being the assured) or referee avoids a life policy. It may do so, but on one of two grounds only; either (i) because the life or referee is acting as agent of the assured; or (ii) because there is some condition in the contract by which the truth of the statements made by the life or referee are warranted or made the basis of the contract (*k*). Some of the earlier cases seem at first sight to support the theory that in the case of an insurance upon the life of another the "life" is necessarily the agent of the assured for the purpose of answering such questions as the insurers may think proper to ask, and that the policy is therefore voidable if the "life" answers any of these questions inaccurately. In some of these cases there is a distinct expression of judicial opinion that the "life" is the agent of the assured for this purpose. In *Everett* v. *Desborough* (*l*) the "life" made a false statement as to his "usual medical attendant," and the Court in setting aside the policy proceeded partly on the ground

(*g*) *American Surety* v. *Pauly* (1896), 72 Fed. Rep. 470.

(*h*) *Gladstone* v. *King* (1813), 1 M. & S. 35; *Stribley* v. *Imperial Marine* (1876), 1 Q. B. D. 507.

(*i*) Arnould, 7th ed., sec. 585.

(*k*) *Venner* v. *Sun Life* (1890), 17 Can. S. C. 394.

(*l*) (1829), 5 Bing. 503.

that the "life" must be considered to be the agent of the assured: but partly also on the ground that there was a condition precedent in the policy that the usual medical attendant of the life insured must be truly declared. Also in *Maynard* v. *Rhodes* (*m*), *Morrison* v. *Muspratt* (*n*), *Huckman* v. *Fernie* (*o*), *Swete* v. *Fairlie* (*p*), and *Rawlins* v. *Desborough* (*q*), the opinion of some of the judges at least appears to have been that the assured must be held responsible for any false statements made by the "life" although not for mere non-disclosure by him of material facts. In a Scottish case, *Forbes* v. *Edinburgh Life* (*r*), Lord President Hope thought that even non-disclosure by the "life" would be fatal to the policy, and in *Rawlins* v. *Desborough* (*q*), Denman, C.J., thought that wilful concealment by tbe "life" would be fatal. If, however, all the cases are carefully examined, it will be found that either (i) there was an express condition in the policy that the statements made by the life should be accurate (*s*); or (ii) the facts were probably known to the assured as well as the "life," and therefore there was non-disclosure by the assured himself (*t*); or (iii) the questions were put to the assured and by him handed on to the "life" to answer on his behalf (*u*). There is, therefore, no authority for saying that the "life" is necessarily the agent of the assured for any purpose. In the case of statements made by referees, that is by medical men or friends, whom the assured is asked to name so that the insurers may make what inquiries they think proper as to the health and habits of the "life," there has been a tendency to consider them as necessarily agents of the assured (*x*). In *Lindenau* v. *Desborough* (*y*) the policy was set aside apparently on the ground that the former medical attendants of the "life" had made false statements or failed to disclose material facts in answer to questions put to them. The report, however, of this case does not show whether there was any express condition in the policy, or whether the assured himself was aware

(*m*) (1824), 5 Dow. & R. 266.
(*n*) (1827), 4 Bing. 60.
(*o*) (1838), 3 M. & W. 505.
(*p*) (1833), 6 C. & P. 1.
(*q*) (1840), 2 Mood. & Ry. 328.
(*r*) (1832), 10 S. 451.
(*s*) *Maynard* v. *Rhodes* (1824), 5 Dow. & R. 266; *Everett* v. *Desborough* (1829), 5 Bing. 503; *Forbes* v. *Edinburgh Life* (1832), 10 S. 451. In practice statements made by the life are usually warranted or made the basis of the contract.

(*t*) *Morrison* v. *Muspratt* (1827), 4 Bing. 60; *Huckman* v. *Fernie* (1838), 3 M. & W. 505.

(*u*) *Huckman* v. *Fernie* (1838), 3 M. & W. 505, where the insurance was effected by the husband on the life of his wife.

(*x*) *Rawls* v. *American Mutual* (1863), 27 N. Y. 282.

(*y*) (1828), 8 B. & C. 586; 3 Man. & Ry. 45.

of the facts alleged to have been misrepresented or concealed, and from the fact that Brougham, in moving for a new trial on behalf of the assured, did not apparently take the objection that the misrepresentation or non-disclosure, if any, was not that of the assured, but of the referee, and from the fact that the judgments lay stress on the duty of the assured to make full disclosure, it may be inferred that the Court thought that the assured himself knew or ought to have known of the state of facts which were not disclosed. In *Rawlins* v. *Desborough* (*z*) the plea of the defendants, and the direction of Denman, C.J., to the jury, proceed apparently on the assumption that at least a wilfully false statement by the referee would vitiate the policy, but there is no discussion or actual decision upon the point.

Primâ facie does not avoid the policy.

Neither as to the "life" nor referee, therefore, is there any conclusive authority to the effect that the policy is necessarily affected by their false statements or non-disclosure. On general principle there is no foundation for such a rule, and what is submitted to be an accurate statement of the law is contained in the judgment of Lord Campbell, C.J., in *Wheelton* v. *Hardisty* (*a*). In that case the insurance was upon the life of another, and the insurers alleged that the life and medical and other referees had been guilty of fraudulent misrepresentations. The assured, in his application, had made a declaration that he believed the answers given by the life and medical referees to be true. It was argued that the life and referees were the agents of the assured at least for the purpose of answering the questions put to them. The Court held that the life and referees were not necessarily the agents of the assured, and in particular that they could not be held to be so when the assured was only asked to state his belief as to the truth of their answers. Lord Campbell, C.J., said, in reference to the previous authorities—

"On behalf of the defendants it has been very powerfully argued, before us, that the person whose life is to be insured (as he is usually called the 'life') and the referees are always to be considered, if not the agents of the assured to effect the policy, at least the agents of the assured in giving answers to all material questions which may be put to them respecting the matters to which they may properly be interrogated. Although this doctrine has some sanction from language which has been used by judges, it seems to me to be contrary to principle; and the decisions cited in support of it admit of an

(*z*) (1840), 2 Mood. & Ry. 328. (*a*) (1858), 8 E. & B. 232.

explanation which leaves me at liberty to condemn it. A policy may, no doubt, be framed which shall make the assured liable for any material misrepresentation or concealment by the life or the referees; but what we have to consider is whether when the policy contains no express condition for this purpose, and is made on a declaration by the assured that they believe the statements of the life and the referees to be true, the life and referees are still the agents of the assured in the manner contended for. In the first place, it seems rather strange if they are employed, not in any respect to negotiate or effect the insurance, but only to give information as to facts exclusively known to themselves, they should be denominated agents. It often happens that the assured have never seen the life and are wholly unacquainted with the state of his health, and with his habits. But an agent is supposed to do what could be done by the principal were the principal present. A more serious objection arises from the consideration that this doctrine would entirely prevent a life policy from being a security upon which a man could safely rely as a provision for his family, however honestly and however prudently he may have acted when the policy was effected. But the assurer and assured being equally ignorant of material facts to influence their contract, if the assurer asks for information and the assured does his best to put the assurer in a situation to obtain the information and to form his own opinion as to whether the information is sincere, can it be permitted where the assurer, without any blame being imputable to the assured, has allowed himself to be deceived, that he shall be able to say to the assured, 'You warranted all the information I received to be true; and having received your premiums for many years now the life drops, and I tell you I was incautious, and the policy I gave you is a nullity'? The *uberrima fides* is to be observed with respect to life insurances as well as marine insurances. The assured is always bound not only to make a true answer to the questions put to him, but spontaneously to disclose any fact exclusively within his knowledge which it is material for the assurer to know; and any fraud by an agent employed to effect the insurance is the fraud of the principal; but there is no analogy between the statements of the life or the referees in the negotiation of a life insurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy."

Where debtor or other person procures a policy in his own interest payable to another.

Where an insurance company issue a guarantee or fidelity policy they may be approached, not by the creditor or employer whom they are going to insure, but by the debtor or employee. The latter has to procure a policy in favour of the former as a condition of the credit or employment. In such cases the debtor or employee is not necessarily the agent of the creditor or employer, for the purpose of effecting the insurance, and therefore his fraud does not avoid the policy as against the creditor employer.

Comptoire Nationale v. *Law Car and General*.

Comptoire Nationale v. Law Car and General (*b*)

The plaintiffs, as bankers, had made advances to certain merchants, O. Brothers, to enable them to fulfil a contract for the delivery of coal to the Danish Government. As a condition precedent to further advances the bank

(*b*) Bray, J., October 21st, 1908; Court of Appeal, June 10th, 1909.

required security, and O., a member of the merchants' firm, said he would procure a policy. He procured a policy from the defendants, indemnifying the bank against loss consequent upon O. Brothers failing to fulfil their contract with the Danish Government, and in the course of the negotiations made a false statement to the defendant's manager as to his financial position. Mr. Justice Bray held that the fraud of O. did not affect the bank as O. was not their agent for the purpose of making representations. He said, "It was O.'s affair to get this policy. He wanted it in order that the advances might be continued. He could go to what insurance company he liked, provided the policy eventually turned out satisfactorily; it was quite immaterial to the plaintiffs what premium he gave or agreed to give, quite immaterial what the conditions were, provided the policy, when it was produced, was a satisfactory one, and therefore it seems to me that it would be entirely wrong to conclude from this that the plaintiffs constituted O. their agent. No authority was cited for that proposition except the case of *Wheelton* v. *Hardisty*, which really did not decide anything of the kind, but hinted that, under certain circumstances, a person who negotiated might be the agent of the person in whose favour the policy was eventually given, but it did not say under what circumstances, and no opinion was expressed at all and no authority, except that one was cited, and I know of none for that proposition. But there is a very familiar case that arises every day: A man is asked to lend money, and the proposed lender says, 'I must have a guarantee or security.' 'Very well,' says the intending borrower, 'I will try and get one,' and thereupon he may bring either the surety himself, or he may bring a document signed by the surety. Is the debtor or intending borrower the agent of the lender to make representations? Surely not." This judgment was affirmed in the Court of Appeal. Vaughan Williams, J., said, "It is said that O. was acting as agent for the bank. In my opinion there is nothing to justify such a finding of fact. The proper conclusion is that O., wanting to persuade the bank to render him financial assistance, and finding that he could not get it without security, he went on his own account to get such security as would be acceptable to the bank." Fletcher Moulton, L.J., said, "It all turns on one point: was O. agent or principal in negotiating the contract? If he had been agent he would have had authority to make the bank liable to pay the consideration, but it is clear that he had no such authority; he, as debtor, was bound to pay the premiums on the policy which he obtained." And Buckley, L.J., said, "I do not think he was agent any more than a lessee is who covenants to obtain an insurance in the name of the lessor."

Fraud of debtor, lessee, or employee *primâ facie* no defence.

Primâ facie, therefore, it would seem that when a debtor, lessee, or employee procures an insurance company to issue a policy insuring his creditor, lessor, or employer, it is no defence for the insurance company against the assured to say that the policy was procured by the fraudulent mis-statements of the person who procured it, but the express conditions of the policy may make it voidable on the ground of any fraud or misrepresentation on the part of the applicant (*c*).

(*c*) *Venner* v. *Sun Life* (1890), 17 Can. S. C. 394. Such a condition ought to be inserted for the proper protection of the office.

Fraud or mistakes by agents of the company.

Very difficult questions arise where the misrepresentation or concealment is the fault not of the applicant or his general agent, but of the person who acts as the company's agent for the purpose of receiving proposals. The information given to the agent by the applicant may be full and accurate, but the agent may, in filling up the proposal which is to be forwarded to the head office, make omissions or mistakes. If the agent was the company's agent for all purposes, the company would clearly be responsible, but for the safety of the company the agent's authority is necessarily limited, and these questions depend (1) on the extent of the agent's actual or apparent authority from the company; (2) on the extent to which the knowledge of an agent is to be imputed to the principal. As to the authority of the agent the ordinary local or canvassing agent of an insurance company with authority to receive and forward proposals, but not to make contracts, has apparent authority to negotiate and settle the terms of a proposal (*d*). His authority is not limited merely to receiving the written proposal completed by the assured, but includes the duty of explaining the questions to an intending applicant, and perhaps putting the answers when received into proper shape (*e*). This is the normal authority of the agent, but it may be extended or restricted by special circumstances in the case. As to the rule which imputes the knowledge of an agent to his principal (*f*) this does not apply (i) where there is no duty to communicate the matter; (ii) where the knowledge is acquired by the agent otherwise than in the course of his agency; (iii) where the agent is acting in fraud of his principal for his own private ends.

Filling up the proposal.

Applying these principles to the case of a mistake or wilful misrepresentation made by the company's agent, it is clear that, *primâ facie*, when such agent fills up the proposal form in the presence of, and from statements then made by, the applicant, and obtains the applicant's signature to the declaration, he is acting as the agent of the company. From this the following general rules may be deduced:

Explaining the questions.

(i) If the agent, in explaining the meaning of the questions, puts a wrong construction upon them, the question is whether the

(*d*) *Bawden* v. *London, Edinburgh, and Glasgow*, [1892] 2 Q. B. 534.

(*e*) *Biggar* v. *Rock Life*, [1902] 1 K. B. 516.

(*f*) *Bawden* v. *London, Edinburgh, and Glasgow*, [1892] 2 Q. B. 534; *Holdsworth* v. *Lancashire and Yorkshire Insurance* (1907), 23 T. R. 521; *May* v. *Buckeye Mutual* (1870), 25 Wis. 291; 3 Am. R. 76.

answer is true in relation to the question as explained. This particularly applies to the case of questions put by a medical examiner, where such examiner is directed to explain the questions (*g*) : but it would seem to apply also to questions put by an agent receiving the proposal. If such agent has authority to negotiate and settle the terms of the proposal he must, by implication, have some authority to explain the matter to the applicant (*h*).

Misunderstanding the assured.

(ii) If the agent, having extracted the necessary information, puts down what he thinks represents the answer, but in the process of translating the colloquial language of the applicant into official form misrepresents what the applicant did in fact say, the question is what in fact was the answer given by the applicant (*i*).

Obvious mistakes.

(iii) If the agent makes an obvious error such as putting down " no " when the applicant said " yes," or " 50 " when the applicant said "60," then the applicant cannot be excused, because although the mistake was the mistake of the agent, yet the applicant having signed the proposal must be taken to have read the answers written down, and to have adopted them (*k*), and as he was not in any way misled by the agent, there can be no equity in his favour. If it is said in such a case that the knowledge of the agent is the knowledge of the principal and that therefore the company must be taken to have known what the actual statement was, the answer is that the agent had no duty to communicate this matter otherwise than by forwarding the applicant's proposal.

Fraudulent misstatements.

(iv) If the agent, in fraud of the company for the purpose of obtaining his commission, wilfully inserts an erroneous answer, there is a misrepresentation for which the assured must be deemed responsible if he has signed the proposal or warranted the truth

(*g*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863; *Connecticut General McMurdy* (1879), 89 Pa. 363 ; *Mutual Life* v. *Selby* (1896), 72 Fed. Rep. 980 ; *New York Life* v. *Russell* (1896), 77 Fed. Rep. 94.

(*h*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow. 255, 262 ; *Wheelton* v. *Hardisty* (1858), 8 E. & B. 232, 276 ; *Insurance Co.* v. *Wilkinson* (1871), 13 Wall. 222 ; *Phœnix Insurance* v. *Warttemberg* (1897), 79 Fed. Rep. 245 ; *Standard Life and Accident* v. *Fraser* (1896), 76 Fed. Rep. 705 ; *Carollton Manufacturing Co.* v. *American Indemnity* (1904), 124 Fed. Rep. 25.

(*i*) *Brewster* v. *National Life* (1872), 8 T. L. R. 648 ; *Insurance Co.* v. *Mahone* (1874), 21 Wall. 152 ; *New Jersey Mutual* v. *Baker* (1876), 94 U. S. 610 ; *Eames* v. *Home Insurance* (1876), 94 U. S. 621 ; *Mutual Benefit* v. *Robison* (1893), 58 Fed. Rep. 723 ; *Columbia Insurance* v. *Cooper* (1865), 50 Pa. 331 ; *May* v. *Buckeye Mutual* (1870), 25 Wis. 291 ; 3 Am. R. 76.

(*k*) *Biggar* v. *Rock Life*, [1902] 1 K. B. 516 ; *New York Life* v. *Fletcher* (1885), 117 U. S. 519 ; *Macmillan* v. *Accident Insurance*, [1907] S. C. 484.

of the statements (*l*). He cannot escape on the ground that he was misled, because, if the agent did mislead him, the agent was not acting as the company's agent, but for his own private ends, and there is, therefore, no equity against the company. But where the agent, after signature of the application form by the applicant, fraudulently inserted a false statement without the knowledge or authority of the applicant, the company was held to be liable (*m*).

Proposal signed in blank.

(v) Another class of case is where the applicant gives the agent the necessary information, and at the agent's request signs the proposal in blank and leaves it to the agent to complete. Here the agent is exceeding the ordinary ostensible authority of the company, and if he fills in the proposal form in this irregular way he must probably be deemed to be acting as the agent of the assured, so as to render the assured responsible for all mistakes (*n*). There are, however, some American cases where the agent, under such circumstances, has been held to have been acting for the company so as to make the company responsible for his mistakes (*o*).

Proposal filled in by agent from his own knowledge.

(vi) Where the agent fills in the particulars from his own knowledge, or from his own inquiries and investigations, and then procures the applicant's signature, he is not acting in the regular manner permitted by his authority, and if the applicant chooses to adopt without question what the agent has inserted he must be responsible (*p*). But if the information is obtained by the agent for the purpose of making a separate report to the company as where the applicant on a fire risk says to the agent, "Come and look at the premises and judge the risk for yourself," knowledge must be imputed to the company, even although he has failed to make the report or has reported the matter inaccurately, and, if knowledge is so imputed, the company cannot avail themselves of the defence of misrepresentation (*q*).

(*l*) *New York Life* v. *Fletcher* (1885), 117 U. S. 519; *U. S. Life* v. *Smith* (1899), 92 Fed. Rep. 503; *Reid & Co.* v. *Employers' Accident* (1899), 1 F. 1031; *Maier* v. *Fidelity Mutual* (1897), 78 Fed. Rep. 566.

(*m*) *Sawyer* v. *Equitable Accident* (1890), 42 Fed. Rep. 30.

(*n*) *Billington* v. *Provincial Insurance* (1879), 3 Can. S. C. 182; *Sowden* v. *Standard* (1880), 5 Ont. A. R. 290; *Shannon* v. *Gore Dist. Mut.* (1878), 2 Ont. A. R. 396.

(*o*) *Brown* v. *Metropolitan Life* (1887), 8 Am. S. R. 894; *Grattan* v. *Metropolitan Life* (1880), 80 N. Y. 281.

(*p*) *Biggar* v. *Rock Life*, [1902] 1 K. B. 516; *Life and Health* v. *Yule* (1904), 6 F. 437; *Pottsville Mutual Fire* v. *Fromm* (1882), 100 Pa. 347. But see *Holdsworth* v. *Lancashire and Yorkshire Assurance* (1907), 23 T. L. R. 521.

(*q*) *Insurance Co.* v. *Wilkinson* (1871), 13 Wall. 222; *In re Universal Non-Tariff Fire* (1875), 19 Eq. 485; *Somers* v. *Athenæum* (1858), 9 Lr. Can. R. 61; *Weber* v. *Metropolitan* (1895), 172 Pa. 111.

When the answers are warranted.

Even where the answers on the proposal are warranted true the assured is not bound if he can show some equity against the company, such as the fact that he was misled by the company's agent acting within his authority (*r*). Also where knowledge can be properly imputed to the company the fact that there is a warranty may become immaterial because, if the company issued the policy with knowledge that the facts were not as warranted, the warranty would be deemed to be waived (*s*).

Condition that agent is agent of the applicant.

In order to strengthen the company's position in cases where the assured alleges that the mistake has been made by the company's agent it is common to insert in the proposal form a notification to the effect that the agent filling up the proposal form is the agent of the applicant, and not of the company. But this does not necessarily mean that he is the agent of the applicant for all purposes in connexion with the proposal, and thus in Canada it was held that notwithstanding this clause the agent was still the company's agent to explain the questions, and if he misled the agent by an erroneous explanation the company was responsible (*t*). And this clause, standing alone, does not prevent the assured from saying that the agent had knowledge of the true facts, and that the circumstances were such that the knowledge should be imputed to the company (*u*).

Condition that knowledge of agent is not knowledge of company.

A fuller measure of protection is given to the company by the further condition that neither the knowledge of, nor statements made to, the agent shall be binding on the company unless embodied in writing on the proposal form. This condition printed on the proposal form appears to be effective as an answer to the plea that the agent's knowledge is the knowledge of the principal (*x*).

Onus of proof.

If the assured has signed the proposal form or warranted the accuracy of the statements therein the onus of proof is on him to show that he did not, in fact, make the answer written down (*y*). The proposal form is *primâ facie* evidence against the assured as to what he did say. But where the questions are put by a medical

(*r*) *Insurance Co.* v. *Mahone* (1874), 21 Wall. 152; *McNally* v. *The Phœnix* (1893), 137 N. Y. 389.

(*s*) *Naughter* v. *Ottawa Agricultural* (1878), 43 U. C. Q. B. 121; *Bawden* v. *London, Edinburgh, and Glasgow*, [1892] 2 Q. B. 534.

(*t*) *Graham* v. *Ontario Mut.* (1887), 14 Ont. R. 358.

(*u*) *Naughter* v. *Ottawa Agricultural* (1878), 43 U. C. Q. B. 121.

(*x*) *Biggar* v. *Rock Life*, [1902] 1 K. B. 516; *Macmillan* v. *Accident Insurance*, [1907] S. C. 484; *Bleakley* v. *Niagara District* (1869), 16 Grant, 198; *Peek* v. *Agricultural Insurance* (1890), 19 Ont. R. 494; *New York Life* v. *Fletcher* (1885), 117 U. S. 519.

(*y*) *Parsons* v. *Bignold* (1846), 15 L. J. Ch. 379.

examiner who is instructed to explain them, the printed form is not evidence of the questions put, that is to say the printed questions plus the explanation; and therefore the printed form with the written answers signed by the assured is not by itself evidence that the assured has made an untrue answer (*z*).

Bawden v. London, Edinburgh, and Glasgow Life, [1892] 2 Q. B. 534

Bawden v. London, Edinburgh, and Glasgow Life.

Application was made to a local agent for accident insurance. The applicant was illiterate and almost unable to read or write, but he could write his name. He had lost the sight of one eye, and of this the agent was aware. The agent produced an accident proposal form and filled it up to the applicant's dictation, and the applicant then signed it. The proposal contained the following declaration: "I am in good health, free from disease, not ruptured and have no physical infirmity, nor are there any circumstances that render me peculiarly liable to accidents . . . and I agree that the statements contained in the proposal shall form the basis of the contract." In the margin of this clause was the following note: "If not strictly applicable particulars of any deviation must be given at back." No mention was made of the fact that the applicant had only one eye and the agent did not communicate the information to the company who accepted the proposal in ignorance. The policy recited the fact that a proposal had been made and that it was agreed that it should be the basis of the contract. It insured *inter alia* against irrecoverable loss of sight in both eyes. During its currency the assured accidentally lost the sight of his one remaining eye. The Court held that he was entitled to recover in respect of a loss of sight in both eyes. The agent was the agent of the company to negotiate and settle the terms of a proposal. He saw that the applicant had only one eye, and therefore the proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company. If the agent had performed his duty to the company he would have written on the back of the form the "deviation" in respect of the eye. The condition in the policy that the statements in the proposal were to form the basis of the contract was not applicable because knowledge was to be imputed to the company that the applicant had only one eye.

Biggar v. Rock Life, [1902] 1 K. B. 516

Biggar v. Rock Life.

A local agent solicited the applicant to insure. He was reluctant to do so, but was ultimately persuaded during a game of billiards with the agent and the company's inspector of agents. On his consenting to make the application the agent filled in the proposal form without further consulting the applicant, and the applicant signed it without reading it or knowing its contents. Several of the answers written down by the agent were untrue, and he acted either with gross negligence or fraudulently, so as to secure his commission. The form contained the usual declaration that the statements therein should form

(*z*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863.

the basis of the contract, and the policy was expressed to be granted "on the express condition of the truthfulness of the statements contained in the proposal." A further condition was as follows: "Any of the circumstances in relation to these conditions coming to the knowledge of any local agent shall not be notice to or be held to bind or prejudicially affect the company." Wright, J., held that the assured was not entitled to recover. The policy was *primâ facie* avoided by the condition as to the truth of the answers. If a person chooses to sign a proposal form without reading it he must be treated as having adopted it. The agent may have been the company's agent to put the answers into shape, but not to invent answers. The very basis of the policy was the statements in the proposal, and these were false, therefore the policy could not stand. The company never knew of the false statements and there was no equity against them.

Although an agent has implied authority to explain the proposal and settle the erms in which the assured's answers should be expressed, he has no authority to explain the terms of the contract made by the company so as to bind the company to a contract other than that expressed in the *interim* receipt or policy (*c*).

Section VI.—Representations and Warranties in Fire Policies

Description of premises.

It is a little doubtful how much is to be inferred from the mere description in a fire or burglary policy of the premises or goods insured. It may be put in three ways: (i) that the description is a representation of the state of the premises or goods; (ii) that the description is a definition of risk; (iii) that the description is a warranty that the premises or goods shall correspond thereto.

Representation.

If the description is contained only in the application, and is not incorporated into the policy either verbatim or by reference, it is merely a representation, and, if true at the commencement of the risk, subsequent alteration will not affect the validity of the policy (*e*).

Definition of risk,

But if the description is embodied in the policy, either actually or by reference, it has at least the force of a limitation of the risk to be run. In this view the premises or goods will be covered by the policy so long, but only so long, as they comply with the description, and if the description is considered merely as a limitation of the risk and not a warranty the insurer will not be wholly discharged, but the policy will

(*c*) *Levy* v. *Scottish Employers' Insurance* (1901), 17 T. L. R. 229; *Union National* v. *German Insurance* (1896), 71 Fed. Rep. 473.

(*e*) *Cumberland Valley Mutual* v. *Mitchell* (1864), 48 Pa. 374; *Frisbie* v. *Fayette* (1856), 27 Pa. 325; *Daniels* v. *Hudson River Fire* (1853), 66 Mass. 416.

merely cease to attach until the property once more corresponds to the description. Thus, where goods are insured a description of their locality or situation constitutes a limitation of the risk; but is not usually to be construed as an absolute warranty, so that if they are removed the policy will merely cease to attach to these particular goods. In so far, however, as the construction and user of premises is concerned, the tendency seems to be to construe the description as a warranty rather than as a mere limitation of the risk. In this view once the warranty is broken the insurer is discharged absolutely, and the risk will not subsequently reattach by the property being brought into conformity with the description (*f*). or warranty.

It is not quite clear whether the warranty imported by the description is an absolute warranty that the premises do not and will not in any respect vary from the description, or whether the warranty is merely that the premises do not and will not vary from the description in such a manner as to increase the risk. In marine insurance the Courts have construed the description of the property insured as an absolute warranty which must be literally fulfilled. In fire cases, however, the English decisions incline rather to limit the warranty so as to prohibit only variations increasing the risk. In *Dobson* v. *Sotheby* (*g*) Lord Tenterden appears to have taken this view. In directing the jury, he says— Nature of warranty implied from.

"If the property insured has not been correctly described the defendants certainly are not liable: but I do not think in this case there is any misdescription which will discharge them. The word 'barn' is not the most correct description of the premises; but it would give the company substantial information of their nature; there would be no difference in the risk, and the insurance would have been at the same rate whether the word 'barn' or a more correct phrase had been used. I think therefore they are substantially well described."

In *Sillem* v. *Thornton* (*h*) the property insured, which was situated in California, was described as a two-storied house. The description was accurate when it was sent off from California, but before the insurance was effected in London the assured had added another storey. The Court held that there was a breach of warranty. Lord Campbell, C.J., said—

"We are now to consider the effect of the description of the premises insured which has been introduced into the policy. And, in the first place, we

(*f*) *Newcastle Fire* v. *Macmorran* (1815), 3 Dow. 255.

(*g*) (1827), Moo. & M. 90.

(*h*) (1854), 3 E. & B. 868.

are of opinion that it amounts to a warranty that the premises corresponded with it on the date when the policy was effected or at least that the premises had not been altered by the assured in the intermediate time, so as to increase the risk of the insurer. . . . But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do anything to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter" (*i*).

Therefore, so far as the decision in *Sillem* v. *Thornton* (*k*) goes it may be that the warranty imported by description is no more than a warranty that the premises will not vary from the description in such a manner as to increase the risk. If this view is right a house might be described as slate-roofed when in fact it was thatched, and it would be a question for the jury to say whether the thatched roof increased the risk. In Ireland, however, in *Quin* v. *National* (*l*) the Court held that the warranty imported by description is absolute and that increase of risk is immaterial. Following the English marine insurance cases, they held that, "whatever appears on the face of the policy, whether on the body of it or on the margin, descriptive of the premises is a warranty, and must be literally true." In that case the premises insured were described as "a dwelling house occupied by a caretaker," and it was held that if they were not so occupied the policy must be void, and no question could be raised as to whether the occupation was material to the risk or not. If there is an express condition that any alterations increasing the risk shall render the policy void, the description may operate as an absolute warranty as to the condition of the premises at the commencement of the risk, but as to the future the express condition precludes any implied warranty (*m*).

Alterations increasing the risk but not affecting the description.

Apart from special conditions in the policy it is doubtful whether an alteration in the premises which does not affect their description, although it increases the risk, will affect the contract. Suppose, for instance, a house was described merely as "a dwelling house built of brick," and during the currency of the policy the assured added two attic rooms to the top storey. The risk is probably thereby increased, but the premium would be the same on the same amount of insurance.

(*i*) 3 E. & B. at pp. 881, 882.
(*k*) (1854), 3 E. & B. 868; and see *Stokes* v. *Cox* (1856), 1 H. & N. 320, 533.
(*l*) (1839), Jones & Carey, 316; Joy, C.B., at p. 340.
(*m*) *Stokes* v. *Cox* (1856), 1 H. & N. 320, 533.

Does the slight increase of risk discharge the insurer? It is submitted that if the insurance was effected entirely according to the description given by the assured it will remain valid so long as the premises correspond to the description; but if the insurer made an examination of the premises before he took the risk, then any alteration involving an increase of risk would avoid the policy, whether or not it had the result of making the premises vary from the description. In the one case the insurer has insured what is described in the policy and he cannot complain so long as it does not vary from that description. In the other case he has insured what he or his agent saw, that is to say, a specific house, and it would be unreasonable to hold him to the insurance when the house was altered so as to increase the risk. In *Thomson* v. *Hopper* (*n*), Willes, J., in a marine insurance case said—

"In effect, there being no violation of the law and no fraud in the assured, an increase of risk to the subject matter of insurance, its identity remaining the same, though such increase of risk be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance. I may add that there is a case of *Sillem* v. *Thornton* (*o*), which turned mainly on a question of identity of the subject-matter intended to be insured at the time of the insurance, and may be sustained on that ground notwithstanding our present decision. That part of the judgment in that case which discusses the above point was not called for by the facts; and if it was intended to negative the proposition just stated we ought to overrule it."

In an American fire case it was held that, in the absence of express conditions, the erection of contiguous buildings, although increasing the risk, did not affect the validity of the policy (*p*).

Alteration in user of premises.

In the case of an alteration in the user of the premises the general rule seems to be that if it does not differ from the user as described in the policy, and a change of user is not expressly prohibited, such alteration does not affect the policy, even although it may increase the danger (*q*).

Baxendale v. Harvey (1859), 4 H. & N. 445

Baxendale v. *Harvey.*

The insurance was upon a warehouse. The assured, who were carriers, had a steam engine on the premises, which they ordinarily used for hoisting goods. After the insurance was effected they began to use it also for grinding provender for their horses, and it was held that, even although the danger of fire might

(*n*) (1858), E. B. & E. 1038.
(*o*) (1854), 3 E. & B. 868.
(*p*) *Young* v. *Washington Mutual* (1853), 14 Barb. N. Y. 545; *Gates* v. *The Madison Mutual* (1851), 5 N. Y. 469.
(*q*) *Shaw* v. *Robberds* (1837), 6 A. & E. 75.

thereby be increased, the policy was not avoided (*r*). Pollock, C.B., said, "This is a mere increase of danger. It is like the case of a person who has an oven on his premises using it for some other purpose . . . A person who insures may light as many candles as he pleases in his house though each additional candle increases the danger."

So in a dwelling house, unless there is any express provision to the contrary, there is nothing to prevent the assured inserting and using additional stoves or fire grates in his house, although each one increases the danger.

Pim v. Reid (1843), 6 Scott, N. R. 1004

Pim v. *Reid.*

The insurance was on a paper machine, engines and machinery in a mill. The premises were used at the time for a paper manufactory, but during the currency of the policy the assured started the business of a cleaner and dyer of cotton waste, which was of a more hazardous description, and a loss occurred. It was held that in the absence of any express condition prohibiting such change in user the policy was not thereby vitiated. Tindal, C.J., said, "It appears to me upon general principles that a policy of insurance is not rendered void by an alteration in the use to which the premises are put after the execution of the policy." And Maule, J., said, "In the first place it has been contended that independently of the express provisions, if at any time after the insurance is effected a hazardous trade is carried on, or goods of a hazardous description are deposited on the premises, the policy is void. But I do not conceive the law to be so. Apart from fraud the insurance company must pay for any loss or damage to the goods insured notwithstanding any variation of circumstances, unless in the conditions upon which they agree to insure they choose to provide for it."

In America it has been held that apart from express condition change of tenancy from a careful to a careless tenant does not affect the validity of the policy (*t*).

Warranty as to absolute accuracy of description.

The effect of misdescription or subsequent alteration of the risk usually depends on the express conditions in the policy. There may be a warranty that the description is accurate, and if so, there can then be no doubt that any inaccuracy will avoid the policy whether or not the variation from the description is material to the risk. So, if there is a warranty that the risk comes within a particular class defined in the policy and it does not do so, the policy is vitiated, even although a jury may think that the variation was immaterial.

(*r*) *Baxendale* v. *Harvey* (1859), 4 H. & N. 445.

(*t*) *Gates* v. *The Madison Mutual* (1851), 5 N. Y. 469.

Newcastle Fire v. Macmorran (1815), 3 Dow. 255

Newcastle Fire v. *Macmorran.*

The premises insured were warranted to be within class 1 of the risks defined in the policy. Class 1 was defined as including buildings which had *inter alia* "not more than two feet of stove pipe." The building contained a stove which had more than two feet of metal pipe, and the judges of the Court of Session in Scotland thought the difference was immaterial. The House of Lords, however, held that whether material or not the breach of warranty avoided the policy.

Warranty against material misdescription.

But the usual condition is against any material misdescription or misstatement, and when the condition is so framed no variation from the description or misrepresentation will affect the validity of the policy unless material to the risk. And thus, in *In re Universal Non-Tariff* (*x*), the buildings were described as roofed with slate. In fact, a small part had a felt roofing, but the Court held that the misdescription was not material, and the policy was therefore held to be valid.

The material time at which all representations and warranties *de presenti* must be satisfied is the time when the risk attaches or the policy is issued. Conversely all conditions relating to subsequent alterations and change of risk refer to a period after the risk has attached or after the policy has been issued (*y*).

Condition against alterations increasing risk.

As regards subsequent alterations the usual condition is against any alteration increasing the risk, and it then becomes a question of fact for a jury whether or not the alteration increased the risk, and no alteration which does not increase the risk will affect the policy even although it may vary the property from the description.

Stokes v. Cox (1856), 1 H. & N. 320

Stokes v. *Cox.*

To the description of the premises there was added "no steam engine employed on the premises," and by the seventh condition indorsed on the policy it was provided that "if the risk is increased by any alteration of the materials composing the building, or by the erection of any stove, coakel, kiln, furnace, or the like, the introduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances" the insurance should be void. The Court held that whatever the meaning and effect of "no steam engine employed on the premises" might have been had these words stood alone, when read in the light of the conditions they could mean nothing more than that no steam engine was employed on the premises at the time the policy was executed.

(*x*) (1875), L. R. 19 Eq. 485.
(*y*) *Fourdrinier* v. *Hartford Fire* (1865), 15 U. C. C. P. 403.

The seventh condition provided fully for future alterations, and the introduction of a steam engine which did not increase the risk was not a breach of that condition.

The above case shows that where there are express conditions dealing fully with possible alterations to the premises these conditions alone will be the test of what may or may not be done, and additional restrictions not contained therein cannot be implied from the description of the property.

Meaning of alteration increasing risk.

When the condition prohibits "alterations by which risk of fire may be increased," the question to be considered in the case of an alteration in construction is whether the alteration is such as to increase the risk during the normal and ordinary use and occupation of the premises. An increase in the size of a building must almost necessarily increase the risk, whether the building is occupied or not, since the area throughout which it is possible for a fire to arise is increased. But some alterations are such that they cannot possibly increase the risk unless there is user. Thus the mere insertion into the premises of an additional furnace or steam engine does not in itself increase the risk. In such cases the question is, not whether the alteration increases the risk, but whether the user of it in the ordinary way increases the risk, and if it is not used at all or on an extraordinary occasion only for some temporary purpose, there is no breach of warranty (*z*). The question as to whether or not there is an increase in the risk is a question of fact to be decided by the jury (*a*) with the assistance of expert evidence (*b*). If, however, the policy defines the risks in classes, or as non-hazardous, hazardous, *et cetera*, facts which take the risk out of one class and put it into a more hazardous class must probably be deemed to increase the risk, whether the jury are of that opinion or not (*c*). Sometimes, where there are extensive alterations, the risk may be increased in one part and decreased in another. If one alteration increases the risk, and another distinct and separate alteration decreases the risk, the increase of risk will discharge the insurer, and the assured cannot set off against it the decrease of risk in another part of the

(*z*) *Barrett* v. *Jermy* (1849), 3 Ex. 535.

(*a*) *Todd* v. *Liverpool, London, and Globe* (1868), 18 U. C. C. P. 192; *Reid* v. *Gore* (1853), 11 Q. B. U. C. 345; *Martin* v. *Capital* (1892), 85 Iowa, 643; *Peck* v. *Phœnix Mutual* (1881), 45 U. C. Q. B. 620.

(*b*) *Warshawkey* v. *Anchor Fire* (1896), 98 Iowa, 221; *Russell* v. *Cedar Rapids* (1889), 78 Iowa, 216; *First Congregational* v. *Holyoke Fire* (1893), 158 Mass. 475.

(*c*) *Merrick* v. *Provincial* (1856), 14 U. C. Q. B. 439.

building (*d*); but if the alterations all form part of one connected operation it may be left to the jury to say whether the effect of the entire operation was to increase the risk or not (*e*).

Condition against increase of risk.

A condition prohibiting in general terms any "alteration" or "change" material to the risk, or increasing the risk, prohibits permanent alteration of user as well as permanent alteration of structure (*f*). Thus the change of user from that of an ordinary private dwelling house to that of an hotel would be prohibited (*g*). But ceasing to keep ready for use certain fire extinguishing appliances where such were not required by the policy was held not to be a change material to the risk or an increase of risk within the meaning of the condition (*h*). Leaving the premises unoccupied has been held to be such a "change" (*i*), and it has been left to the jury to say whether non-occupation increased the risk (*f*). A change in the title to the premises is probably not such a change as is contemplated by the condition (*j*): but in one American case it was left to the jury to say whether a mortgage was an "increase of hazard" (*k*). Such a condition does not apply to any act of ordinary user consistent with the nature of the premises, and the description in the policy. Thus, the taking of boarders in a dwelling was held not to be an increase of risk within the meaning of the condition (*l*). "Change" of risk has been held to connote "increase" of risk and therefore not to be applicable to any case where the actual hazard was not increased (*ll*).

When assured is not in possession.

If the assured has not the possession or control of the premises insured, alterations increasing the risk may be made without his consent. If there is an absolute warranty or condition in the policy against increase of risk, the insurer is discharged, and the assured cannot plead that the act of his tenant was beyond his

(*d*) *Pottsville Mutual Fire* v. *Horan* (1879), 89 Pa. 438; *Heneker* v. *British America* (1863), 13 U. C. C. P. 99.

(*e*) *Date* v. *Gore District* ((1865), 15 U. C. C. P. 175; *Jones' Manufacturing Co.* v. *Manufacturers' Mutual Fire* (1851), 62 Mass. 82.

(*f*) *Hervey* v. *The Mutual Fire* (1861), 11 U. C. C. P. 394; *Davis* v. *Western Home Insurance* (1890), 81 Iowa, 496.

(*g*) *Guerin* v. *Manchester* (1898), 29 Can. S. C. 139; *Martin* v. *Capital* (1892), 85 Iowa, 643.

(*h*) *Brighton Manufacturing Co.* v. *Reading Fire* (1887), 33 Fed. Rep. 232; *Albion Works* v. *Williamsburg* (1880), 2 Fed. Rep. 479.

(*i*) *McKay* v. *Norwich Union* (1892), 27 Ont. R. 251; *Foy* v. *Aetna* (1854), 3 Allen (N. Br.) 29; *Luce* v. *Dorchester Mutual* (1872), 110 Mass. 361.

(*j*) *McKay* v. *Norwich Union* (1895), 27 Ont. R. 251; *Collins* v. *London Assurance* (1895), 165 Pa. 298.

(*k*) *Crittenden* v. *Springfield Fire* (1892), 85 Iowa, 652.

(*l*) *Manley* v. *Insurance Co.* (1869), 1 Lans. 20.

(*ll*) *Gill* v. *Canada Fire, &c.* (1882), 1 Ont. R. 341.

control (*m*). It is common therefore to provide against increase of risk in "any manner within the control of the assured," thus practically limiting the warranty to the acts of the assured and his servants or agents (*n*). Alterations made by a tenant were held not to be "within the control" of the landlord, although they constituted breaches of the covenants in the lease, and the landlord might have entered and determined the tenancy (*o*).

Conditions requiring notice of increase of risk,

Some American policies require the assured to give notice to the company, "if the risk shall be increased from any cause whatever within the knowledge of the assured." This seems to apply to increase of risk, whether arising on the premises or on adjoining premises, and whether within or without the control of the assured. The condition only applies, however, to facts which are known by the assured to increase the risk (*p*).

or of any alterations or additions.

Where the policy provided that "any alterations or additions to the building insured," should vitiate the policy unless written notice containing full particulars should be given to the secretary, and the consent of the board obtained and indorsed on the policy, and that if such alterations or additions increased the risk an additional premium should be paid, it was held that any alteration without notice avoided the policy, whether it increased the risk or not (*q*).

Where the condition relates to changes of risk beyond the control of the assured the indorsement of consent is not usually a condition precedent, and the policy will not be vitiated if notice is given within a reasonable time after the assured has acquired knowledge of the alteration (*qq*).

A local agent has no apparent authority to waive a condition of this nature (*r*), and notice given to him is not notice given to the company (*s*), unless by previous conduct the agent has

(*m*) *Abrahams* v. *Agricultural Mutual* (1876), 40 U. C. Q. B. 175; *Diehl* v. *The Adams County* (1868), 58 Pa. 443; *Californian Insurance* v. *Union Compress* (1889), 133 U. S. 387; *Long* v. *Beeber* (1884), 106 Pa. 466; *Liverpool, London, and Globe* v. *Gunther* (1885), 116 U. S. 113; *Kuntz* v. *Niagara District* (1866), 16 U. C. C. P. 573; *McClure* v. *Watertown Fire* (1879), 90 Pa. 277.

(*n*) *Murdock* v. *Chenango County* (1849), 2 N. Y. 210.

(*o*) *Heneker* v. *British and American* (1864), 14 U. C. C. P. 57.

(*p*) *Franklin* v. *Gruver* (1883), 100 Pa. 266.

(*q*) *Peck* v. *Phœnix Mutual* (1881), 45 U. C. Q. B. 620; *Lindsay* v. *Niagara District* (1869), 28 U. C. Q. B. 326; *Diehl* v. *Adams' Co. Mutual* (1868), 58 Pa. 443.

(*qq*) *Canada Agricultural* v. *Canada Mutual* (1870), 17 Grant, 418; *Pim* v. *Reid* (1843), 6 Man. & Gr. 1; *Peck* v. *Phœnix Mutual* (1881), 45 U. C. Q. B. 620.

(*r*) *Lindsay* v. *Niagara District* (1869), 28 U. C. Q. B. 326; *Williams* v. *Canada Farmers* (1876), 27 U. C. C. P. 119.

(*s*) *Sykes* v. *Perry* (1859), 34 Pa. 79.

been held out as having authority to waive the condition or receive notice (*t*). Consent in general terms to make alterations and repairs has been held to authorise only such alterations and repairs as do not eventually increase the risk (*ss*), and not to authorise the erection of an entirely new building (*tt*).

Temporary alterations or increase of risk.

A warranty against alteration in the construction or user of the premises or generally against change of risk or increase of hazard does not *primâ facie* extend to temporary variation either of structure or user, but only to alterations of a more or less permanent character (*u*).

Dobson v. Sotheby (1827), 1 Moo. & M. 60

Dobson v. *Sotheby.*

The premises were described as a barn "where no fire is kept and no hazardous goods deposited." The premises required tarring, and a fire was consequently lighted in the inside, and a tar barrel was brought into the building for the purpose of performing the necessary operations. By the negligence of the assured's servant the tar boiled over, and set fire to the premises. Lord Tenterden, C.J., in directing the jury, said he thought there was no breach of warranty. "If the company intended to stipulate not merely that no fire should habitually be kept on the premises, but that none should ever be introduced upon them they might have expressed themselves to that effect; and the same remark applies to that of hazardous goods also. In the absence of any such stipulation I think that the condition must be understood as forbidding only the habitual use of fire or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects in insuring is security against the negligence of servants and workmen."

Shaw v. Robberds (1837), 6 A. & E. 75 (*x*)

Shaw v. *Robberds.*

The premises were described as "a kiln for drying corn in use," and by the conditions the policy was declared to be forfeited if the buildings were not accurately described, and the trades carried on therein specified, and further that "if any alteration or addition be made in or to the building . . . or the risk of fire to which such building is exposed be by any means increased,"

(*t*) *Williams* v. *Canada Farmers* (1876), 27 U. C. C. P. 119.

(*ss*) *Crane* v. *City Insurance* (1880), 3 Fed. Rep. 558.

(*tt*) *Preoria Sugar Co.* v. *People's Fire*, 24 Fed. Rep. 773.

(*u*) *Gates* v. *The Madison Mutual* (1851), 5 N. Y. 469; *De Moines Ins. Co.* v. *Insurance Co.* (1896), 99 Iowa, 193; *Brighton Manufacturing Co.* v. *Reading* (1887), 33 Fed. Rep. 232; *Bentley* v. *Insurance* (1899), 191 Pa. 276; *Plinsky* v. *Germania Fire* (1887), 32 Fed. Rep. 47; *First Congregational* v. *Holyoke Fire* (1893), 158 Mass. 475; *Krug* v. *German Fire* (1892), 147 Pa. 272; *Townsend* v. *Northwestern* (1858), 18 N. Y. 168; *Commonwealth* v. *Hide* (1873), 112 Mass. 136; *Johnson* v. *Dominion Grange* (1896), 23 Ont. A. R. 729; *Martin* v. *Mutual Fire* (1876), 45 Md. 51.

(*x*) And see *Barrett* v. *Jermy* (1849), 3 Exch. 535, 545.

such alteration, etc., must be immediately notified or the policy would be void. On one occasion the assured permitted the owner of some bark which had been shipwrecked near the kiln to dry it in the kiln. No charge was made. The bark caught fire, and the kiln was destroyed. The jury found that the process of drying bark was more hazardous than that of drying corn, and that the fire was occasioned by the drying of the bark. It was held that there was no breach of warranty. "The condition," said Lord Denman, C.J., "points at an alteration of business, at something permanent and habitual; and if the plaintiff had either dropped his business of corn drying, and taken up that of bark drying, or added the latter to the former, no doubt the case would have been within the condition. Perhaps if he had made any charge for drying this bark, it might have been a question for the jury whether he had done so as a matter of business, and whether he had not thereby made an alteration in his business within the meaning of the condition. . . . No clause in this policy amounts to an express warranty that nothing but corn should ever be dried in the kiln, and there are no facts or rule of legal construction from which an implied warranty can be raised."

Warranties relating to precautionary regulations.

Similarly where the observance of any rules or regulations relating to the management of the premises is warranted the warranty is not broken by a temporary breach of the rules on the part of the assured's servants (*y*). As where a "constant watch" was warranted and the premises were burned during the temporary absence of the watchman (*z*). And even a temporary non-observance of a rule by the assured himself may not be a breach of warranty, as where the warranty was that no smoking should be allowed on the premises, and it was held that if the rule was laid down and generally observed the non-compliance on one occasion by the assured himself would not discharge the insurer (*a*). On the other hand, where the condition was that business books should be kept locked in a fire-proof safe at night, and it was in fact the custom to lock up the books, but on the night of the fire they were accidentally left out, and were burned, it was held there was a breach of warranty (*b*). In a case of fidelity insurance in Australia a warranty that the dealings of the employee would be checked in a particular way was held not to be broken by a failure on the part of the assured's servants to carry out his instructions (*c*).

Warranties absolutely

But there is nothing to prevent the condition being so

(*y*) *Daniels* v. *Hudson River Fire* (1853), 66 Mass. 416.

(*z*) *King* v. *Phœnix* (1895), 164 Mass. 291.

(*a*) *Hosford* v. *Germania Fire* (1888), 127 U. S. 399.

(*b*) *Western Assurance* v. *Redding* (1895), 68 Fed. 708.

(*c*) *Dougharty* v. *London Guarantee* (1880), 6 Vict. L. R. (Law) 376.

framed as to prohibit even temporary variation from the description.

prohibiting certain dangerous elements.

Glen v. Lewis (1853), 8 Ex. 607

Glen v. *Lewis.*

The policy contained the condition, "no steam engine shall be introduced into the premises." These words were held to amount to a warranty that no steam engine would ever be used even temporarily on the premises, and the policy was held to have been avoided by the introduction and use of a steam engine experimentally for two days only.

If, therefore, the insurers desire to prohibit even the occasional and temporary introduction of fire, heat, or hazardous goods, etc., into a building they may do so by expressly providing that such things shall not be introduced.

Description of locality of movable property.

If movable property insured against fire or burglary is described as being in a particular place the locality of the property is of the essence of the contract. If the insurer insures property in house A the insurance does not cover the same property when removed to house B, unless the policy expressly provides for removal.

Pearson v. Commercial Union (1876), 1 A. C. 498

Pearson v. *Commercial Union.*

The insurance was against loss by fire on a ship "lying in the Victoria Docks, London, with liberty to go into dry dock and light the boiler fires once or twice during the currency of this policy." The vessel went into dry dock two miles up the river, and when the repairs were completed, instead of returning directly to the Victoria Docks, she was moored in the river so that her paddle wheels might be more conveniently replaced. The paddle wheels could have been replaced in dock, but it would have been more expensive to do so. While lying in the river the vessel was destroyed by fire, and the House of Lords held that the loss was not covered by the policy. The vessel, by remaining in the river longer than was necessary for the purpose of transit from dock to dock, had gone outside the defined limits of the risk.

The description in respect of the locality of goods insured probably does not amount to a warranty that the goods will never be taken outside the defined locality, but is to be treated rather as a definition of the risk so that the policy ceases to attach if the goods are removed, but reattaches when they are returned to the specified place.

Gorman v. Hand-in-Hand (1877), I. R. 11 C. L. 224

Gorman v. *Hand-in-Hand.*

Certain agricultural instruments were described as being "in coach-house, stable, and cowhouse." It was held that they were not covered by the policy when lying in the adjoining yard, but the opinion of the Court was that the policy would reattach on their return to the coach-house, stable, or cowhouse.

Articles such as carriages, horses, farm implements, and the like, which in the course of ordinary use are removed from the place where they are kept, may possibly be covered in all such places as they may be taken to in the ordinary course of daily use. Thus, in an American case the policy purported to insure certain specified property including a phaeton described as "contained in the barn." It was burned while absent at a shop for repairs, and was held covered (*f*). The Court thought the warranty implied by the description was that it would be kept in the barn when not absent therefrom for temporary purposes. This is, however, a very doubtful case, and probably the better opinion would be that the description was not a warranty, but defined the risk, and that the phaeton was only covered while in the barn.

Description of ownership or interest.

Unless the conditions of the policy require that the assured's interest in property insured shall be accurately stated it is unnecessary to specify what the assured's interest is (*g*), and a general description of premises as "belonging to the assured," or "the property of the assured" must not be construed into a strict warranty that he is the absolute proprietor (*h*). So in the case of goods which were described as "in the assured's dwelling house," whereas they were in a house in which he lived as a lodger, the Court held that there was no breach of warranty even although there was a proviso that "the premises in which the goods are kept shall be accurately described" (*i*).

Descriptions of use or occupancy

The description of premises as a "dwelling house" is a warranty that they are not habitually used for any other purpose such as a carpenter's shop or a dry store; and similarly with any other description which implies a particular user, the premises must not be habitually used for something quite distinct (*k*). But the mere description of premises as a dwelling house does not import a warranty of actual occupation throughout the risk (*l*). Where a house is described as "occupied as a dwelling" or

(*f*) *McClure* v. *Girard Fire* (1876), 43 Iowa, 349.

(*g*) *Kerr* v. *Hastings Mutual* (1877), 41 U. C. Q. B. 217.

(*h*) *Gill* v. *Canada Fire* (1882), 1 Ont. R. 341; *Back* v. *Phœnix* (1885), 76 Me. 586; *Rohrbach* v. *Germania Fire* (1875), 62 N. Y. 47; *Dohn* v. *Farmers' Joint Stock* (1871), 5 Lans. 275.

(*i*) *Friedlander* v. *London Association* (1832), 1 M. & Rob. 171.

(*k*) *Shaw* v. *Robberds* (1837), 6 A. & E. 75; *Sillem* v. *Thornton* (1854), 3 E. & B. 868; *Wall* v. *East River Mutual* (1852), 7 N. Y. 370.

(*l*) *Quin* v. *National* (1839), Jones & Carey, 316; *Woodruff* v. *Imperial Fire* (1880), 83 N. Y. 133; *Browning* v. *Home Insurance* (1877), 71 N. Y. 508; *Cumberland Valley Mutual* v. *Douglas* (1868), 58 Pa. 419.

"occupied by the assured" there may be a warranty that the premises are so occupied at the commencement of the risk (*m*); but such words are frequently construed as words merely of identification not containing any warranty or promise that the premises shall continue to be occupied throughout the risk (*n*).

are *primâ facie* warranties *de futuro*.

The description relating to the user of the premises must generally be construed as a warranty that the user shall not be substantially altered during the risk; but in one or two cases the description has been construed as a warranty as to the user at the commencement of the risk only (*o*). And when questions are asked in the application as to use or occupation of the premises, or as to precautions taken against fire and the questions and answers relate to the present time only it has been held that a warranty that the answers are true, or a declaration that they are the basis of the insurance does not necessarily import a warranty as to the future use or occupation of the premises (*p*), or observance of the precautions (*q*). But in a Canadian case where the question was asked on the application form, "Is there a watchman kept on the premises at night?" and the answer was, "Yes," and the declaration was that the statements in the proposal should form the basis of the liability of the company and should form a part and be a condition of the insurance contract the Court held that there was a warranty that a night watchman should be kept throughout the risk (*r*). This certainly seems the most reasonable construction and it is submitted that although the questions and answers may in form relate to the present only, if the object is to get a description of the nature of the risk to be undertaken the statement ought as a rule to be construed as applicable to the entire currency of the risk (*s*). A different construction, however, may be permitted when the assured making the statement has not the control of the premises as in another Canadian case where a mortgagee insured his interest in a mill, and, in answer to a question on the application form, stated that there was always a watchman on

(*m*) *Alexandra* v. *Germania Fire* (1876), 66 N. Y. 464; *O'Niel* v. *Buffalo Fire* (1849), 3 N. Y. 122; *Parmelee* v. *Hoffman* (1873), 54 N. Y. 193.

(*n*) *Joyce* v. *Maine Insurance* (1858), 45 Me. 168; *O'Niel* v. *Buffalo Fire* (1849), 3 N. Y. 122; *Somerset Mutual Fire* v. *Usaw* (1886), 112 Pa. 80.

(*o*) *Smith* v. *Mechanics' Fire* (1865), 32 N. Y. 397; *Stout* v. *City Fire* (1861), 12 Iowa, 371; *U. S. Fire* v. *Kimberley* (1870), 34 Md. 224.

(*p*) *Gould* v. *York County* (1859), 47 Me. 403.

(*q*) *Daniels* v. *Hudson River Fire* (1853), 66 Mass. 416.

(*r*) *Whitelaw* v. *Phœnix* (1877), 28 U. C. C. P. 53.

(*s*) *First National Bank* v. *Insurance Co.* (1872), 50 N. Y. 45.

the premises. The application was referred to in the policy as the assured's warranty, and a part of the contract, but the Court held there was no continuing warranty, although a similar statement made by the owner or occupier might have been so construed (*t*).

Clerical errors in description.

If the assured makes a mistake in describing the risk on the application form or to the agent of the insurers, he must as a rule suffer for the mistake, since he cannot hold the company to a risk other than that which they have accepted (*u*). In certain cases, however, where there is no doubt as to the identity of the premises insured a misnomer will not affect the validity of the policy (*u*). If the description is not sufficiently specific, and there is consequently doubt as to the identity of the premises, the assured may prove by parol evidence which property he intended to insure, and unless it appears that the insurers thought they were insuring other property, the property which the assured intended to insure will be taken to be the property insured (*u*). Where the premises were described as Nos. 754 and 756, George Street, Sydney, it appeared that the numbers had been changed, and parol evidence was admitted to show what premises were in fact covered (*x*). When there is no doubt as to the general identity of the premises parol evidence is not admissible to explain patent ambiguities as to the scope of the insurance. Thus, where it was doubtful whether the policy was intended to cover the machinery in all the insured buildings, or only in some of them, it was held inadmissible to show by the proposal and other evidence that the intention was to insure all the machinery (*y*).

Misrepresentation as to part of the property.

Divisibility of contract.

Apart from special circumstances or conditions, misrepresentation or concealment as to any part of the property insured will avoid the whole policy, for *primâ facie* the contract is one and indivisible (*z*). But if the insurance contained in one policy is severable into distinct parts with several risks, to each of which the premium is separately apportioned, a misrepresentation or concealment affecting one risk only will not, apart from special conditions, avoid the contract as to those risks which are not affected (*a*). And even if the premium is a single sum

(*t*) *Worswick* v. *Canada Fire* (1878), 3 Ont. A. R. 487.

(*u*) *Ionides* v. *Pacific* (1871), L. R. 6 Q. B. 674, 686.

(*x*) *Hordern* v. *Commercial Union* (1887), 56 L. J. P. C. 78.

(*y*) *Hare* v. *Barstow* (1843), 8 Jur. 928.

(*z*) *Gore District Mutual* v. *Samo* (1878), 2 Can. S. C. 411; *Hopkins* v. *Prescott* (1847), 4 C. B. 578.

(*a*) *Pickering* v. *Ilfracombe Rly.* (1868), L. R. 3 C. P. 235, 250; *Kearney* v. *Whitehaven*, [1893] 1 Q. B. 700.

unapportioned it would seem that if the risks are clearly severable, those only should be held void which are affected by the misrepresentation or concealment (*b*).

Breach of warranty as to part.

If, however, a matter is warranted in the policy, breach of the warranty will probably, apart from special conditions, affect the whole contract, however severable the risks may be. The materiality of the warranty to any part of the risk is unimportant, and therefore the smallest breach discharges the insurer absolutely. The only ground on which the policy might be severed so that a breach of warranty would affect one part only would be that the policy contained two entirely separate contracts, each standing by itself, and having nothing in common except that they were written on the same paper.

Conditions relating to divisibility.

The common condition in a fire policy is that misdescription, misstatement, or omission, makes the policy void as to the property affected by such misdescription, misstatement, or omission. Whether any circumstance directly affecting part of the property does or does not indirectly affect the whole property is a question of fact, and in a Canadian case where three out of seven tenement dwellings insured as one risk were left vacant it was held that the whole property was affected (*c*). Where the condition is that the policy shall be void in case of any misdescription, change of risk, or any other like matter, the policy becomes void as to the whole insurance, even although the contravention of the condition has been in respect of and affects only a small portion of the risk (*d*).

Section VII.—Representations and Warranties in Life Policies

Warranty of absolute accuracy

An applicant for life insurance is sometimes called upon to warrant the absolute accuracy of every statement made by him in the proposal form. He may be called upon to warrant the fact that he has no disease or symptom of disease, and if it afterwards turns out that he had some latent disease or some symptoms of disease which he did not understand, the policy will be invalidated, however fully and honestly he may have stated the facts within his knowledge (*e*). In a Scottish case, *Hutchison* v. *National Loan* (*f*),

(*b*) *Greenwood* v. *Bishop of London* (1814), 5 Taunt. 727.

(*c*) *McKay* v. *Norwich Union* (1895), 27 Ont. R. 251.

(*d*) *Gore District Mutual* v. *Samo* (1878), 2 Can. S. C. 411; *Russ.* v. *Mutual* (1869), 29 U. C. Q. B. 73; *Cashman* v. *Liverpool Fire* (1862), 5 Allen, N. Br. 246.

(*e*) *Thomson* v. *Weems* (1884), 9 A. C. 671; *Joel* v. *Law Union*, [1908] 2 K. B. 863.

(*f*) (1845), 7 D. 467.

the judges in the Court of Session thought that it would be illegal, or at least absurd, for an assured to warrant matters which could only be tested by a post mortem examination, and they expressed the view that the Court ought not to give effect to such a warranty. The House of Lords, however, in *Thomson* v. *Weems* (*g*), disapproved of any such rule, and Lord Blackburn said—

is a valid warranty,

"It seems to me a very reasonable stipulation on the part of the insurer, and that it is not at all absurd or improper on the part of the assured to assent to such being a term in the contract. It is seldom that a derangement of one important function can have gone so far as to amount to disease without some symptoms having developed themselves, but the insurers have a right, if they please, to take a warranty against such disease, whether latent or not; and it has very long been the course of business to insert a warranty to that effect."

but not favoured by the Court,

Such a stringent warranty, however, is not looked upon with favour by judges or juries. In *Joel* v. *Law Union and Crown* (*h*), Fletcher Moulton, L.J., said—

"I wish I could adequately warn the public against such practices on the part of insurance offices. I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers should the latter wish to dispute the policy when it falls in. . . . If the company choose to dispute the policy and establish a single inaccuracy in those statements which are thus made conditions the policy is void, and usually all that has been paid thereon is forfeit."

and must therefore be clearly expressed.

It is therefore incumbent on the insurers to make the matter clear to the assured if they require a warranty of absolute accuracy (*i*).

"It is plainly the duty of the Court to require the insurers to establish clearly that the assured consented to the accuracy and not the truthfulness of his statements being made a condition of the validity of his policy. No ambiguous language suffices for this purpose" (*k*).

Assured may only warrant the honesty of his statements.

In order to determine the extent of the warranty, if any, which the assured has given it is necessary to examine firstly the general declaration or condition in the proposal form or policy. In many cases it is clear that the assured is only required to warrant the honesty of his statements, as where he declares that he is "not aware of any disorder tending to shorten life" (*l*), or that "he

(*g*) (1884), 9 A. C. 671, 682.
(*h*) [1908] 2 K. B. 863.
(*i*) *Wheelton* v. *Hardisty* (1857), 8 E. & Bl. 232, 300.
(*k*) Fletcher Moulton, L.J., in *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863.
(*l*) *Jones* v. *Provincial* (1857), 3 C. B. (N. S.) 65.

believes the statements to be true " (*m*), or that " the answers are true to the best of his knowledge and belief " (*n*), or where the condition in the policy states that " the policy will be void in case of any false and fraudulent averments " (*o*). On the other hand, words may be used which show a clear intention to demand an absolute warranty of accuracy; but frequently the language is open to either construction, and this is so when the warranty is that the statements are " true." " True " may, according to the context, mean either " true " in the moral sense or " true " in the absolute sense of accurate. Through a long series of decisions it has been laid down that *primâ facie* the words " false " and " untrue " are to be read in their primary meaning of inaccurate, and therefore where there is nothing more than a bare warranty that a statement made is true, the absolute accuracy of the statement is warranted (*p*). In *Joel* v. *Law Union and Crown* (*s*) Fletcher Moulton, L.J., appears to question this rule. He says—

A warranty that the statements are true

is *primâ facie* a warranty of absolute accuracy,

" To make the accuracy of these answers a condition of the contract is a contractual act, and if there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information that he is consenting thus to contract, we ought to refuse to regard the answers given as being conditions. In other words, the insurers must prove, by clear and express language, the *animus contrahendi*; it will not be inferred from the fact that questions were answered, and that the party interrogated declared that his answers were true."

If this is intended to apply, not only to the case in question where the answers were made to the medical officer, but to the case of answers and statements made in the proposal form, and declared to be true in a declaration or condition which forms part of the contract, it seems to be contrary to established authority. A simple warranty that the statements in the proposal are true must,

(*m*) *Wheelton* v. *Hardisty* (1857), 8 Bl. & El. 232.

(*n*) *Confederation* v. *Miller* (1887), 14 Can. S. C. 330.

(*o*) *Scottish Provident* v. *Boddam* (1893), 9 T. L. R. 385.

(*p*) *Duckett* v. *Williams* (1834), 2 C. & M. 348; *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484; *Cazenove* v. *Equitable* (1859), 6 C. B. (N. S.) 437; (1860), 29 L. J. C. P. 160; *Macdonald* v. *Law Union* (1874), L. R. 9 Q. B. 328; *Hambrough* v. *Mutual Life* (1895), 72 L. T. 140; *Fowkes* v. *Manchester* (1863), 3 B. & S. 917, 929; *Grogan* v. *London* (1885), 53 L. T. 761; *Johnson* v. *Maine Insurance* (1891), 83 Me. 182; *Cummings* v. *Kennebeck Mutual* (1896), 89 Me. 37; *Campbell* v. *New England Mutual* (1867), 98 Mass. 381; *Edington* v. *Aetna Life* (1879), 77 N. Y. 564.

(*s*) [1908] 2 K. B. 863.

in the light of that authority, be accepted as free from ambiguity, and must be construed as an absolute warranty of accuracy. But ambiguity may be readily imported by the use of many redundant phrases intended to strengthen, but in reality weakening the force of the warranty, and the context may justify the Court in construing the words "false" and "untrue" in the narrower sense of morally false (*t*). Thus, where the declaration signed by the assured was to the effect that the policy should be void in case "any designedly untrue statement" had been made; but the condition in the policy was that it should be void in case "any false averment" had been made; the condition was construed in the light of the declaration, and "false averment" was held to mean "wilfully false averment" (*u*).

but may be only a warranty of moral truth.

Even if there is an absolute warranty that the statements made are true, some of the statements warranted may be only statements of opinion or belief, and so in the case of the particular statement which may be in question the warranty may be no more than a warranty of the assured's honesty in making the statement. Thus, if the statement is that the assured is in "good health" or "enjoys good health," that means no more than that he is conscious of ordinary vitality and freedom from distressing symptoms (*x*). It is not untrue or inaccurate unless he was conscious of pain or weakness. It is very different from a statement that the assured has no disease or symptoms of disease. In *Thomson* v. *Weems* (*y*) the claimant argued that a statement that the applicant was temperate in his habits was a statement of something which was necessarily a matter of opinion, and that therefore, if the applicant stated his opinion honestly, the statement was not untrue. The House of Lords, however, held that the statement was one of fact, and that its truth or untruth was a question for the jury, and did not depend upon the opinion of the person making the statement.

Statements warranted accurate may be only statements of belief.

The questions put to the applicant may elicit only his opinion, as, "Do you consider yourself of sound constitution?" That is a query which relates, not to the soundness of the applicant's constitution, but to his opinion on the subject. The answer can only be untrue if it was dishonest (*z*). Or the question

Question put may elicit the assured's opinion only

(*t*) *Moulor* v. *American Life* (1884), 111 U. S. 335; *Phœnix Life* v. *Raddin* (1887), 120 U. S. 183.

(*u*) *Fowkes* v. *Manchester* (1863), 3 B. & S. 917.

(*x*) *Hutchison* v. *National Loan* (1845), 7 D. 467.

(*y*) (1884), 9 A. C. 671.

(*z*) *Thomson* v. *Weems* (1884), 9 A. C. 671, 690.

may be put to elicit facts within the knowledge of the assured, and without any intention of getting a warranty as to the existence or non-existence of matters as to which he was ignorant. Thus, where the query is, "Have you had" certain diseases? it relates only to matters of which the assured must have been previously conscious, and does not refer to antecedent latent disease of which the assured was unconscious (*a*). Here, however, the question elicits more than mere honesty of statement. If the assured had had a certain disease and forgotten, a denial would be untrue, notwithstanding its honesty. And probably if the disease was an affliction of a marked character of which the assured was conscious, a denial would be untrue notwithstanding that the assured was ignorant of the nature of the disease; but if the disease was only apparent to the assured by some slight or insignificant symptom, which an ordinary layman would disregard as of no importance, the denial would be true, since the question was directed only to cases where the assured was conscious of definite sickness.

or the disclosure of facts within his knowledge.

A broad distinction must also be drawn between the questions put in the proposal form and those put by the medical man who is appointed to examine the applicant on behalf of the insurance company (*b*). The former are put for the purpose of obtaining statements upon which the contract is to be based, and the answers are therefore readily construed as absolute warranties of the facts stated. But the questions put by the medical man are put for his guidance in making his report, and all that can be reasonably demanded of the assured for that purpose is that he shall answer to the best of his knowledge and recollection, and a declaration that he has made true answers must be interpreted in this sense (*c*).

Questions put by the medical examiner.

A distinction has also been drawn between questions put to the assured concerning his own health and habits, and questions put concerning the health and habits of another when the insurance is on the life of a third party. The former are readily susceptible of the construction that they are only put to elicit facts within the knowledge of the declarant, whereas the latter necessarily elicit facts which are not within his knowledge, and may be more

Questions put concerning the health of a third person.

(*a*) *Life Association of Scotland* v. *Foster* (1873), 11 M. 351; *Thomson* v. *Weems* (1884), 9 A. C. 671, 693.

(*b*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863; *Life Association of Scotland* v. *Foster* (1873), 11 M. 351; *Delahaye* v. *British Empire* (1897), 13 T. L. R. 245.

(*c*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 863.

readily construed as eliciting an absolute warranty as to the facts (*d*).

Duckett v. Williams (1834), 2 C. & M. 348

Duckett v. *Williams.*

The policy was effected by an insurance company by way of reinsurance. The declaration in the proposal form was as follows:—"We, M. & D., the trustees of the Provident Life, do hereby declare and set forth that the herein named J. S. is now in good health, and has not laboured under gout, dropsy, fits, palsy, insanity, affection of the lungs or other viscera, or any other disease which tends to shorten life, and that his age does not exceed 41 years . . . and we agree that the declaration or statement hereby made shall be the basis of the agreement between ourselves and the H. A. Company, and that if any untrue averment be contained therein, or if the facts required to be set forth in the above proposal be not truly stated" . . . the premium shall be forfeited, and the insurance become void. In a previous action the policy had been held to be void on the ground that the life was not in good health, and this was an action brought to recover the premiums. It was held that "untrue" did not mean untrue to the knowledge of the party, but simply inaccurate without reference to his knowledge; and Lord Lyndhurst said, "The point is whether the facts stated were not truly stated within the meaning of the declaration and agreement. It was contended on behalf of the plaintiff that the words must mean 'truly' or 'untruly' within the knowledge of the party making the statement, and that if the party insuring ignorantly and innocently makes a misstatement he is not to forfeit the premiums under the clause in question. We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue because the party making it is not apprised of its untruth, and, looking at the context, we think it clear that the parties did not mean to restrict the words in the manner contended for."

Hutchison v. National Loan (1845), 7 D. 467

Hutchison v. *National Loan.*

A proposal for insurance on the applicant's own life contained the following question and answer: "*Q.* Has the party an habitual cough, or any disease, or symptom of disease? *A.* No." The following declaration was signed by the applicant: "I do hereby declare that the age of me does not now exceed 43 years, that I am now in good health, and do ordinarily enjoy good health, and that in the above proposal I have not withheld any material circumstance or information touching the past or present state of health or habits of life of me the said A. A. with which the directors of the Society ought to be made acquainted. And I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said Society; and if any fraudulent or untrue allegation be contained herein or in the proposal all moneys which shall have been paid on account of such assurance shall be forfeited to the said Society, and the policy be void." The policy contained the following proviso: "Provided always that in case any fraudulent or untrue allegation be contained in the said recited declaration or in the proposal

(*d*) *Life Association of Scotland* v. *Foster* (1873), 11 M. 351.

therein referred to, or in any of the testimonials or documents addressed to or deposited with the said Society in relation to the said assurance, then this policy shall be void and all moneys paid thereunder shall be forfeited to the Society." On the debate on issues it was held that "good health" did not mean absolute freedom from all latent disease, but merely that the party never had any consciousness of ailment, and never exhibited any symptoms of ailment, and Lord Fullerton said, "It may be quite correct to lay it down as was done by Lord Lyndhurst, 'that a statement is not the less untrue because the party making it is not apprised of its untruth.' But, in my opinion, the statement in the declaration here was in its sound construction true if the party making the declaration never had any consciousness of ailment and never exhibited any symptoms of ailment. According to the ordinary and only intelligible sense of the term in the circumstances in which it was used she was in 'good health' if she neither was conscious of nor exhibited the slightest symptoms of disease." The other members of the Court went further than Lord Fullerton, and refusing to be bound by *Duckett* v. *Williams* (*f*), held that the words "fraudulent or untrue" meant "knowingly and blameably false," and that if there was no negligence by the party acquiring knowledge of his own condition there would be no breach of warranty (*g*).

Anderson v. Fitzgerald (1853), 4 H. L. C. 484

Anderson v. *Fitzgerald.*

A proposal made by a party for insurance on his own life contained the following questions and answers: "*Q.* Did any of the party's near relations die of consumption or any other pulmonary complaint? *A.* No. *Q.* Has the party's life been refused or accepted at any office? *A.* No." Then followed this declaration signed by the applicant: "I hereby agree that the particulars mentioned in the above proposal shall form the basis of the contract between the assured and the company, and if there be any fraudulent concealment, or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement . . . the policy shall be void." The policy contained certain specific warranties and 14 out of 27 answers in the proposal form were repeated in the policy and expressly warranted. The two answers stated above were not so warranted, but the policy contained this general proviso, "If anything so warranted as aforesaid shall not be true, or if any circumstance material to the insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised on the said company, or any false statements made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void." Evidence was adduced on behalf of the insurance company tending to show that two of the assured's sisters had died of consumption at the ages of 65 and 67, and that the assured had already been accepted at six and refused at six other offices. The trial judge directed the jury that the plaintiffs were entitled to recover unless the statements made in effecting the policy were material and false. The jury found a verdict for the

(*f*) (1834), 2 C. & M. 348.

(*g*) This opinion was followed in *McLaws* v. *U. K. Temperance and General Provident* (1861), 23 D. 559, but ultimately disapproved in *Thomson* v. *Weems* (1884), 9 A. C. 671, 694.

plaintiff, and on a motion for a new trial the case went to the House of Lords where a new trial was allowed. The House held that the only question for the jury was whether or not the statements were false, their materiality was not in question. The majority of the House and of the consulted judges were also of opinion that "false statements" meant inaccurate statements, and that the meaning was not confined to wilfully false statements. Lord St. Leonards, who dissented, was of opinion that the words "true" and "truly" in the first part of the proviso was used in the wider sense of inaccurate, but that in the latter part of the proviso the word "false" was so closely associated with the word "fraud" that it ought to be construed in the narrower sense as meaning wilfully or morally false, and he thought that the materiality of the questions and answers ought to be considered by the jury in coming to their decision as to whether the statement was wilfully untrue.

Wheelton v. Hardisty (1857), 8 E. & B. 232

Wheelton v. *Hardisty.*

Insurance was effected by an investment company to secure advances made to the life insured. The proposal referred to the statements made by the life and his referees on an application to another company which had been refused, and concluded with the declaration signed on behalf of the assured company, "We believe that the above particulars and statements are true." The policy recited that a proposal had been made (but did not declare it to be the basis of the contract), "whereby it was declared that the life in question did not exceed 35 years, and that he had not certain specified complaints or any other disease or disorder tending to shorten life," and that the insurance company "thereupon undertook" the proposed assurance subject to the terms and conditions "herein and hereunder expressed." The statements made by the life and his referees as to the habits and health of the life were found to have been intentionally untrue, but the Court held that the policy was not thereby avoided. The recital in the policy of the statements in the proposal form did not operate to constitute a warranty of the truth of these facts. The word "thereupon" was merely an adverb of time, and the facts stated were not thereby constituted the basis of the policy. They were not expressly made the basis of the policy, and the declaration of the assured was only as to their belief. Apart from warranty, the fraud of the life did not affect the validity of the policy unless the life made the statements as agent for the assured, and in this particular case there could be no suggestion of agency.

Jones v. Provincial Life (1857), 3 C. B. (N. S.) 65

Jones v. *Provincial Life.*

The assured in applying for insurance on his own life signed the following declaration in the application form: "I the above-named . . . do hereby declare that my age does not exceed 29 years, that I have had the small pox or cow pox; that my habits are temperate; that I have not had gout (and other specified diseases); that no proposal to insure my life has been declined at any office; that I am now in good health, and do ordinarily enjoy good health; and that I am not aware of any disorder or circumstance tending to shorten life, or to render an assurance on my life more than usually hazardous, unless anything stated above may be so considered." Within a year of the making of the application the assured had had two severe bilious attacks, which were not disclosed, and the medical evidence differed as to whether

these illnesses did or did not tend to shorten life. The trial judge directed the jury that "if the assured honestly believed at the time he made the declaration that the bilious attacks had no effect upon his health, and did not tend to shorten his life, or to render any assurance upon it more than usually hazardous, the fact that he was aware that he had had those attacks even although (without his knowledge) they had such a tendency would not defeat the policy." This direction was held to be correct. The words "I am not aware" referred not merely to the knowledge of the assured of the disorder or circumstances, but also to his knowledge that it tended to shorten life, and there was no evidence to show that he did know, and therefore no breach of the warranty.

Cazenove v. British Equitable (1859), 6 C. B. N. S. 437; (1860), 29 L. J. C. P. 160

Cazenove v. *British Equitable.*

Upon application for insurance on his own life the applicant filled up a "personal statement." *Inter alia* the statement contained the following questions and answers:—"(4) Whether had since infancy any and what other disease (than those enumerated before) requiring confinement? No. (8) How often has medical attendance been required? Two years ago. (9) How long did such attendance continue? About one week. (10) For what disease or diseases? Disordered stomach. (11) For what period confined to the house or bed? A week. (12) How long is it since these circumstances occurred? One year. (13) Name and address of the medical attendant or attendants employed on occasion of such disease? Dr. Roper, Rock Ferry." The assured also signed a declaration: "I declare all the above answers to be correct and true." In the policy there was this proviso: "In case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee, or other person, then the policy shall be void." The policy was issued in March, 1857, and evidence was adduced to show that in December, 1855, the assured was attended by Dr. Roper for a violent bilious attack, and in January, 1856, Dr. Roper and subsequently Dr. Craigie attended him for another similar attack. In February, 1856, he had another violent attack in Birmingham, and was there attended by three medical men. The attendance at Birmingham was not disclosed. The jury found that no material information was withheld, and judgment was entered for the plaintiff. On appeal judgment was reversed, and entered for the defendant company. Taking all the answers in the personal statement together there was a statement that the assured had not had any disease since December, 1855, when Dr. Roper attended him. That was untrue in view of the fact that he was attended by three medical men in February, 1856. The condition demanded the absolute truth of the statements made. The bilious attack was a disease within the meaning of the question.

Hutton v. Waterloo Life (1859), 1 F. & F. 735

Hutton v. *Waterloo Life.*

On application for a policy on his own life the assured stated, in answer to questions on the proposal form, that he was temperate, had no disorder tending to shorten life, and that the name and address of his ordinary medical attendant was Dr. C. He also signed the following declaration on the proposal form: "I agree that the above shall be taken as part of the declaration

which shall be the basis of the contract, and that any misrepresentation shall render the policy void."

The evidence tended to show drinking habits before and after the policy was taken out, and delirium tremens, that Dr. C. had been the family doctor, but about a year before Dr. L. had been called in, and had attended the assured for intemperate habits. The jury found (1) that the man was not temperate at the time of the proposal, (2) that he had delirium tremens, and that it tended to shorten life, (3) that the representation as to the medical attendant was not true, but (4) that it was *bonâ fide*. The judge entered judgment for the defendant company on findings (1) and (2).

The report of the case is meagre, but apparently the judge thought that innocent misrepresentation would not avoid the policy, but that on (1) and (2) the misrepresentation if at all must have been wilful, and that it was unnecessary to leave the question of *bona fides* to the jury.

Fowkes v. London and Manchester (1862), 3 F. & F. 440; (1863), 3 B. & S. 917

Fowkes v. *London and Manchester.*

Upon application by the assured for insurance on his own life the proposal contained the following questions and answers:—"*Q.* Have you ever been afflicted with gout? *A.* No. *Q.* Has the life been offered at any other office, and, if so, has it been accepted, at what rates? *A.* It has been offered and accepted at the ordinary rate." The following declaration was signed by the assured: "I do hereby declare that the above written particulars are correct and true throughout and I do hereby agree that this proposal and declaration shall be the basis of the contract between me and the company, and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein then all the money which shall have been paid . . . shall be forfeited, and the policy shall be void." The policy contained this proviso: "If any statement in the declaration (which declaration shall be considered as much a part of the policy as if the same were actually set forth herein) is untrue, or if the assurance by the policy has been effected through any wilful misrepresentation, concealment, or false averment whatsoever . . . the policy shall be void." There was evidence tending to show that assured was attended for a "very slight attack of suppressed gout" showing itself in redness and tenderness in the great toe, but there was no evidence to show that the assured had been informed or knew that the malady was gout. There was also evidence to show that the assured had previously proposed at one office and been declined, and at another where the medical officer had pronounced his life insurable, but the assured had not carried the matter further. The jury found that the assured was not "afflicted with gout" and that the answer to the second question was untrue, but not designedly so. Judgment was entered for the plaintiff, and on appeal the Court of Queen's Bench held that the declaration and the policy were to be read together, and so read the policy was only avoided in the event of a designedly untrue statement having been made in the proposal form.

In the course of the argument before the Court of Queen's Bench, Cockburn, C.J., said that although the materiality of the questions and answers was not directly in issue, the materiality of the matter inquired into might affect the question of the truth of the answer as if the assured was asked the age of his father, and he answered that he was 40 years old, whereas he was 40 years and

4 months, and Blackburn, J., said, "an answer substantially though not accurately correct would be true."

Life Association of Scotland v. Foster (1873), 11 M. 351

Life Association of Scotland v. *Foster.*

The assured was examined by the company's medical officer. Among the questions and answers were the following:—"*Q.* Are you, in your opinion, in perfect health? *A.* Yes. *Q.* Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, diseases of the chest, or of the brain, or liver, or any affection of the kidneys or urinary organs? *A.* No." The medical officer put the questions from the usual printed form, and wrote down the answers made by the assured, and the assured then signed a declaration at the foot of the form that "the above statements are faithful and true." The proposal form contained a declaration by the assured that "if any untrue averment be made in the answers to questions by the Society's medical officer" the policy should be void, and in the policy there was a proviso "that if anything averred in the declaration forming the basis of the assurance or in the relative documents be untrue this policy and assurance shall be void." The assured had at the time the policy was issued a small swelling on the groin, which she thought of no importance, but which was, in fact, a rupture. The Court held that the object of the question was merely to elicit facts within the knowledge of the assured, and that it was never intended that the answer to it should be construed as a warranty that the assured was free from all the specified diseases even in an incipient and latent form. Lord President Inglis pointed out the possible distinction in the interpretation of a question when put to a person regarding his own health, and the interpretation of the same question when put to a person regarding the health of another. For instance, the question put to the insured, "Are you free from rupture?" might well be interpreted as intended to elicit only facts within his knowledge, whereas if the insurance was on the life of another, and the question was put to the assured, "Is the life free from rupture?" and an unqualified answer, "Yes," is given the assured obviously undertakes the assertion of something more than what is within his actual knowledge, and may well be held to have warranted the fact that there is no rupture.

Macdonald v. Law Union (1874), L. R. 9 Q. B. 328

Macdonald v. *Law Union.*

Insurance was effected by M. on the life of T. The proposal contained the following question and answer:—"*Q.* Has the life been proposed for insurance at this or any other office or offices? if so, at what offices was she accepted or declined? *A.* No." The answer was filled in by M., who signed the declaration, "I declare that the above particulars are truly set forth." The policy contained this proviso: "If the declaration under the hand of the assured delivered at the defendant's office, as the basis of the insurance is not in every respect true, or if there has been any misrepresentation, concealment or untrue averment in treating for the insurance . . . then the insurance shall be void and the premiums forfeited." Evidence was adduced to show that T. had previously been proposed for insurance, and declined by two offices. The jury found that the answer was untrue to the knowledge of T., but not to the knowledge of M.

Judgment was entered for the defendants, and affirmed in the Court of

Queen's Bench, on the ground that both the declaration in the proposal form and the proviso in the policy were as to the absolute truth of the statements irrespective of knowledge.

Scottish Equitable Life v. Buist (1876), 3 R. 1078; (1877), 4 R. 1076

Scottish Equitable Life v. Buist.

On the application by the assured for insurance on his own life the proposal form contained the following questions and answers:—"5. Are your habits sober and temperate? Yes. Have they always been so? Yes. 9. Have you ever been affected with insanity, apoplexy, palsy, dropsy, asthma, liver complaint, rupture, consumption, or spitting of blood, epileptic or other fits, or any disorder tending to impair the constitution or shorten life? No. 15. Has your life ever been proposed for insurance? If so name the office and state the date and result? No." Appended to the proposal form was the following declaration signed by the assured: "I do hereby declare that the above particulars are correct and true throughout, and that I have not concealed or withheld any circumstance tending to render an assurance on my life more than usually hazardous; and I do hereby agree that the foregoing proposal, together with what is therein contained and this declaration, shall be the basis of the contract between me and the Society, and that if any untrue averment is contained in this declaration or in the answers above given, or if it shall hereafter appear that any of the matters above set forth have not been truly and fairly stated, then all moneys which shall have been paid on account of the insurance to be made in consequence hereof shall be forfeited and belong to the Society . . . and the policy shall be null and void." The policy contained this condition, "In case it shall hereafter appear that any untrue averment is contained in the declaration before recited as to the age, state of health, or description of the assured . . . then this certificate shall be void." On the death of the assured the Society alleged that the assured had made wilfully false statements in the proposal, and they brought this action of reduction against the assured's assignees for cancellation and delivery up of the policy, on the ground of breach of warranty and fraud. The assignees denied the allegations, and pleaded that, at any rate, the policy was not void against onerous assignees, and that the company could have found out the truth for themselves from the medical man to whom the assured referred them. The Court held that an assignee for value and in good faith of a policy of insurance was subject to all the exceptions and pleas pleadable against the original assured, and therefore, whether the defence was breach of warranty or fraud, it was equally pleadable against the assignee, and, on the question of the medical referee, they held that an insurance company obtained such reference for their own benefit, and if they chose to depend on the assured's statement or warranty, instead of resorting to the medical man, they were entitled to do so. The case was sent to trial before a judge without a jury, and on the evidence the Court found that the assured had made wilfully false statements in respect that he was intemperate, that he was suffering from syphilis in its secondary or even tertiary stage, and that he had made proposals to other companies, some of which had been declined. On this evidence the Court held that the company were entitled to judgment (*n*). The Lord

(*n*) In the House of Lords counsel or the claimant admitted that he could not distinguish the case from *Anderson* v. *Fitzgerald* (1853), 4

Ordinary (Lord Young), was of opinion that although the company were not bound to prove that the statements of the assured were gross and wilful falsehoods, yet the onus was on them to show that the assertions were blameably reckless or careless on a matter which was or reasonably might be material to the risk (o).

London Assurance v. Mansel (1879), 11 Ch. D. 363

London Assurance v. *Mansel.*

Upon application by the assured for insurance on his own life the proposal form signed by him contained the following question and answer:—"*Q.* Has a proposal ever been made on your life at any other office or offices? If so, when? Was it accepted at the ordinary premium or at an increased premium, or declined? *A.* Insured now in two offices at £16,000 at ordinary rates. Policies effected last year." The declaration signed by the applicant was, "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance." The company accepted the proposal in writing, a cheque was sent for the first premium, and the company sent a certificate of insurance. Afterwards the company discovered that one of the offices with which the applicant was insured had refused to increase the amount, and that the applicant had been declined by several other companies. The company thereupon returned the premium, and brought this action to set aside the agreement. The defendants contended that the company, by accepting an incomplete answer to the question, had waived further information, and that the matter not disclosed was not material. The Court held that the answer was "untrue," that it was not so obviously incomplete as to constitute a waiver of further information, and, even although no question had been asked, a previous refusal was a material fact which ought to have been disclosed. The contract was rescinded accordingly.

Thomson v. Weems (1884), 9 A. C. 671

Thomson v. *Weems.*

The insurance was upon the life of the assured. Among the questions upon the proposal form were these:—"(i) Are you temperate in your habits? (ii) And have you always been strictly so?" and the assured answered, "(i) Temperate. (ii) Yes." The following declaration was signed by the assured: "I the said W. do hereby declare that I am at present in good health . . . that the foregoing statements of my age, health, and other particulars are true, that I have answered truly the above questions as to any prospect or intention I may have of proceeding or residing beyond the limits of Europe . . . and I do hereby agree that this declaration shall be the basis of the contract . . . and if any untrue averment has been made, or any information necessary to be made known to the company withheld, all sums which shall have been paid shall be forfeited . . . and the assurance

H. L. C. 484, and the appeal was dismissed without argument; 5 R. (H. L.) 64.

(*o*) This question was not necessary for the decision of the case, and as there seems to have been a clear warranty as to the absolute truth of the statements the later decisions show that neither the materiality of the statements nor the honesty of the assured in making them was the issue. The dicta of Lord Young in this case are expressly disapproved by Lord Watson in *Thomson* v. *Weems* (1884), 9 A. C. 671, 689.

be absolutely null and void." The policy recited that "the assured had subscribed a declaration which is hereby declared to be the basis of this insurance," and contained this proviso, "that if anything averred in the declaration hereinbefore referred to shall be untrue this policy shall be void, and all moneys received by the said company in respect thereof shall belong to the said company for their own benefit." Evidence was adduced tending to show that the assured was a very free drinker, that four months after the policy was issued he was suffering from chronic hepatitis (a disease of the liver generally produced by excessive drinking over a considerable period), resulting in congestion of the brain, of which he died eight months after the policy. The case went to the House of Lords, where it was held that the evidence showed that the assured was intemperate at the time the policy was issued, and therefore that the answer was not true and that the policy was void. The absolute accuracy of the statement was warranted. Although temperance is to a certain extent a matter of degree and opinion, the assured who warrants that he is temperate warrants the fact, and not merely his opinion. The materiality of the matter warranted was not in issue. Lord Watson said, "In its plain and ordinary sense, the statement that the applicant is temperate is an averment of fact, and not a mere assertion of the opinion or belief entertained by the assured with regard to that fact. It then appears to me that whatever may be the import of the word 'temperate' (which is a separate matter) the assured must be held to have warranted not that the assertion was true according to his sincere conviction, but that it was true in point of fact. . . . There are facts innumerable which can only be ascertained by the test of opinion, but they are not the less facts in a legal, whatever they may be in a metaphysical, sense. It appears to me to be vain to contend that the character of a man's habits, temperate or intemperate, is a matter of opinion, and not of fact."

Grogan v. London & Manchester (1885), 53 L. T. 761

Grogan v. *London and Manchester.*

The insurance was effected by T. G. on the life of his father. He filled in the proposal as follows:—"*Name of life to be insured,* P. G. *Residence in full,* 191, G. Ancot Street, Manchester. *Born at* Ballyhannis *in the county of* Mayo *on the* Sep. 10, 1835," and signed the following declaration: "I do hereby declare that the foregoing particulars are true in every respect, and I agree that the questions and answers taken together shall be the basis of the contract between the company and myself." Evidence was adduced to show that the life had a house in Ireland, that he sometimes resided there, and sometimes in England, when he came over to work, and when the policy was effected was staying with his son at the address given and returned to Ireland after three months. It was held that the statement as to residence was true, and that the residence asked for was the place where the life was residing at the time of insurance, so that if the company desired to find him they could do so. The Court expressed an opinion that if the residence had been inaccurately stated the policy would have been void.

The Scottish Provident v. Boddam (1893), 9 T. L. R. 385

The Scottish Provident v. *Boddam.*

B. applied for insurance on his own life. In the proposal he was asked whether a proposal had been made on the same life in any other office, and he answered, "Yes, in the Edinburgh Life, in April." The declaration signed by

the applicant was as follows: "I do hereby agree that this proposal and declaration shall be the basis of the contract, and that in case it shall hereafter appear that this contains an untrue statement as to the age, or that evidence furnished in connexion with this application contains any false and fraudulent averment in other respects, then all moneys which shall have been paid on account of the said insurance shall be forfeited and belong to the institution and the assurance itself shall be absolutely null and void."

The application was accepted and a memorandum of acceptance was sent to the applicant. Next day the applicant was found dead in a railway tunnel and the company brought this action to cancel the acceptance on the ground of misrepresentation as to previous proposals. The facts were that the applicant had been accepted by the "Edinburgh Life," and "Royal Exchange," and had applied to the "Colonial and Mutual," and "Equitable." In the case of these two last-mentioned companies he had been medically examined but had not carried the matter further. Day, J., held that an untrue declaration as to material matters had been made, but the company had by their declaration made the contract voidable on the ground of fraud only, and as no fraud had been alleged or proved the contract must stand and the company were not entitled to have it set aside.

Hambrough v. Mutual Life (1895), 72 L. T. 140

Hambrough v. Mutual Life.

The insurance was on the life of the assured. The proposal contained the usual questions as to health and previous applications, and the following declaration was signed by the assured: "I agree that all the foregoing statements and answers, as well as those that I make to the company's examiner are warranted to be true, and are offered to the company as a consideration of the contract which I hereby agree to accept as issued by the company in conformity with this application." A provisional policy was issued for 60 days in these terms: "In consideration of the application for this policy, which is hereby made a part of this contract, and of £97 1*s.* 8*d.* the company does insure the life of H. for the sum of £10,000 in favour of himself for the term of 60 days from date." The policy was obtained by one Monson, purporting to act as the agent of the assured, and the jury found that certain of the answers on the proposal form were inaccurate and that Monson was aware of the inaccuracies, but that the assured was not, and had acted in good faith. Judgment was entered for the defendants, and on a motion for a new trial it was argued (1) that mere untruth did not avoid the policy, but in the absence of fraud would merely give rise to a cross-claim for damages; (2) that if the intention was that the validity of the policy should depend on the absolute truth of the answers, that should have been clearly stated. The Court held (1) that the finding of fraud on the part of the assured's agent avoided the policy, and that there was evidence to support such a finding; (2) that there was a warranty that the statements were in fact true, and as there was a breach of that warranty the policy was void.

Delahaye v. British Empire Mutual Life (1897), 13 T. L. R. 245

Delahaye v. British Empire Mutual Life.

The policy was on the life of the assured. In the proposal he stated, in answer to a question, that he had never suffered from any serious illness or disease tending to shorten life. The declaration signed by the assured was

in these terms: "I do hereby declare that I am at present in good health, that I am now and have always been of sober and temperate habits, and that I am not, to the best of my knowledge, the subject of any disease tending to make assurance more than usually hazardous, and I hereby agree that this declaration shall be the basis of the contract between me and the British Empire Mutual Life Assurance Company, and that if any untrue statement be made therein, or in the answers to the questions put by the company's medical examiner in reference to this proposal, all sums paid to the company on account of the assurance shall be forfeited, and any policy granted hereon shall be to all intents and purposes null and void." The policy recited that the assured had delivered a proposal and declaration, and that the assured "did thereby agree that such proposal and declaration should be the basis of the contract." When the assured was examined by the company's medical officer the latter put the following question to the assured:—"Have you ever suffered from indigestion, or jaundice, or from any disease of the stomach or bowels, liver or kidneys?" The assured answered, "No," and the officer wrote down the answer on the company's printed form, which was afterwards signed by the assured. At the trial uncontradicted evidence was adduced to show that the assured had suffered from jaundice some two years before the proposal was made, but the jury found that no answer in the proposal was untrue and that no answer made to the medical officer was untrue, and that, if any answer was untrue, it was not untrue to the knowledge of the assured. On a motion for a new trial the Court held (1) that the accuracy of the answers in the proposal might be warranted, but (2) that there was no warranty with reference to the answers to be made to the medical officer except that he would answer them to the best of his knowledge. The assured did not know at the time he signed the declaration what questions might be put to him. There was a great difference between the answers on the proposal, and those to be given to the medical officer, and the declaration must be construed so as to give effect to that difference. The only point which the company relied on was that an untrue answer had been made to the medical officer in respect of the jaundice. The jury had found that the assured had answered all the questions honestly, and that was sufficient.

Hemmings v. Sceptre Life Association, Ltd., [1905] 1 Ch. 365

Hemmings v. *Sceptre Life Association, Ltd.*

In 1887 a lady signed a proposal for insurance upon her own life and stated therein that her age was 41 next birthday. The proposal concluded with the following declaration: "I do hereby declare that the preceding answers and statements are to the best of my knowledge and belief correct and true and that I have not withheld or concealed any fact or circumstance which the directors ought to know in accepting my proposal. And I do hereby agree that this proposal and declaration shall be the basis of the contract between myself and the association, and if it shall hereafter appear that I have made any untrue statement herein then the policy to be issued shall be void, and the premiums paid shall be forfeited." The policy issued upon the proposal recited that the assured had signed a declaration in writing declaring that her age on the next birthday would not exceed 41 years (evidence of which age must be produced) which declaration she had agreed should be the basis of the contract between herself and the company, and it was witnessed

that upon payment of an annual premium of £112 16*s.* 8*d.*, until the assured reached the age of 60 or until her death under that age, the stock and funds of the company should upon such event be liable to pay the sum of £2000, and it was further declared that in case the assurances thereby made should be proved to have been obtained by wilful misrepresentation, concealment, or other fraud, in regard to any matters contained or referred to in the before-mentioned declaration or otherwise, then the policy should be void, and all payments which should have been made to the company on account thereof should be forfeited to the company. Subsequently, in 1897, during the life of the assured it was discovered that the statement of age in the proposal was inaccurate, and that the then age of the assured was 44 next birthday, and not 41. The company were immediately informed of the mistake, but notwithstanding the information, they accepted two further premiums on the policy, that is to say, the premiums falling due in 1898 and 1899. In August, 1899, the company demanded payment of the balance of premiums with interest at 5 per cent., on the basis that the assured should have paid a premium of £22 10*s.* more than the premium actually paid. The holder of the policy refused to pay any additional premium, and the amount of the original premium was tendered, but not accepted each year until, in 1904, the assured attained the age of 60 years. This action was then brought upon the policy. The company contended that they were not liable to pay until the assured attained the age of 63, as the policy was on the basis that she was 41 when insured, and would pay 20 premiums before she was 60 years old. It was held that the company were liable to pay the full sum insured with accrued bonuses. Reading the declaration with the policy there was no forfeiture of the policy and premiums unless the misrepresentation was wilful, and it was admitted to be innocent. As, however, the contract was made on the basis that the assured was 41 the company might have cancelled the policy and returned the premiums on discovering that the assured was three years older. They, however, by accepting further premiums, elected to affirm the contract after full knowledge of the fact, and by that election they were bound.

Joel v. Law Union & Crown, [1908] 2 K. B. 863

Joel v. Law Union and Crown.

The policy was on the life of the assured, who answered the usual questions on the proposal form, and signed the following declaration: "I do declare that to the best of my knowledge and belief the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the company." The company sent a printed form to a doctor with instructions to examine the applicant on their behalf. The printed form contained the usual questions under the heading, "Questions to be put to the applicant (with any necessary explanation) by the medical officer, who will fill in the applicant's answers." Among the questions were these:—"(7) What medical men have you consulted? When? And what for? . . . (9) Have you at any time had, and if so, when, any of the following ailments . . . (*b*) . . . mental derangement, brain fever, or other disease of the brain?" The doctor interviewed the assured, and recorded the following answers, "(7) Dr. S., rarely, colds; Dr. H., last spring, measles . . . (9) . . . (*b*) No." The assured thereupon signed the declaration at the foot of the form: "I do hereby declare with reference to the proposal for assurance on my life

and my declaration dated October 30, 1902, that the answers to the foregoing questions are true." The policy contained no reference to the proposal, or to either of the declarations. It appeared on the evidence that some eight years before the assured had had a severe attack of influenza followed by nervous depression, and that she had, on the advice of Dr. S., consulted Dr. K. The depression ultimately developed into acute mania, and for six months was in Dr. L.'s private asylum. The plaintiff alleged that the assured was always ignorant of the fact that she had suffered from mental derangement. Some three years after the policy was issued she committed suicide. The jury found that the assured was ignorant that she had suffered from mental derangement, that she foolishly, but not fraudulently, concealed the fact that she had consulted Dr. K. for nervous depression, and that the fact was material for the company to know. On these findings the Lord Chief Justice entered judgment for the defendants. He held that, although there was no warranty that the answers were true, yet there was a concealment of material fact, and that that was sufficient to avoid the contract. The Court of Appeal affirmed the Lord Chief Justice in his opinion that there was no warranty as to the absolute truth of the statements made to the doctor. The object of the questions put by the doctor was to obtain the doctor's report, and all that was required was a full and honest answer by the assured. These questions were not prepared for the purpose of getting a warranty from the assured as to their absolute accuracy. The declaration that the answers were true meant no more than that they were full and honest, and they were not intended to be the basis of the contract. They were also of opinion that, if there was a concealment of material fact, that would be sufficient to avoid the contract, but they were not satisfied that the assured had concealed anything from the doctor, or that the doctor did not know from his brother, Dr. S., of the fact that the assured had consulted him for nervous breakdown. The onus to prove concealment was on the office, and they had not called the doctor although he was in Court during the trial. The questions were to be put to the applicant "with any necessary explanation." The question clearly called for some explanation, but there was no evidence as to what the question *plus* the explanation was. In the light of the explanation the answer may have been quite true, and the doctor may have had full information about the nervous breakdown. The Court was not satisfied that the jury had appreciated this aspect of the case. The written answers and the assured's declaration were allowed to go to the jury as, and taken by the judge to be, a concealment of the fact which made her liable for non-disclosure, whereas the document by itself was not evidence of non-disclosure. The Court ordered a new trial although Lord Justice Buckley was inclined to the opinion that judgment might have been entered for the plaintiff since the defendant had not adduced any real evidence of non-disclosure.

CHAPTER VI

Life Insurance; Claims and Title to Policy

Section I.—Proof of Death and Age

Proof satisfactory to the directors.

The insurance money on an ordinary life policy is usually made payable when proof satisfactory to the directors shall have been made of the death of the assured, and of the title of the party or parties claiming under the policy. Formerly the policy money was made payable after the lapse of a specified period, such as three months after such proof shall have been made: but the tendency of modern practice is to make claims payable immediately on proof of death and title. Proof satisfactory to the directors means proof which ought to be satisfactory to them (*a*). Death must be proved by such evidence as the directors may reasonably require, but the directors are not justified in refusing payment merely because their unreasonable or capricious demands have not been satisfied (*b*). Reasonable persons may reasonably take different views, and therefore it does not follow that, because a judge or jury subsequently finds the death proved, it was therefore the duty of the company to have paid when the claim was first made, even although practically the same evidence was placed before them at that time as was afterwards placed before the Court (*c*). Where the evidence is not clear the company under such a clause is entitled to the protection of an order of the Court, and, if it acts reasonably in declining to pay in a doubtful case, it will be entitled to deduct from the sum insured the costs incurred by it in defending the action (*c*). The question, however, of reasonableness is a question of fact, and a judge or jury having found the death proved on the evidence before them may also find as a fact that the company was unreasonable in not accepting that evidence as sufficient, and upon such a finding the company will have to pay the costs of the action (*d*).

(*a*) *London Guarantee* v. *Fearnley* (1880), 5 A. C. 911, 916.
(*b*) *Braunstein* v. *Accidental Death* (1861), 1 B. & S. 782.
(*c*) *Doyle* v. *City of Glasgow Life* (1884), 53 L. J. Ch. 527.
(*d*) *Ballantine* v. *Employers' Insurance* (1893), 21 R. 305.

Evidence of death.

Death may be proved (1) by direct evidence, that is to say, by the oath of some person present at the death; or (2) by death certificate, that is to say, by production of a certified copy entry in the Register of Deaths, or in some other public record which is admissible in evidence; or (3) by evidence of prolonged absence or other facts from which the fact of death may properly be inferred.

Evidence of age.

The age of the deceased may be proved (1) by direct evidence as to the date of birth; (2) by birth certificate, that is to say, by production of a certified copy entry in the Register of Births, or in some other public record of the birth which is admissible in evidence; (3) by baptismal certificate, that is to say, by production of a certified copy entry in a baptismal register, together with direct evidence that the child was a very young infant when baptised; (4) by production from the proper custody of a family Bible or Testament, wherein the births of members of the family have been regularly recorded.

Evidence of identity.

A birth or death certificate ought to be accompanied by evidence of identity if there is any room for doubt as to whether the person named in the certificate, and the person whose life is insured are one and the same (*e*).

Register of births, deaths, and marriages.

A compulsory system of registration of births, deaths, and marriages, was first introduced in England in 1836, when the Births and Deaths Registration Act of that year was passed (*f*). That Act, and the amending Act of 1874 (*g*), contain the present statutory provisions with regard to the compulsory registration of births and deaths, and the subsequent proof of the birth or death recorded by production of a certified copy of the entry.

Compulsory registration.

Correct information respecting every birth or death happening within the jurisdiction is required to be given by the proper informant as defined in the Act, and the person required to give information is liable to penalties if he fails to do so (*h*). Information concerning any birth is to be given within forty-two days, and information concerning any death is to be given within five days. In the case of death the medical practitioner attending the deceased during his last illness must sign a certificate stating the cause of

(*e*) *Parkinson* v. *Francis* (1846), 15 Sim. 160. At one time it was the practice of the Court of Chancery to require a burial certificate to be produced as well as the death certificate (*Riseley* v. *Shepherd* (1873), 21 W. R. 782); but the death certificate alone is now deemed to be sufficient evidence in all Courts (*Traill* v. *Kibblewhite* (1847), 10 Jur. 107; *Valters Trust, In re* (1887), W. N. 128).

(*f*) 6 & 7 Will. 4, c. 86.

(*g*) 37 & 38 Vict. c. 88.

(*h*) 37 & 38 Vict. c. 88, ss. 1–16.

death. The medical certificate must be delivered to the Registrar or, where there has been an inquest, the coroner's certificate of the finding of the jury must be so delivered. Quarterly returns are made by each Registrar to the Superintendent Registrar of his district who makes a return to the Registrar-General at the General Register Office (*i*).

Births and deaths occurring at sea.

Births and deaths occurring at sea on board any vessel of the Royal Navy, or any other British ship, or on board any foreign vessel carrying passengers to and from any port in the United Kingdom, must be entered in the log book of the vessel (*k*). In the case of a merchant vessel it is the duty of the master upon arrival in any port of the United Kingdom to give information to the Registrar-General of Shipping and Seamen, who makes a return of such information to the Registrar-General of Births, Deaths, and Marriages (*l*). In the case of a vessel of the Royal Navy, it is the duty of the commander to make a return to the Registrar-General of Births, Deaths, and Marriages (*l*) at such times and in such manner as may be required by the Naval regulations. The Registrar-General makes an entry in the Marine Register of all returns in respect of births, deaths, and marriages occurring at sea.

Certified copy is evidence of facts recorded in the register.

Upon payment of the prescribed fee or fees, the register books of the district Registrar or at the General Register Office may be searched, and a certified copy of any entry may be obtained (*m*). A certified copy issued by the Registrar-General and stamped or sealed with the seal of the General Register Office is admissible as evidence of the facts properly recorded in the register book (*n*). An entry or a certified copy thereof is, however, not admissible as evidence unless the entry is in conformity with the following requirements (*n*):

(1) The entry must purport to be signed by the person required by law to give the required information as to the birth or death, or to be made on a coroner's certificate, or in pursuance of the provisions for the registration of births and deaths at sea.

(2) Where in the case of a death more than twelve months have intervened between the day of death or the finding of a dead

(*i*) 6 & 7 Will. 4, c. 86, s. 32.

(*k*) 37 & 38 Vict. c. 88, s. 37; Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, ss. 254, 339, and Sch. VIII.

(*l*) In the case of Scottish or Irish subjects the return is made to the Registrar-General for Scotland or Ireland as the case may be. In all other cases the return is made to the Registrar-General for England.

(*m*) 6 & 7 Will. 4, c. 86, ss. 35–37.

(*n*) Sec. 38.

body and the date of registration, the entry must purport to be made with the authority of the Registrar-General.

(3) Where in the case of a birth more than three months have intervened between the day of birth and the date of registration, there must be a marginal note on the register to the effect that the informant has made a statutory declaration as to the truth of the information given.

(4) Where in the case of a birth more than twelve months have intervened between the day of birth and the date of registration, the entry must purport to be made with the authority of the Registrar-General.

A certified copy of an entry is evidence not merely of the fact of birth or death, as the case may be, but of the date thereof, and of all other facts of which the Acts require information to be given and recorded (*o*). Thus, a death certificate is evidence of the cause of death as recorded in the information given in the medical certificate or coroner's inquest.

Certified copy proves itself.

By the Official Documents Evidence Act, 1845, official documents or certified copies thereof are to be received in evidence if they purport to be sealed or impressed, or sealed and signed, or signed as directed by the respective Acts under which they are admissible (*p*). A certified copy of an entry in the Register of Births, Deaths, and Marriages, accordingly proves itself, and no evidence need be given of the authenticity of the certificate, or of the official capacity of the person by whom it purports to be signed.

Registers of baptisms and burials.

Before the general system of compulsory registration was introduced, the parish registers of baptisms and burials were the most reliable sources of information as to births and deaths. These, however, were often kept with great irregularity until 1812, when the Baptismal and Burial Registers Act of that year provided for the keeping of proper parochial registers in separate books, and for the transmission of verified copies to the Registrars of each diocese once every year (*q*). There were also many non-parochial registers, such as those kept by Nonconformists. In 1836 a royal commission was appointed to inquire into the state of such non-parochial registers, and to take measures for collecting, arranging, and depositing such records. Under the Non-Parochial Registers Act 1840 (*r*), which was passed in pursuance of the report of the

(*o*) *Goodrich, In the estate of*, [1904] P. 138.
(*p*) 8 & 9 Vict. c. 113.
(*q*) 52 Geo. 3, c. 146.
(*r*) 3 & 4 Vict. c. 92.

commissioners, the non-parochial records collected by them were deposited with the Registrar-General of Births, Deaths, and Marriages, and the records so deposited are deemed to be in legal custody. Extracts certified by the Registrar-General under the seal of the General-Register Office are admissible as evidence (*s*).

All public records admissible as evidence of facts properly recorded.

All public records regularly kept and produced from proper custody are admissible as evidence of the facts properly recorded therein. Thus the parish register recording a burial in the workhouse cemetery (*t*), the muster book of a vessel of the Royal Navy recording the death of a seaman (*u*), an Army form kept under the R.A.M.C. rules recording the admission of a soldier to hospital and the fact that he was suffering from a specified disease (*x*), and an Army marriage register kept pursuant to the Army Marriage Act and recording a marriage, have been held to be admissible as evidence of the facts recorded therein (*y*). Upon the same principle an entry in a family Bible recording the birth of a member of the family and produced from the custody of a member of the family is admissible as evidence of the date of birth (*z*).

Superfluous facts recorded in public record.

Public records, however, are only admissible as evidence of the facts which are recorded therein pursuant to the duty of the keeper of the record, and therefore a parochial register of baptisms or burials is not by itself evidence of the date of birth, even although the date of birth is stated therein (*a*). An entry of a baptism is merely evidence of the fact and date of baptism, and of the fact that the person baptised was born before that date (*b*). Combined with parol evidence that the child was very young when baptised it would be evidence of the proximate date of birth.

Production of record from proper custody.

In cases of public or family records it is not necessary to prove that the entry was made by the person whose duty it was to make the entry. It is sufficient if the record is produced from proper custody (*c*).

Certified copies of public record.

A copy of or extract from any public book or document is admissible as evidence of the contents thereof if proved to have been examined or certified as a true copy by the officer to whose custody the public book or document is entrusted (*d*).

(*s*) Sec. 11.
(*t*) *Doe* v. *Andrews* (1850), 15 Q. B. 756.
(*u*) *R.* v. *Rhodes* (1742), Leach, 24.
(*x*) *Gleen* v. *Gleen* (1900), 17 T.L.R. 62.
(*y*) *Adams* v. *Adams* (1900), W. N. 32.
(*z*) *Hubbard* v. *Lees* (1866), L. R. 1 Ex. 255.
(*a*) *Robinson* v. *Buccleugh* (1886), 3 T. L. R. 472.
(*b*) *Bulley's Settlement, In re* (1886), W. N. 80.
(*c*) *Hubbard* v. *Lees* (1866), L. R. 1 Ex. 255.
(*d*) Evidence Act, 1851 (14 & 15 Vict. c. 99).

Army records in regimental books.

By the Army Act, 1881, when a record is made in one of the regimental books in pursuance of any Act or of the Queen's Regulations or otherwise in pursuance of military duty, and purports to be signed by the commanding officer or officers whose duty it is to make such record, such record is evidence of the facts therein recorded; and a copy of any such record purporting to be a true copy by the officer having the custody of such book shall be evidence of such record (*e*).

Certified extracts from foreign registers.

Foreign registers and other public records, and certified extracts therefrom, are admissible as evidence in England as to those matters which are properly and regularly recorded therein, when it appears that they have been kept under the sanction of public authority, and are recognised by the tribunals of the county where they are kept as authentic records (*f*). Under this rule parochial registers in Scotland which are public records and admissible as evidence by the common law of Scotland, are also admissible as evidence in England (*f*).

Registration of births and deaths in Ireland.

By the Births and Deaths Registration (Ireland) Acts, 1863 and 1880, provision is made for the compulsory registration of births and deaths, and for the proof thereof, which is substantially the same as the corresponding provision made by the English statutes (*g*).

Registration of births and deaths in Scotland.

The registration of births and deaths in Scotland is regulated by the Registration of Births, Deaths, and Marriages (Scotland) Acts, 1854 and 1860 (*h*). Registration is compulsory since 1854. In case of death the medical attendant must transmit his certificate to the Registrar, or if the death is sudden and unexpected the procurator fiscal must transmit to the Registrar the result of his inquiry. The inquiry made by the procurator fiscal in Scotland is not a public inquiry like the coroner's inquest in England. A public inquiry into the cause of death may however be held under the Fatal Accidents Inquiry (Scotland) Act, 1895 (*i*), where a person meets with a fatal accident in the course of and apparently arising out of some industrial employment or occupation. The inquiry is before the sheriff and a jury, and it is the duty of the sheriff clerk to transmit the finding of the jury to the Registrar of births, deaths, and marriages. Provision is made for the keeping of a

(*e*) 44 & 45 Vict. c. 58, s. 163 (1), (g), (h).

(*f*) *Lyell* v. *Kennedy* (1889), 14 A. C. 437.

(*g*) 26 & 27 Vict. c. 11; 43 & 44 Vict. c. 13, s. 28.

(*h*) 17 & 18 Vict. c. 80; 23 & 24 Vict. c. 85.

(*i*) 58 & 59 Vict. c. 36.

marine register wherein are entered the particulars of the births and deaths of Scottish subjects occurring at sea. All parochial registers in Scotland before 1820 are in the custody of the Registrar-General. Parochial registers from 1820 to 1855 are in the custody of the parish registrars for each district.

Scottish foreign register.

Under the Registration of Births, Deaths, and Marriages (Scotland) Act, 1860, the Registrar-General keeps a register entitled "The Foreign Register," in which may be entered any birth, death, or marriage of a Scottish subject which has taken place in a foreign country since 1854, and which has been (1) intimated to the Registrar within twelve months after the passing of the Act, or (2) intimated within twelve months after the happening of the occurrence and duly certified by the British Consul of the foreign country or place.

Proof of entry in Scottish register.

Any extract from any register kept by the Registrar-General for birth, deaths, and marriages in Scotland, or by a parochial or district Registrar, is admissible as evidence of the facts recorded in the register, provided the extract is authenticated by the seal of the Registrar-General or the signature of the parochial or district Registrar, as the case may be (*j*). The Official Documents Evidence Act, 1845, does not, however, apply to Scotland, and it is therefore necessary to prove that the certified extract produced was in fact issued and signed by the Registrar by whom it purports to be signed.

Presumption of death.

If a person has disappeared, and no direct evidence of his life or death can be obtained, his death may be proved either by (1) circumstantial evidence, that is to say, by proof of facts from which a jury might reasonably infer the fact of death; or (2) a presumption of law arising from the fact of disappearance and absence for seven years without being heard of.

Seven years' absence.

The presumption of law arising from seven years' absence is not in England a statutory presumption; it is a presumption of common law based upon the analogy of two statutes relating to presumption of death in special cases (*k*). After the expiration of seven years from the time a person was last seen or heard of, there arises a *primâ facie* presumption of the fact of death (*l*).

(*j*) 17 & 18 Vict. c. 80, s. 58; 10 Edw. 7 & 1 Geo. 5.

(*k*) *Nepean* v. *Doe* (1837), 2 M. & W. 894. The statutes referred to are 1 Jac. 1, c. 11, relating to the presumption of death in bigamy prosecutions, and 19 Car. 2, c. 6, relating to the presumption of death in claims for recovering possession of land.

(*l*) *Phené Trusts* (1870), L. R. 5 Ch. 139.

Evidence necessary to raise presumption.

There must be evidence from those who would be likely to hear of the missing person if alive, that they have not heard of him (*m*), and probably there must also be evidence that reasonable inquiries have been made by advertisement and otherwise in or about the place or places where he was last seen or heard of, or where he was likely to have gone (*n*). In one case, however, where an action was brought against an insurance company on a policy effected by a creditor on the life of his debtor, the Court appears to have presumed the death without any other evidence than that of the debtor's wife, that her husband had deserted her and run away with a nursemaid, and that she had not heard of him for over seven years (*o*). The decision in this case appears to throw the burden of making inquiries upon the party who desires to rebut the presumption of death, and in an action in the King's Bench or Chancery Division it may be sufficient for the party alleging death merely to call the missing person's nearest relations in this country to say that he was living here and disappeared more than seven years ago, and that they have not heard from him or of him since the date of his disappearance. If, however, the party alleging death knows that the missing person went or intended to go to a foreign country, it seems clear that he cannot ask the Court to presume death unless he has made reasonable inquiry in that country for persons who might know something about him. In the case of the *Prudential Insurance* v. *Edmonds* (*p*), Lord Blackburn said, "there should have been an inquiry and search made for the man amongst those who, if he was alive, would be likely to hear of him . . . so as to see whether or no there has been such an absence of hearing of him as would raise the presumption that he was dead." It does not seem reasonable that the inquiry and search which Lord Blackburn demands should be confined to relations or other persons resident in this country if the person is known, or believed, to have gone to reside in a foreign country. As a rule when inquiries are made for a missing person all sorts of vague rumours and reports are received from people who think they have seen him. Such rumours and reports must be investigated, and ought not to be withheld from the Court, even although the relations and friends

(*m*) *Doe* v. *Andrews* (1850), 15 Q. B. D. 756.

(*n*) *Prudential Assurance* v. *Edmonds* (1877), 2 A. C. 487; *Allin's Legacy, In re* (1867), 17 L. T. 60; *McMahon* v. *McElroy* (1869), Ir. R. 5 Eq. 1.

(*o*) *Willyams* v. *Scottish Widows* (1887), 4 T. L. R. 489.

(*p*) (1877), 2 A. C. 487.

believe them to be without foundation. If, however, the party alleging death can satisfy the Court that the rumours and reports are in fact devoid of reasonable foundation then the fact of such rumours and reports having been received within the seven years does not prevent the presumption of death from arising (*q*).

Disappearance under circumstances tending to show intentional concealment.

Sometimes a person disappears under circumstances which lead to the inference that even if he was alive it is very unlikely that his friends and relations would hear of him. He may have had very good reasons for blotting himself out from the world which previously knew him. It has been said that under such circumstances the presumption of death does not arise from seven years' absence. Thus where a girl of sixteen left her father's house under circumstances which indicated an intention of concealing herself and never returning home (*r*), and where a young woman left England and took a situation in Paris as a governess and having become a Roman Catholic quarrelled with her family, ceased to communicate with them, and subsequently disappeared (*s*), and where a convict having been transported and discharged after having served his sentence was never heard of again (*t*), the Court in each instance refused to presume death. Probably in an action in the King's Bench or Chancery Division the Court ought in every case of absence, and not being heard of for seven years, to presume death in the first instance, thus laying the onus of proving continuation of life upon the party alleging it. Circumstances such as existed in the above-mentioned cases are merely facts from which the Court or jury may, in the face of the presumption, find that the missing person is still alive.

No presumption of law as to the date of death.

Although death is presumed after seven years' absence, there is no presumption of law as to the time of death (*u*). The onus of proving life or death at any particular time rests on the person alleging it (*x*). There is, on the one hand, no presumption of survivorship during the seven years (*y*), nor is there any presumption

(*q*) *Prudential Assurance* v. *Edmonds* (1877), 2 A. C. 487.

(*r*) *Watson* v. *England* (1844), 14 Sim. 28.

(*s*) *Bowden* v. *Henderson* (1854), 2 Sm. & G. 360.

(*t*) *Mileham's Trust* (1852), 15 Beav. 507.

(*u*) *Phené Trusts* (1870), L. R. 5 Ch. 139.

(*x*) *Rhodes, In re* (1887), 36 Ch.D. 586.

(*y*) *Phené Trusts* (1870), L. R. 5 Ch. 139; *Benham's Trust, In re* (1867), 37 L. J. Ch. 265. Stated as a rule of law, there is no presumption of continuation of life in English law; but where a person has been seen alive and well on a certain date the proper inference of fact may be that he was alive for a reasonable time thereafter. *Phené Trusts, In re* (1870), L. R. 5 Ch. 139. Where a deed contains a grant in favour of any individual there is a presumption in so far as any rights under the deed are concerned that the grantee was alive at the date of the

of death at any time before the expiration of seven years (*z*). The time of death when it becomes material must be decided as a question of fact upon such evidence as can be adduced (*zz*). The fact that the missing person is to be presumed dead at the time of the inquiry is not, however, to be disregarded in the attempt to determine the date of death. The circumstances attending the disappearance may not be such as would by themselves entitle a jury to find that the man died at or about the time of such disappearance. But when there is added to the circumstances attending the disappearance the presumption of law that at the date of the inquiry the man is in fact dead, then the Court or jury may very properly come to the conclusion that, if dead, the death occurred at or about the time of disappearance (*a*). As a rule the date of disappearance is a more probable date of death than any other point of time during the seven years, and the end of the seven years is the most improbable date to fix as the actual date of death (*b*). If the Court finds it necessary to come to some decision as to the date of death in the absence of any evidence beyond the fact of seven years' absence, it fixes the date of disappearance as the date of death (*c*).

Death may be proved by circumstantial evidence before the lapse of seven years.

It is not always necessary when a person has disappeared to wait for seven years before his death can be proved. When the circumstances attending the disappearance are such that a Court or jury may reasonably find, as a matter of fact, that the missing man is dead, the presumption of law arising from seven years' absence is not required, and therefore death may be proved within the seven years (*d*). Thus if a man was known to have embarked on a vessel which has never reached port, death may be proved when all reasonable hope of the vessel ever turning up has been abandoned, and the underwriters on the vessel have paid a total loss (*e*). So where a man alleged to be deceased was known to have been shipwrecked and to have formed one of the crew of an open boat which was launched in very rough weather and was

grant (*Corbishley's Trusts, In re* (1880), 14 Ch. D. 846).

(*z*) *Lambe* v. *Orton* (1859), 29 L. J. Ch. 286.

(*zz*) *Phené Trusts* (1870), L. R. 5 Ch. 139.

(*a*) *Hickman* v. *Upsall* (1876), 4 Ch. D. 144.

(*b*) *Lewes' Trusts, in re* (1871), L. R. 6 Ch. 356; *Connor, In re* (1892), 29 L. R. Ir. 261; *Webster* v. *Birchmore* (1807), 13 Ves. 362; *Beasney's Trusts, In re* (1869), L. R. 7 Eq. 498; *Lakin* v. *Lakin* (1865), 34 Beav. 443; *Sillick* v. *Booth* (1842), 1 Y. & C. C. C. 117.

(*c*) *Aldersey, In re*, [1905] 2 Ch. 181.

(*d*) *R.* v. *Tolson* (1889), 23 Q. B. D. 168.

(*e*) *Norris, In the Goods of* (1858), 1 Sw. & Tr. 6; *Main, In the Goods of* (1858), 1 Sw. & Tr. 11.

never heard of again, the Court of Probate gave leave to swear the death within a year (*f*). In one case leave to swear the death was given after three years (*g*). The missing man was seventy-three years old at the time he disappeared, and complete search and inquiry had been made for him without success. In a man of that age death was a much more probable cause of disappearance than it would be in the case of a younger man.

Practice of the Probate Division in giving leave to swear death.

The practice of the Court of Probate in presuming death and giving an applicant for probate or letters of administration leave to swear the death of a missing man apparently varies from the practice in other Courts. It has been frequently said in the Court of Probate that that Court does not adhere strictly to the seven years' presumption of law observed in other Courts. The Court of Probate is probably more rigorous in requiring the applicant to make complete inquiry and investigation into the circumstances attending the disappearance, and to ascertain, by all reasonable advertisement and otherwise, whether any one can be found who has seen or heard of the missing person. The Court will not give leave to swear the death where there is reason to suppose that the missing person went away with the intention of concealing himself, and where therefore the absence for seven years raises no reasonable inference of fact that he is dead (*h*). As a rule the Court of Probate will not give leave to swear death before the expiration of seven years from the date of disappearance when there is no other evidence of death than lapse of time, but it may do so in special circumstances (*i*). When seven years have elapsed the Court will give leave to swear death in the absence of anything to show an intentional disappearance.

Probate Division a protection for insurance companies.

If the missing person is the assured who has insured his own life and the policy is vested in him the Court of Probate provides a very valuable protection to the insurance company. No action can be brought upon the policy until the assured's personal representatives have completed their title by probate or letters of administration. This they cannot do until they have obtained leave to swear the death, and from what has been said it is clear that it is often more difficult to get the judge of the Court of Probate to presume death than it would be to persuade a jury to return a verdict of death.

(*f*) *Hurlston, In the Goods of,* [1898] P. 27.

(*g*) *Matthews, In the Goods of,* [1898] P. 17.

(*h*) *Lidderdale, In re* (1910), The Times Newspaper, March 24.

(*i*) *Winston, In the Goods of,* [1898] P. 143.

Notice to company of application for leave to swear death.

It is now recognised as the established practice to give notice of an application for leave to swear the death to any insurance company in which the missing person's life was insured (*k*), and if the company appears and successfully resists the application it may be allowed its costs against the applicant (*l*).

How far leave to swear death binds the company.

The company is not bound by the order of the Court of Probate giving leave to swear the death. Leave is usually granted to swear the death on or after the date upon which the missing person was last seen or heard of, but it is still open to the company to defend proceedings against it either on the ground that there is no evidence of death or that there is no evidence of death before the date when the policy expired. If, however, the company disputes the death after the judge of the Court of Probate has upon full investigation and inquiry presumed death it will do so at the risk of having to pay all the costs of subsequent proceedings.

Presumption of death in Scotland.

By the Common Law of Scotland there is no legal presumption of death until the extreme limit of life is reached (*m*). The limit of life is stated as 100 years (*n*). Until a person has reached that age the Common Law presumes that he is still alive (*m*).

Statutory presumption in Scotland does not apply to insurance claims.

The Presumption of Life Limitation (Scotland) Act, 1891 (*o*), provides that when any person has disappeared and has not been heard of for seven years the Court may presume death, and that where there is not sufficient evidence that he died at any definite date he may be presumed to have died exactly seven years after the date on which he was last known to be alive. The Act, however, does not apply to any claim against the insurers under a policy of assurance upon the life of any person who has disappeared, and the person claiming under such policy must in any question with the insurers prove the death of the person whose life is insured in the same manner as if the Act had not been passed.

Evidence necessary to

Death must be proved by such evidence as will satisfy the

(*k*) *Barber, in the Goods of* (1886), 11 P. D. 78; *Kirkbride, In the Goods of* (1891), L. J. N. C. 96.

(*l*) *Lidderdale, In re* (1910), The Times Newspaper, March 24.

(*m*) *Williamson* v. *Williamson* (1886), 14 R. 226. There have been occasional attempts to introduce an arbitrary period of presumption, but no rule has ever been established (see *Kennedy* v. *McLean* (1851), 13 D. 705; *Rhind's Trustees* v. *Bell* (1878), 5 R. 527).

(*n*) *Bruce* v. *Smith* (1871), 10 M. 130.

(*o*) 54 & 55 Vict. c. 29.

Court that the person is in fact dead. Mere disappearance and lapse of time short of 100 years from birth is not sufficient (*p*). But the presumption of life grows weaker as time passes, and the older the missing person is at the time of the inquiry the more easily will the presumption of life be rebutted (*q*). In one of the later cases it is stated that a man must within the limit of human life be presumed to be alive until his death is proved, or until facts and circumstances are proved sufficient to raise a presumption that he died at some particular date (*r*). Probably, however, that is placing the presumption of life too high, and the real test appears to be whether on the whole evidence there is any real doubt that the man is dead (*q*), and, if there is not, the Court will hold that death has been proved (*s*), even although there is no evidence tending to show the proximate date of death (*t*). The Court does not insist upon direct evidence of all the circumstances, but will admit evidence of rumours, information, and belief (*u*). In one case where a man had disappeared under circumstances which made it improbable that he would communicate with his relatives and friends, even if alive, the Court after evidence as to his health and habits came to the conclusion that he was not likely to live very long, and held that he was dead, twenty-five years after his disappearance, and when, if alive, he would have been eighty years of age (*x*). In another case where a man had been last heard of as having been discharged from a hospital in Jamaica, and had then expressed an intention of returning home, the Court held that he might be deemed to have died seven years after that date (*y*). The Court, therefore, will draw the best inference it can from the facts of the case, and, if it is necessary to fix the date of death, will do so in a more or less arbitrary manner where there is no definite evidence pointing to any particular date.

satisfy Court that missing person is dead.

In some cases where there was a strong probability of death

Payment of fund on

(*p*) *Williamson* v. *Williamson* (1886), 14 R. 226; *Barstow* v. *Cook* (1862), 24 D. 790; *Fife* v. *Fife* (1855), 17 D. 951; *Campbell* v. *Lamont* (1824), 3 S. 145.

(*q*) *Bruce* v. *Smith* (1871), 10 M. 130.

(*r*) *Williamson* v. *Williamson* (1886), 14 R. 226.

(*s*) *Erskine* v. *Steven* (1622), Mor. Dict. 12643; *French* v. *Wemyss* (1667), Mor. Dict. 12644; *Sands* v. *Tenents* (1678), Mor. Dict. 12645; *Fairholm* v. *Fairholm's Trustees* (1858), 20 D. 813.

(*t*) *Bruce* v. *Smith* (1871), 10 M. 130; *Rhind's Trustees* v. *Bell* (1878), 5 R. 527.

(*u*) *Laurie* v. *Drummond* (1670), Mor. Dict. 12643; *Hogg* v. *Whitefield* (1706), Mor. Dict. 12645; *Forrester* v. *Boutcher* (1760), Mor. Dict. 11674; *Stewart* v. *Hay* (1760), Mor. Dict. 11675; *Campbell's Trustees* v. *Campbell* (1834), 12 S. 382.

(*x*) *Bruce* v. *Smith* (1871), 10 M. 130.

(*y*) *Rhind's Trustees* v. *Bell* (1878), 5 R. 527.

giving security.

but the evidence was not sufficient to justify the Court in holding the death proved as a fact, the Court has permitted the person entitled to the fund on the death of the missing person to enjoy the income of it (*z*), or even to take possession of the capital on giving proper security to refund it in the event of the missing person appearing to claim it (*a*).

Section II.—Interest upon Policy Moneys

No interest allowed at Common Law.

Formerly interest upon the policy moneys could not be recovered from the company, even although the company had wrongfully delayed payment (*b*).

Interest can now be recovered under the provisions of the Common Law Procedure Act, 1833.

Common Law Procedure Act, 1833, sec. 29

3 & 4 Will. 4, c. 42, sec. 29.

29. The jury on the trial of any issue, or on any inquisition of damages may, if they shall think fit give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act.

Discretion of Court.

The Act does not give interest as of right. The jury or the Court acting as a jury may exercise their discretion in the matter (*c*).

Interest runs from date of default.

The Court will not award interest unless the company was in default in making payment, and then interest will run only from the time of such default. A claimant is not entitled to interest until he has tendered to the company proper proof of death, and a good title to the policy moneys (*d*). He must be able and willing to give the company a complete legal discharge before interest will begin to run (*e*).

Conflicting claims.

Conflicting claims do not justify the company in keeping the money after the time for payment has passed. Their duty is to pay into Court or interplead, and if they have improperly delayed doing so, they must pay interest from the date when

(*z*) *Campbell* v. *Lamont* (1824), 3 S. 145.

(*a*) *Fettes* v. *Gordon* (1825), 4 S. 149; *Garland* v. *Stewart* (1841), 4 D. 1; *Henderson* v. *Morton* (1710), Mor. Dict. 12646.

(*b*) *Higgins* v. *Sargent* (1823), 3 D. & Ry. 613.

(*c*) *Powell's Trusts, In re* (1852), 10 Hare 134.

(*d*) The time of payment is frequently the end of a fixed period, such as three or six months, after proof satisfactory to the directors.

(*e*) *Webster* v. *British Empire Mutual* (1880), 15 Ch. D. 169.

the money was payable, until the date of payment in. In the case of an interpleader, even although they may be entitled to their costs of the interpleader summons they may nevertheless have to pay interest on the sum paid in (*f*). Where a company were requested by the claimants not to pay the money into Court pending the settlement of the dispute between them it was held that the company were not bound to pay interest (*g*).

Rate of interest.

The rate of interest payable by the company on policy moneys which are overdue, is apparently the ordinary commercial rate of five per cent. simple interest (*h*).

Section III.—Claimant's Title

Discharge of company.

In settling a claim under a policy the insurance company ought not to pay unless they obtain a discharge—

(1) from the person in whom the legal chose in action is vested, that is to say, the person who is entitled to sue the company at law in his own name, or from some person duly authorised to receive the money on his behalf, and

(2) from any other person who has an equitable claim to the policy moneys (and who is not merely a beneficiary under a trust or a mortgagor or other person entitled to an equity of redemption).

Whether legal discharge essential.

It has been said that it is not always necessary for a company to insist upon obtaining a legal discharge, and that it will often be sufficient for them to take a discharge from a person who, although he has not the legal chose in action, has undoubtedly the sole beneficial interest in the policy moneys. No doubt in business it is not always practicable or advisable to insist upon strict legal formalities, and, in practice, companies do not always take a legal discharge. That, however, is a question for the company. They must decide what risk it is worth while taking. It is impossible to advise a company that they are absolutely safe unless they have a discharge from the person or persons entitled to sue them at law. So long as the legal chose in action remains undischarged some equitable claim of which the company had no notice may be made, and an action brought in the name of the

(*f*) *French* v. *Royal Exchange* (1857), 6 Ir. Ch. R. 523; *Rosier's Trusts, In re* (1877), 37 L. T. 426.

(*g*) *French* v. *Royal Exchange* (1858), 7 Ir. Ch. R. 523.

(*h*) *Horner, In re*, [1896] 2 Ch. 188.

proprietor of the legal chose in action. To such an action it would be no defence for the company to allege that they had no notice of the equity, if in fact the equity took priority over the equity of the person to whom payment had been made. The company, therefore, are in every case entitled to insist upon a legal discharge (*i*).

Title to legal chose in action.

Primarily the person entitled to the legal chose in action is the assured, and his legal representatives after his death. The assured is the person with whom the contract of insurance is made, that is the person to whom the promise or covenant to pay is made (*k*).

Position of nominee.

The simplest form of insurance is a covenant to pay to the assured, his executors, administrators, or assigns. But the promise may be to pay to some third person. If such third person is nothing more than a nominee, that is to say, if he is not in fact a party to the contract, he has no right at law against the company (*l*).

The nominee is the agent for the time being of the legal owner and has his authority to receive the money and give a discharge. So long as the company have no notice of the withdrawal of authority from the nominee they can safely pay to him and accept his discharge in lieu of that of the actual legal owner. The legal owner can, however, at any time withdraw his authority, and if the company have notice of such withdrawal they can no longer get a good discharge from the nominee.

Nominee may, in fact, be the assured.

The form of the policy is not conclusive, and the person who is apparently a mere nominee may, in fact, be the assured, and the nominal assured may be merely an agent to effect an insurance on behalf of the person to whom the policy moneys are made payable. Thus a debtor may effect a policy which in form is an insurance by him on his own life payable to his creditor, but which, in fact, is an insurance by the creditor paid for by him out of his own money. In such case the nominee as principal in the transaction is, upon disclosing his real position with regard to the contract, entitled to sue at law in his own name, and is the legal holder of the policy (*m*).

(*i*) *Haycock's Policy, In re* (1876), 1 Ch. D. 611, 613.

(*k*) *Dever, Ex parte* (1887), 18 Q. B. D. 660.

(*l*) *Cleaver* v. *Mutual Reserve*, [1892] 1 Q. B. 147; *Price* v. *Easton* (1833), 4 B. & Ad. 433; *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393.

(*m*) *Rawls* v. *American Mutual* (1863), 27 N. Y. 282.

Transfer of the legal title

The legal chose in action may pass from the assured either by assignment or by operation of law.

by assignment,

The legal chose in action can only pass by assignment if the assignment is in writing and in strict accordance with the provisions of the Policies of Assurance Act, 1867, or the Judicature Act, 1873 (*n*). An assignment of the legal chose in action is established by—

(1) A properly stamped assignment in writing conveying either unconditionally or by way of security the right to sue for the whole policy moneys payable under the policy.

(2) Notice in writing to the company given before it received notice of any other assignment.

by operation of law,

The legal chose in action may pass by operation of law without assignment (1) on death, to the deceased's personal representative; (2) on bankruptcy, to the trustee in bankruptcy; and (3) on the marriage of a married woman, to her husband.

death,

The passing of the legal chose in action to the personal representative on death is established by the production of the original or an office copy of a properly stamped probate or letters of administration granted by the Court of Probate in England, or of a Scottish or Irish or Colonial grant sealed by the Court of Probate in England (*o*).

bankruptcy,

The passing of the legal chose in action to the trustee in bankruptcy is established by the production of an office copy of the adjudication order, and a copy under the seal of the Board of Trade of the Board of Trade Certificate certifying the appointment of the trustee (*oo*).

marriage.

Before the Married Women's Property Acts (1870 and 1882), the legal choses in action of a married woman passed to her husband by operation of law. Between 9th August, 1870, and 1st January, 1883, choses in action belonging to a married woman as her separate estate, or purchased by her out of her separate estate, did not pass to her husband, and since 1st January, 1883, no chose in action of a married woman has passed to her husband by operation of law (*p*).

(*n*) *Infra*, pp. 425–432.

(*o*) *Infra*, pp. 619–631.

(*oo*) *Infra*, pp. 580–619. In small bankruptcies where an order for summary administration is made, the property of the bankrupt remains vested in the official receiver, and his title will be proved by production of an office copy of the order. *Infra*, p. 618.

(*p*) *Infra*, pp. 535–552.

Settlement with person entitled to legal chose in action.

The person entitled to the legal chose in action whether he be the assured or his personal representative or an assignee under the Policies of Assurance Act, 1867, or the Judicature Act, 1873, is *primâ facie* entitled to payment (*pp*). If the company has no notice of any equitable claim the receipt of the person legally entitled is a sufficient discharge (*q*), and persons having equitable claims must look for satisfaction to the person who has received the money (*qq*). The same rule applies to *bonâ fide* settlements of claims (*r*). Until the company has notice of an equitable claim it may deal freely with the person entitled at law either by settling a claim, accepting a surrender, taking a charge on the policy for money advanced, or otherwise (*s*). The company is in the position of a debtor dealing with his creditor. The debtor may, until he has received notice that some other person has an equitable interest, agree with him to extinguish or modify the terms of the debt (*t*).

Notice of equitable claim.

Immediately the company has notice of an outstanding equitable interest it cannot by payment or otherwise do anything to take away or diminish the rights of the equitable assignee as they stood at the time of the notice (*u*), and, if the company disregards the notice and pays or settles with the person legally entitled, it may be called to account by the equitable assignee, and may have to pay the money over again to him (*v*).

Settlement with trustee or mortgagee.

This, however, does not apply to payment made to a trustee (*w*) or personal representative or to a mortgagee (*x*). Such person, if entitled to the legal chose in action, may give a complete discharge for the policy moneys when due notwithstanding the claims of beneficiaries or persons entitled to the equity of redemption of the mortgage.

Proof of claimant's title.

The company are always entitled to insist upon strict legal proof of a claimant's title, and every step in the title ought therefore to be made clear by proper documentary evidence.

Production of policy.

Sometimes the claimant is unable to produce the policy.

(*pp*) *Triston* v. *Hardey* (1851), 14 Beav. 232.

(*q*) *London Investment Co.* v. *Montefiore* (1864), 9 L. T. 688.

(*qq*) *Williams* v. *Sorrell* (1799), 4 Ves. 389.

(*r*) *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, 16.

(*s*) *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. 80.

(*t*) *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. 80; *Newman* v. *Newman* (1885), 28 Ch. D. 674.

(*u*) *Roxburgh* v. *Cox* (1881), 17 Ch. D. 520; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569.

(*v*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569.

(*w*) *Infra*, p. 514.

(*x*) *Infra*, p. 504.

This alone is not a good reason for refusing payment provided the non-production of the policy is satisfactorily explained. The claimant may fail to produce the policy either because it is in the hands of some other person who declines to give it up, or because it has been lost.

Policy in hands of third person.

Where the policy is in the hands of a third person, that person may have a right to retain the document although he has no claim to the policy moneys. A solicitor may have a lien on it for his charges, or the policy may have been the subject of an imperfect gift sufficient to transfer the property in the document, but insufficient to transfer the chose in action. Where the policy is in the hands of a third person who has thus a right to retain it, the company cannot insist on its production. The claimant is in a position to prove his case, because he can subpœna the person who retains the document, to produce it at the trial of the action. The company are probably entitled to a statutory declaration from the claimant, stating that he has asked for production of the policy, but that it has been refused. If the policy is in the hands of a third person who has no right as against the claimant to retain it, the company are probably within their rights in insisting that the claimant shall take the proper steps to obtain and produce it before payment is made to him. It may be noted here that a mortgagee exercising his power of sale has a statutory right under the Conveyance Act, 1881, section 20 (7), to recover from any person other than a person having a prior charge on the moneys, the policy and all other documents of title.

Lost policy.

When the policy is alleged to be lost, the company are probably entitled to ask for a statutory declaration from the claimants stating the circumstances under which the policy was lost, and averring that a diligent search has been made. The declaration should also contain a denial by the claimant of any assignment deposit or charge by him, or of any knowledge of a conflicting claim to the moneys. It is usual to ask for an indemnity from the claimant, but probably the company are not entitled to it (*y*), and if the case is reasonably clear, and the company pay into Court solely on the ground that the claimant declines to give them an indemnity, they may be ordered to pay the claimant's costs of applying to the Court for payment out (*z*).

(*y*) *Crokatt* v. *Ford* (1855), 25 L. J. Ch. 552; *England* v. *Tredegar* (1866), L. R. 1 Eq. 344.

(*z*) *Harrison* v. *Alliance Assurance*, *infra*, p. 419. See *Bushnan* v. *Morgan* (1833), 5 Sim. 635, where in a suit in equity to recover money insured under a lost policy the Court

Surrender of policy.

Where a policy is offered for surrender, the company must not only satisfy themselves that the claimant has a proper title, which would give him the right to receive the policy moneys if due, but they must also satisfy themselves that the claimant has the right to sell the policy because surrender is analogous to sale. Where the claimant is a trustee or mortgagee, his power of sale must be carefully considered (*zz*).

Bankruptcy of claimant, inquiry as to.

Payment cannot be safely made after the company has notice of an act of bankruptcy committed by the claimant. If the claimant became bankrupt within three months thereafter, and the company had paid with knowledge of the act of bankruptcy, they would have to pay over again to the trustee in bankruptcy. In the present state of the law in England it is not necessary for the company in the absence of notice to make inquiries as to whether or not a claimant has committed an act of bankruptcy or has become bankrupt. Payments made to a bankrupt before the date of the receiving order without notice are protected by statute, payments made after the date of the receiving order without notice are apparently protected under the equitable doctrine of notice (*a*).

Voluntary assignee, inquiry as to solvency of assignor.

Even where the claimant is a voluntary assignee of the policy it is not necessary in England to make any inquiries as to the solvency of the assignor. The assignment may be subsequently set aside at the instance of the trustee in bankruptcy or the creditors of the assignor, but so long as the company has no notice of the insolvency of the assignor it is protected. The assignment is valid until set aside, and therefore payment of the policy moneys when due upon the receipt of a voluntary assignee gives the company a complete discharge. In accepting a surrender of a policy for the surrender value from a voluntary assignee the company becomes a purchaser for value without notice, and is equally protected (*aa*).

Company has no right to assignee's documents of title.

When payment of the policy moneys is claimed by an assignee, the company is not entitled to demand delivery up to them of the assignee's documents of title showing his title from the original assured. Having produced them to prove his claim against the

ordered the plaintiff to give the company an indemnity and referred the matter to the master to settle the terms thereof.

(*zz*) *Infra*, pp. 502, 515, 533.

(*a*) In Ireland and Scotland, however, it is not so. All assignments after the date of the bankruptcy or sequestration are void against the trustee, and search ought to be made in the bankruptcy records. *Infra*, p. 597.

(*aa*) *Infra*, pp. 592, 597, 600.

company he is entitled to retain them in order to protect himself against any claims which might subsequently be made against him (*b*). All that the company is entitled to is an acknowledgment of the right to production and an undertaking to produce when required (*c*).

Payment to claimant's agent.

If payment is made to an agent for the claimant the company must satisfy themselves that the agent has sufficient authority to receive the money. Under section 17 (2) of the Trustee Act, 1893, a trustee may appoint a solicitor or banker as his agent to receive the insurance money by permitting such agent to have the custody of and produce the policy with a receipt signed by the trustee, and payment to such agent so producing the policy and receipt is a sufficient discharge to the company (*d*). It has been suggested that under section 56 of the Conveyancing Act, 1881, a solicitor acting for any claimant may give the company a good discharge by producing the policy with the receipt of the claimant endorsed thereon. It is submitted that that section only applies to a receipt for consideration money, and is inapplicable to a receipt for policy moneys even where the policy is under seal. Except, therefore, in the case of payment to a solicitor or banker as agent for a trustee the company ought to insist upon the production of a written authority authorising a named agent to receive the policy moneys on the claimant's behalf.

Conveyancing and Law of Property Act, 1881, sec. 56

44 & 45 Vict, c. 41, sec. 56.

Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

Title to equitable chose in action.

Where the company has received notice of an equitable assignment, it must not only obtain a discharge from the person

(*b*) *Palmer, In re*, [1907] 1 Ch. 486.

(*c*) But where the deeds relate to the policy only without any other property, the usual practice is for them to be handed over to the company.

(*d*) Trustees include executors and administrators, but not mortgagees (Trustee Act, 1893, sec. 50). And see *infra*, p. 516.

entitled to the legal chose in action but must also see that the equitable claim is satisfied. Subject to the discharge of the legal chose in action the company may safely pay the equitable assignee if it has no notice of any competing equitable claim (*c*). Any settlement, surrender, or other arrangement made with such equitable assignee is valid against all other equitable claims of which they have had no notice (*c*).

Who is entitled to equitable interest in policy moneys.

Primâ facie the person who pays for the policy, that is to say, the person on whom the ultimate burden of the premiums falls, is the person entitled to the equitable and beneficial interest in the policy moneys (*d*). If one person bears the burden of the premiums the fact that the policy is effected in the name of a third person, or that the moneys are made payable to a third person does not *ipso facto* entitle such third person to the beneficial interest (*dd*). On the contrary, if such person is a stranger, the presumption is that the policy was made in his name, or that he was nominated as payee for the purpose of holding the moneys in trust for the person who has paid for the policy, and for his assigns (*e*). If, however, the person in whose name the policy is effected, or who is nominated payee, is a wife or child of the person who has paid for it or is a near relative to whom such person stands *in loco parentis*, the presumption is that the policy was intended to be a gift or portion (*f*). The resulting trust is thus rebutted, and if the policy moneys are received by the nominal assured or payee, he may retain them for his own benefit. Until payment of the policy moneys, however, the nominal assured or payee is in the position of a donee of an uncompleted gift. Unless

Payee or nominal assured.

(*c*) *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, 16; *Ottley* v. *Grey* (1847), 16 L. J. Ch. 512; *Desborough* v. *Harris* (1855), 5 De G. M. & G. 439.

(*d*) *A Policy No.* 6402 *of the Scottish Equitable, In re*, [1902] 1 Ch. 282; *Devers, Ex parte* (1887), 18 Q. B. D. 660; *Cleaver* v. *Mutual Reserve*, [1892] 1 Q. B. 147.

(*dd*) *Worthington* v. *Curtis* (1875), 1 Ch. D. 419; *Weston* v. *Richardson* (1882), 47 L. T. 514; *Grant* v. *Hill* (1812), 4 Taunt. 380; *Hadden* v. *Bryden* (1899), 1 F. 710; *Hopkins* v. *North Western Life* (1900), 99 Fed. Rep. 199. In a Scottish case a newspaper coupon insurance promised payment of £1000 to the person adjudged by the editor to be the next-of-kin of the deceased, and stipulated that the person or persons who should be adjudged by the editor to be the next-of-kin should be the only person or persons entitled to receive and give a discharge for the policy moneys. The deceased was survived by three brothers and a sister. The editor adjudged the sister to be the next-of-kin, and paid the whole amount to her. In an action by the brothers against her, it was held that they had no right to share in the fund (*Hunter* v. *Hunter* (1904), 7 F. 136).

(*e*) *A Policy No.* 6402 *of the Scottish Equitable, In re*, [1902] 1 Ch. 282; *Pfleger* v. *Brown* (1860), 28 Beav. 391; *Field* v. *Lonsdale* (1850), 13 Beav. 78.

(*f*) Lewin on Trusts (12th edition, p. 183).

he can show that there was an equitable assignment to him for value or a declaration of trust in his favour, the real assured may withdraw the authority to pay the money to him and direct the company to pay it to himself for his own benefit (*ff*). The relationship, in such cases, is merely evidence of intention on the part of the person providing the policy, and if a contrary intention appears from other evidence the wife or child will not be entitled to a beneficial interest merely on the ground of relationship (*g*). On the other hand, where a policy is effected in the name of or made payable to a stranger, there may be evidence either in the policy or otherwise to show that the policy was intended for his benefit, and that he was not named as a bare trustee.

A policy No. 6402 of the Scottish Equitable Life, In re, [1902] 1 Ch. 282

A policy of the Scottish Equitable Life, In re.

In 1850 W. S. effected a policy on his own life. The policy purported to be "for behoof of H. S." and it certified that H. S. and her executors, administrators and assigns should be entitled on the death of W. S. to receive the policy moneys; it was further agreed that the policy moneys should be payable to the executors, administrators, or assigns of the assured. H. S. was the sister of the deceased wife of W. S., and after the death of the wife in 1850 W. S. and H. S. went through the ceremony of marriage, and lived together as man and wife. H. S. died in 1870, and W. S. died in 1900. W. S. had always retained the policy in his possession, and paid the premiums thereon until his death. The policy moneys were claimed by the executors of W. S. on the one hand, and the personal representative of H. S. on the other. It was held that this was like the case of a person purchasing property in the name of another, where the presumption is that if it is in the name of a stranger the stranger is not beneficially entitled, but holds it in trust for the purchaser, but if it is in the name of wife or child, the wife or child is beneficially entitled. Here H. S. must be deemed to be a stranger, and therefore, although in law her representative would be entitled to receive the moneys, in equity the moneys belonged to the personal representatives of W. S.

Above decision criticised.

The above decision is open to criticism. In the first place H. S. was not a party to the contract, and the legal chose in action was not in her and her representatives. It is even doubtful from the wording of the policy whether she was the payee. She was apparently designated as the person entitled to the beneficial interest. That is the clear and obvious meaning of the Scottish phraseology "for behoof of." It is submitted that in this policy

(*ff*) *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393.

(*g*) *Hadden* v. *Bryden* (1899), 1 F. 710.

there was in effect a declaration of trust in favour of H. S. who thereby took a vested beneficial interest which passed to her personal representatives, and that the legal chose in action and the right in law to receive the money was in the assured and his representatives.

Life insured without interest.

Apart from a declaration of trust (*h*) or express or implied contract, a person whose life is insured by another has no claim to the policy moneys. Where the person effecting the insurance has no interest in the life, that is a matter between the assured and the company, but it gives the person whose life is insured no claim to the policy moneys (*i*).

Assignment of equitable interest in policy moneys

The equitable interest in the policy moneys can be assigned without any formality or notice to the company (*ii*). Priority of notice may govern the question of priority of one equity over another, but notice to the company is not necessary to complete the assignment in equity between assignor and assignee (*j*). A voluntary assignment must be completed by an assignment *de presenti* in writing, but where the transaction is for value the Court will enforce even an oral promise to assign (*jj*).

Section IV.—Payment into Court

Payment into Court Act, 1896.

An insurance company which cannot otherwise obtain a satisfactory discharge for policy moneys payable by it may now do so by paying the moneys into Court under the provisions of the Act of 1896.

59 Vict. c. 8.

Life Assurance Companies (Payment into Court) Act, 1896

Short title.

1. This Act may be cited as the Life Assurance Companies (Payment into Court) Act, 1896.

Interpretation.

2. In this Act—

The expression "life assurance company" means any corporation, company, or society carrying on the business of life assurance, not being a society registered under the Acts relating to friendly societies;

The expression "life policy" includes any policy not foreign to the business of life assurance.

Power to pay money into Court.

3. Subject to rules of Court any life assurance company may pay into the High Court, or where the head office of the company is situated within the

(*h*) *Langelier* v. *Charlebois* (1903), 34 Can. S. C. 1.

(*i*) *Henson* v. *Blackwell* (1845), 4 Hare, 434; *Hadden* v. *Bryden* (1899), 1 F. 710.

(*ii*) *Infra*, p. 436.

(*j*) *Infra*, p. 438.

(*jj*) *Infra*, pp. 438, 458.

jurisdiction of the Chancery Court of the County Palatine of Lancaster either into that Court or into the High Court, any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained.

Receipt of officer sufficient discharge.

4. The receipt or certificate of the proper officer shall be a sufficient discharge to the company for the moneys so paid into Court, and such moneys shall, subject to rules of Court, be dealt with according to the orders of the High Court or the Palatine Court, as the case may be.

Extent of Act.

5. This Act does not extend to Scotland.

Rules of the Supreme Court, Order LIVc.

R. S. C., O. 54c.

1. An assurance company desiring to make a payment into Court under the Act shall cause an affidavit, by its secretary, or other authorised officer, to be filed, intituled "In the matter of the Policy No. , effected with [*here give the name of the company*] and in the matter of the Act," and setting forth :—

(*a*) A short description of the policy and a statement of the persons entitled thereunder, according to the terms of the policy, with the names and addresses of such persons, so far as the same are known to the company.

(*b*) A short statement of the notices received by the company claiming an interest in or title to the money assured, the dates when such notices were received, the dates of withdrawal of such notices, if any, as have been withdrawn, and the names, and, except as to notices withdrawn, the addresses, so far as the same are known to the company, of the persons by whom such notices have been given.

(*c*) A statement that, in the opinion of the board of directors of the company no sufficient discharge can be obtained otherwise than by payment into Court under the Act.

(*d*) The submission by the company to pay into Court such further sum, if any, whether for interest (*k*) or otherwise, as the Court or a Judge may direct, and to pay any costs which the Court or a Judge may consider under the circumstances of the case ought to be paid by the company.

(*e*) An undertaking by the company forthwith to transmit to the paymaster any notice of claim received by the company after the making of the affidavit, with a letter referring to the title of the affidavit.

(*f*) The place where the company may be served with any petition, summons, order, or notice of any proceeding relating to the money.

2. The company shall not deduct any costs or expenses of or incidental to the payment into Court (*l*).

3. No payment shall be made into Court under the Act where any action to which the company is a party is pending in relation to the policy or the moneys thereby assured except by leave of the Judge to be obtained by summons in the action.

4. The company shall forthwith give notice of such payment by prepaid

(*k*) *Ante*, p. 406.

(*l*) *Infra*, pp. 418, 423, note. In Ireland it was held that even although no rules of procedure had been made under the Act the company must bear their own costs of payment in *Power's Policies, In re.* [1899] 1 Ir. R. 6.

letter through the post, to the several persons appearing by the affidavit to be entitled to or interested in the money assured and paid into Court, or to have given notice of claim to the company, except where the notice has been withdrawn, and except so far as the name or address of any such person is unknown to the company.

5. Any person claiming to be entitled to or interested in the money paid into Court may apply in the Chancery Division, by petition or, where the amount does not exceed £1000, by summons in respect thereof.

6. No petition or summons relating to the money shall be answered or issued unless the applicant has named therein a place where he may be served with any petition or summons, or notice of any proceeding or order relating to the money.

7. Unless the Court or a Judge shall otherwise direct, the applicant shall not, except when he asks for payment of a further sum of costs by the company, serve such petition or summons on the company, but shall serve the same on or give notice thereof to every person appearing by the affidavit on which payment into Court was made to be entitled to, or interested in, or to have a claim upon the money, or who has given any further notice which has been transmitted to the paymaster as aforesaid.

8. These Rules (which shall come into operation forthwith) may be cited as the Rules of the Supreme Court (Life Assurance Companies), 1896, and with reference to the Rules of the Supreme Court, 1883, as Order LIVc.

Advantage of the Act of 1896.

The advantage of proceeding under the Act of 1896 is that the company can get an absolute discharge against all claims present and future and not only, as in the case of interpleader, where there is an existing conflict between rival claimants. Thus, where difficulty arises from the fact that the person entitled to sue at law cannot be ascertained, or from the fact that the company has had actual or constructive notice of equitable claims from persons who at the date of payment cannot be ascertained, or generally where owing to amateur or bad conveyancing the title is not satisfactory, the Act provides a solution.

Disadvantage of the Act of 1896.

The disadvantage of proceeding under the Act of 1896 is that the company has to bear its own costs of payment in, and if it is ultimately held that it was over cautious, and that it could have got a perfectly good discharge without payment in it may be ordered to pay the costs of the claimant's application to have the money paid out. Frequently, however, the company can arrange beforehand for payment of its costs by the claimants, as payment into Court under the Act may be the cheapest way out for them, and where the company acts reasonably there is not much danger of its being mulcted in further costs.

When a company is

The right of an insurance company to get a discharge under the Act depends solely on the fact that in the honest opinion of

the board of directors no sufficient discharge can otherwise be obtained (*m*). The right of the company to impose the costs of legal proceedings upon a claimant depends upon the opinion of the board of directors being not only honest but in the opinion of the Court reasonable (*n*). entitled to pay in.

Harrison v. Alliance Assurance, [1903] 1 K. B. 184

Harrison v. *Alliance Assurance.*

In 1875, B effected a policy on the life of A. B died shortly afterwards, and letters of administration were granted to his widow who was party to a deed of family arrangement whereby the policy was assigned to trustees of whom H was the last survivor. Notice of the deed was given to the company in 1882, and the life dropped in 1901. Many years before the policy had been lost, and of this fact the company had notice and continued to accept payment of the premiums from the trustees. The company offered to pay the money to H, the surviving trustee upon receiving a sufficient indemnity, but the parties were unable to agree as to the terms of the indemnity. H commenced an action to recover the money and the company took out a summons in the action for leave to pay the money into Court. The Court gave leave, and Collins, M.R., said, "Unquestionably the case is brought within the latter words of the section, for it is distinctly stated in the affidavit filed on behalf of the defendants that their board of directors are of opinion that no sufficient discharge can be obtained in this case otherwise than by proceeding under the Act; and there is, it seems to me clearly, ground for that opinion, for although there may be under the circumstances a strong presumption that the plaintiff has a good title I do not think it can be said that his title is absolutely free from doubt. This appears to me to be one of the kind of doubts for the purpose of meeting which the Act was passed. It must be borne in mind that the defendants in seeking the protection of the Act do so at the risk of having to pay any costs to which the plaintiff may, in consequence, be put if their own attitude has been in any way unreasonable. If the plaintiff's title to the policy money be as clear as his counsel alleges it to be then no doubt such order will hereafter be made against the defendants with regard to the plaintiff's costs as justice to him may require." Subsequently, on the plaintiff's application for payment out of Court, Buckley, J., ordered the company to pay the plaintiff's costs (*o*).

When a company is liable to be sued in more than one country for the same amount, as for instance in Scotland and England, payment into Court in one country is not an absolute bar to proceedings in the other country (*p*), but, as a rule, if payment into Court is made in the country where the claim is made payable, the Courts in the other country would stay proceedings until the

(*m*) *Harrison* v. *Alliance Assurance Co.*, [1903] 1 K. B. 184.

(*n*) *Harrison* v. *Alliance Assurance Co.*, [1903] 1 K. B. 184; *Carroll's Policy, In re* (1892), 29 L. R. Ir. 86.

(*o*) Article by Mr. A. R. Barrand, Journal of the Institute of Actuaries, vol. xli. p. 203.

(*p*) *Cook* v. *Scottish Equitable* (1872), 26 L. T. 571.

claims against the fund paid in had been adjudicated on. The fact that legal proceedings for determining the question in dispute have been commenced in Scotland will not necessarily prevent the company from paying the fund into the English Court, and this would be their proper course if the money is made payable in England, and they are likely to be sued in England.

Alternative procedure.

Possible alternatives to payment into Court under the Act of 1896 are payment into Court under the Trustee Act, 1893, and interpleader.

Trustee Relief Act, 1847.

Before the Policies of Assurance Act, 1867, it was much more difficult than now for a company to get a legal discharge owing to the greater difficulty in ascertaining who was entitled to sue at law, and the companies adopted the device of paying the moneys into Court under sections 1 and 2 of the Trustee Relief Act, 1847, which were substantially the same as section 42 of the Trustee Act, 1893 (*q*). This course of procedure was apparently acquiesced in for some time, and the insurance companies in any case of reasonable doubt got a clean discharge and an order for their costs as between solicitor and client to be paid either out of the fund or by the party who had failed in his claim against the fund (*r*). This whole procedure was based on the assumption that the insurance company as stakeholders were in the position of trustees. The practice continued until some time after the passing of the Policies of Assurance Act, 1867, and only received a check when Jessel, M.R., expressed an opinion (*s*) that insurers were not in any sense trustees, and were not entitled to the benefit of the Trustee Relief Act. At the same time he held that if an insurance company did pay the policy moneys into Court under circumstances which made it difficult for them to get a discharge, and the claimants applied to have it paid out to them, the company were entitled to have their costs as between solicitor and client, because the claimants, by making the application, had

(*q*) *Hall, In re* (1861), 10 W. R. 37; *United Kingdom Life, In re* (1865), 34 Beav. 493; *Moseley's Policy, In re* (1869), 21 L. T. 384; *Chapman* v. *Besnard and Keays* (1869), 17 W. R. 358; *Jeffery's Policy, In re* (1872), 20 W. R. 857. The company were only allowed their costs of the legal proceedings, and were not allowed charges and expenses beyond these costs, such as the expense of making preliminary inquiries and investigating the title (*Webb's Policy, In re* (1866), L. R. 2 Eq. 456).

(*r*) *United Kingdom Life, In re* (1865), 34 Beav. 493; *Webb's Policy, In re* (1866), L. R. 2 Eq. 456; *Cobbe's Settlement, In re* (1866), 15 L. T. 170.

(*s*) *Haycock's Policy, In re* (1876), 1 Ch. D. 611.

acquiesced in the fund being treated as a trust fund. This was followed by a decision of the same judge to the effect that a claimant could disregard the payment into Court altogether, and sue upon the policy.

Matthew v. Northern Assurance (1878), 9 Ch. D. 80

Matthew v. Northern Assurance.

The assured voluntarily assigned a policy on his own life. The assignee claimed the policy moneys on the death of the assured, and a claim was also made by the assured's personal representatives. Apparently the company did not communicate with the personal representatives, but intimated to the assignee that they could not pay without their concurrence, and shortly afterwards paid the money into Court. Jessel, M.R., said that the company ought to have given the executors notice of the assignment, and asked them whether they disputed it. They had no justification for not taking the proper steps to ascertain whether there was a dispute or not. If the company had satisfied themselves that there were in fact conflicting claims they could have interpleaded or paid into Court under the provisions of the Judicature Act, 1873. In a case where there was no dispute the company had no right to relief under the Trustee Relief Act.

Company not trustee of the policy moneys.

It is clear from the above case that an insurance company cannot now be deemed to be a trustee of the policy moneys even where the form of the policy is a charge upon the funds of the company without any direct promise to pay. An insurance company is in the position of an ordinary debtor, and must be treated accordingly. It cannot therefore avail itself of the Trustee Act, except in so far as any debtor may do so under the provisions of the Judicature Act, 1873. The proviso to section 25 (6) of that Act provides that in the case of assignments of choses in action to which the Act applies if the debtor, trustee, or other person liable in respect of the debt shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims he shall be entitled to call upon the several persons making claim thereto to interplead, or he may, if he think fit, pay the money into Court under and in conformity with the provisions of the Acts for the relief of trustees.

Judicature Act, 1873, sec. 25 (6).

Trustee Act, 1893, sec. 42.

The provision for the relief of trustees by payment into Court is now section 42 of the Trustee Act, 1893. The section and the rules for payment in are given below. It is doubtful, however, whether an insurance company can ever be advised to make a payment in under this Act, as it would probably be said that since 1896 the proper course of procedure, if the company desire to

make a payment into Court is under the Act of that year. Even if payment into Court under the Trustee Act is now open to a life insurance company at all, the costs of payment in are in the discretion of the Court (*t*), and although it was formerly the practice to give the company paying in under the Trustee Relief Act, 1847, their costs of payment in, in any case where there was a reasonable doubt, it is probable that the Court would now decline to give a life insurance company any better terms than they would get under the Act of 1896; that is to say, they would at least have to bear the costs of payment in.

56 & 57 Vict. c. 53.

Trustee Act, 1893, sec. 42

Payment into Court by trustees.

42.—(1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

(3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depository, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

R. S. C., O. 54B.

Rules of the Supreme Court, Order LIVb

Lodgment under section 42.

4.—(1) Where a trustee desires to make a lodgment in Court under section forty-two of the Act he shall make and file an affidavit intituled in the matter of the trust (described so as to be distinguishable) and of the Act, and setting forth:—

(*a*) A short description of the trust and of the instrument creating it.

(*b*) The names of the persons interested in and entitled to the money or securities, and their places of residence to the best of his knowledge and belief.

(*c*) His submission to answer all such inquiries relating to the application of the money or securities paid into Court, as the Court or Judge may make or direct.

(*d*) The place where he is to be served with any petition, summons, or order or notice of any proceeding relating to the money or securities.

Provided that if the fund consists of money or securities being, or being

(*t*) *Carroll's Policy, In re* (1892), 29 L. R. Ir. 86.

part of, or representing a legacy or residue to which an infant or person beyond seas is absolutely entitled, and on which the trustee has paid the legacy duty, or on which no duty is chargeable, the trustee may make the lodgment (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force.

(2) Where the lodgment in Court is made on affidavit—

(*a*) the person who has made the lodgment shall forthwith give notice thereof, by prepaid letter through the post, to the several persons whose names and places of residence are stated in his affidavit as interested in or entitled to the money or securities lodged in Court;

(*b*) no petition or summons relating to the money or securities shall be answered or issued unless the petitioner or applicant has named therein a place where he may be served with any petition or summons, or notice of any proceeding or order relating to the money or securities or the dividends thereof;

(*c*) service of any application in respect of the money or securities shall be made on such persons as the Court or Judge may direct.

Interpleader.

The other alternative method in a case to which the Judicature Act applies is by interpleader (*u*). There can be little doubt that this procedure is still open to an insurance company (*x*). The advantage of it is that in the ordinary course if there is a real dispute between two or more claimants the company will get their costs out of the policy moneys, such costs being ultimately borne by the unsuccessful claimant or claimants (*y*). The disadvantage of interpleader is that the company will not get an absolute discharge from all claims, and therefore it can only be resorted to in cases when the company is satisfied that one or other of the actual claimants is the person entitled to the money.

Rules of the Supreme Court, Order LVII.

R.S.C., O. 57.

When relief by interpleader granted.

1. Relief by way of interpleader may be granted,—

(*a*) Where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels, for or

(*u*) *Desborough* v. *Harris* (1855), 5 De G. M. & G. 439, 458; *Prudential Assurance* v. *Thomas* (1867), L. R. 3 Ch. 74.

(*x*) But see *Chapman* v. *Besnard and Keays* (1869), 17 W. R. 358, where a bill of interpleader was refused on the ground that the company's proper remedy was to pay the money into Court.

(*y*) The fact that the company can by interpleading saddle the claimants with the whole costs of the interpleader proceedings will often prove a strong inducement to rival claimants to give the company an indemnity as to costs if they will adopt the cheaper procedure and pay into Court instead of interpleading. Where there were conflicting claims of numerous incumbrancers and the company paid into Court upon an indemnity as to costs, it was held that such costs could not be allowed out of the policy moneys as mortgagees' costs and expenses, but must be borne by the incumbrancers who gave the indemnity (*Weniger's Policy, In re* (No. 2), [1910] W. N. 278).

in respect of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto.

2. The applicant must satisfy the Court or a Judge, by affidavit or otherwise,—

(*a*) That the applicant claims no interest in the subject matter in dispute, other than for charges or costs; and

(*b*) That the applicant does not collude with any of the claimants; and

(*c*) That the applicant, except where he is a sheriff or other officer charged with the execution of process by or under the authority of the High Court who has seized goods and who has withdrawn from possession in consequence of the execution creditor admitting the claim of the claimant under Rule 16 of this Order, is willing to pay or transfer the subject matter into Court or to dispose of it as the Court or a Judge may direct.

Adverse titles of claimants.

3. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another.

4. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons.

When application to be made by a defendant.

5. The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.

Stay of action.

6. If the application is made by a defendant in an action the Court or a Judge may stay all further proceedings in the action.

Order upon summons.

7. If the claimants appear in pursuance of the summons, the Court or a Judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant.

Disposal of matters in summary manner.

8. The Court or a Judge may, with the consent of both claimants, or on the request of any claimant, if having regard to the value of the subject matter in dispute it seems desirable so to do, dispose of the merits of their claims and decide the same in a summary manner and in such terms as may be just.

Questions of law.

9. Where the question is a question of law, and the facts are not in dispute, the Court or a Judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. If a special case is stated, Order XXXIV. shall, as far as applicable, apply thereto.

Failure of claimant to appear, or neglect to obey summons.

10. If a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a Judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and the persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

Order under Rule 8, final.

11. Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way, under Rule 8 of

this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or Judge, as the case may be, or of the Court of Appeal.

Payment in where company claim interest.

The company cannot by interpleader raise any question between themselves and a claimant (*z*). When the company themselves claim a charge or other interest in the policy moneys, they should deduct the amount claimed by them before payment in or before calling upon the claimants to interplead. Under the Trustee Relief Act, 1847, it was held that where a company paid policy moneys into Court without reservation of any claim to it on their own behalf, the payment in was equivalent to an admission that they held it solely as trustees, and had no personal interest, and they could not afterwards make any claim upon the fund (*a*).

Section V.—Assignment

Assignment of the legal chose in action.

Before the Policies of Assurance Act, 1867, and the Judicature Act, 1873, policies were assignable in equity, but not at law. The legal right of an assignee, that is to say, the right to sue the company at law in his own name depends entirely upon one or other of the above statutes. The former applies to life policies only, the latter to all legal choses in action, and therefore to all classes of insurance policies.

Effect of statutory provisions.

Both these statutes are primarily intended to simplify procedure, and to give an assignee of a legal chose in action a direct instead of an indirect remedy against the debtor. Neither statute makes any chose in action assignable which was not previously assignable in equity, nor does either interfere with assignments in equity by requiring any technicality which was not previously required by courts of equity. The formalities required by these statutes are required merely as a condition precedent to the passing of the right to sue at law. Where such formalities have not been observed the right of the assignee to proceed in equity against, or in the name of, the assignor, may still exist according to the old rules of equity which the statutes leave intact (*b*).

(*z*) *Bignold* v. *Audland* (1840), 11 Sim. 23.

(*a*) *Jeffery's Policy, In re* (1872), 20 W. R. 857.

(*b*) *Brandt* v. *Dunlop*, [1905] A.C. 454.

30 & 31 Vict. c. 144.

Policies of Assurance Act, 1867

An Act to enable Assignees of Policies of Life Assurance to sue thereon in their own Names. [20th *August* 1867.]

WHEREAS it is expedient to enable Assignees of Policies of Life Assurance to sue thereon in their own Names:

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Assignees of Life Policies may sue in their own Names.

1. Any Person or Corporation now being or hereafter becoming entitled, by Assignment or other derivative Title, to a Policy of Life Assurance, and possessing at the Time of Action brought the Right in Equity to receive and the Right to give an effectual Discharge to the Assurance Company liable under such Policy for Monies thereby assured or secured, shall be at liberty to sue at Law in the Name of such Person or Corporation to recover such Monies.

Defence or Reply on equitable Grounds may be pleaded.

2. In any Action on a Policy of Life Assurance, a Defence on equitable Grounds, or a Reply to such Defence on similar Grounds, may be respectively pleaded and relied upon in the same Manner and to the same Extent as in any other personal Action.

Notice of Assignment to be given.

3. No Assignment made after the passing of this Act of a Policy of Life Assurance shall confer on the Assignee therein named, his Executors, Administrators, or Assigns, any Right to sue for the Amount of such Policy, or the Monies assured or secured thereby, until a written Notice of the Date and Purport of such Assignment shall have been given to the Assurance Company liable under such Policy at their principal Place of Business for the Time being, or in case they have Two or more principal Places of Business, then at some One of such principal Places of Business, either in *England* or *Scotland* or *Ireland*, and the Date on which such Notice shall be received shall regulate the Priority of all Claims under any Assignment; and a Payment *bonâ fide* made in respect of any Policy by any Assurance Company before the Date on which such Notice shall have been received shall be as valid against the Assignee giving such Notice as if this Act had not been passed.

Principal Places of Business to be specified on Policies.

4. Every Assurance Company shall, on every Policy issued by them after the Thirtieth Day of *September*, One thousand eight hundred and sixty-seven, specify their principal Place or principal Places of Business at which Notices of Assignment may be given in pursuance of this Act.

Assignment by Endorsement or separate Instrument.

5. Any such Assignment may be made either by Endorsement on the Policy or by a separate Instrument in the Words or to the Effect set forth in the Schedule hereto, such Endorsement or separate Instrument being duly stamped.

Notices of Assignment to be acknowledged.

6. Every Assurance Company to whom Notice shall have been duly given of the Assignment of any Policy under which they are liable shall, upon the Request in Writing of any Person by whom any such Notice was given or signed, or of his Executors or Administrators, and upon Payment in each Case of a Fee not exceeding Five Shillings, deliver an Acknowledgment in Writing under the Hand of the Manager, Secretary, Treasurer, or other principal Officer of the Assurance Company of their Receipt of such Notice; and every such written Acknowledgment, if signed by a Person being *de jure*

or *de facto* the Manager, Secretary, Treasurer, or other principal Officer of the Assurance Company whose Acknowledgment the same purports to be, shall be conclusive Evidence as against such Assurance Company of their having duly received the Notice to which such Acknowledgment relates.

Interpretation of Terms.

7. In the Construction and for the Purposes of this Act the Expression "Policy of Life Assurance," or "Policy," shall mean any Instrument by which the Payment of Monies, by or out of the Funds of an Assurance Company, on the happening of any Contingency depending on the Duration of Human Life, is assured or secured; and the Expression "Assurance Company" shall mean and include every Corporation, Association, Society, or Company now or hereafter carrying on the Business of assuring Lives or Survivorships, either alone or in conjunction with any other Object or Objects.

Not to apply to Contracts under certain Acts.

8. Provided always, That this Act shall not apply to any Policy of Assurance granted or to be granted or to any Contract for a Payment on Death entered into or to be entered into in pursuance of the Provisions of the Acts Sixteenth and Seventeenth *Victoria*, Chapter Forty-five, and Twenty-seventh and Twenty-eighth *Victoria*, Chapter Forty-three, or either of those Acts, or to any Engagement for Payment on Death by any Friendly Society.

Short Title.

9. For all Purposes this Act may be cited as "The Policies of Assurance Act, 1867."

SCHEDULE.

I *A.B.* of, *&c.*, in consideration of, *&c.*, do hereby assign unto *C.D.* of, *&c.*, his Executors, Administrators, and Assigns, the [within] Policy of Assurance granted, *&c.* [*here describe the policy*]. In witness, *&c.*

Right of assignee to sue at law under Policies of Assurance Act.

Under the above statute the right of an assignee of a life policy to sue in his own name, and accordingly his ability to give a legal discharge, is dependent on the following conditions :—

(1) The assignee must have the equitable right to receive the money.

(2) He must have a properly stamped assignment in writing either by indorsement on the policy or by a separate instrument.

(3) Notice must have been given to the company in accordance with the Act.

Right in equity to receive the money.

The right in equity to receive the insurance money is considered in detail below. The qualification is introduced to guard against the assignee obtaining a better title under the Act than he would formerly have had when suing in the name of the assured (*c*). It means that the claimant must either be beneficially entitled to the money, or be entitled to receive it in the capacity of a trustee, as in the case of a trustee under a settlement or of a mortgagee with power to receive the moneys under a mortgaged policy. Obviously it is impossible for a company to ascertain with

(*c*) *Scottish Amicable Life* v. *Fuller* (1867), Ir. R. 2 Eq. 53.

certainty whether any claimant is the person who possesses the ultimate right in equity to receive the money, because there may be equities of which the company has no notice, but which are effective against the claimant. Apparently, however, the Act points not to the person who may thus, irrespective of notice to the company, have the ultimate right in equity, but to the person who for the time being has the right as against the company. The company, therefore, in considering who has the right in equity to receive the money, need not be concerned as to possible equitable claims of which they have no notice, formal or informal. But they must consider all equities of which they have any notice whatsoever, even although formal notice in accordance with the Act has not been given. If, then, on considering all equities of which they have notice the proper conclusion is that the person who has first given formal notice under the Act would not, according to the rules of equity before the Act, have been entitled to receive the money and give a discharge, such a person is not under the Act entitled to sue in his own name, nor has he under the Act the power to give a legal discharge to the company. When, therefore, there are two assignees, and the company has notice of both assignments, but the one who has priority in equity has not got a formal assignment, or has not given first formal notice to the company, and the other has, the company cannot under this Act obtain a legal discharge from either or both, for apparently the right to sue at law and to give a legal discharge is still vested in the assignor. How far the Judicature Act remedied this defect will be considered below.

Assignment within the meaning of the Act.

An agreement to assign is not an assignment within the Act.

Spencer v. Clarke (1878), 9 Ch. D. 137

Spencer v. *Clarke.*

The assured deposited his policy with A as security for an advance. No notice of this deposit was given to the company and the assured afterwards applied to B for an advance upon the policy. He accounted for the non-production of the policy by falsely stating that he had left it at home. B thereupon advanced the money upon receiving a memorandum of deposit whereby the assured stated that in order to secure the repayment of the money lent he had deposited the policy in question, and promised to make, execute and deliver when requested to do so a valid and effectual mortgage of the policy. B gave notice of this memorandum to the insurance company, but no further mortgage was executed, and the policy remained in the possession of A. B had a good equitable charge on the policy money and the only question was whether he was entitled to priority over A, who had possession of the policy, but had never given notice to the company. The Court held that the

policy had not been assigned to B within the meaning of the Act, and, therefore B had not acquired the right to sue at law. In order to bring the case within the statute there must, according to the plain words of the statute and the explanatory form of assignment in the schedule, be an assignment, and an agreement to assign upon request is not an assignment. B, therefore, took no benefit from the statute, and the question of priority between him and A depended on purely equitable principles. A was held entitled to priority because he had possession of the policy, and B had thereby constructive notice of his charge (*d*).

The Policies of Assurance Act, 1867, applies not only to an unconditional assignment, but also to an assignment by way of mortgage.

Assignment by way of mortgage within the Act.

Haycock's Policy, In re (1876), 1 Ch. D. 611

Haycock's policy, In re.

The assured had mortgaged his life policy some twenty-five years before his death, and notice had been given to the company. The assured subsequently assigned the policy, but on his death the company refused to pay the moneys to the assignee without proof that the mortgage had been paid off. The Court held that they were justified in refusing payment since the mortgagee was the person entitled to sue in law under the Policies of Assurance Act, 1867, and they were entitled to have a discharge from him.

The Judicature Act, 1873, sec. 25 (6)

36 & 37 Vict. c. 66, sec. 25 (6).

25.—(6) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court under and in conformity with the provisions of the Acts for the relief of trustees.

(*d*) This decision standing alone suggests that if there had been a written assignment within the meaning of the Act, B would have had priority, but as this was a question of priority *inter se* between two claimants the later cases of *Newman* v. *Newman* (1885), 28 Ch. D. 674, and *Weniger's Policy, In re*, [1910] 2 Ch. 291, show that even if there had been a complete assignment the constructive notice of a prior charge would have prevented B acquiring priority over A in a final distribution of the policy moneys.

Right of assignee to sue at law under the Judicature Act.

It will be observed that the right of an assignee to sue at law under this Act is not, as under the Policies of Assurance Act, dependent on the assignee having the right in equity to receive the money (*e*). All that is necessary is that—

(1) There has been an assignment in writing which is valid in equity as between assignor and assignee.

(2) There has been express notice in writing to the company.

The assignee whose assignment first complies with these two conditions gets the legal right of action, and accordingly the right to give a legal discharge. Notice of other assignments prior in equity does not apparently affect his right to sue at law, and therefore it seems reasonably clear under the Judicature Act that if there were two assignees and the company had notice of both assignments, but the one who had priority in equity had not a written assignment, or had not given formal notice, while the other had, the company could obtain a legal discharge from the latter, and could get a complete discharge on receiving the consent of both to the payment made. There would be no necessity, if only this Act applied, to get any discharge from the assignor. The fact, however, that the two Acts are somewhat inconsistent on this point, and that the Policies of Assurance Act is specially applicable to policies of life assurance, whereas the Judicature Act applies generally to all legal choses in action, makes it at least doubtful whether in the case of a life policy the latter can be safely relied on. It is of the utmost importance that a company should always obtain a discharge from the person entitled to sue at law, because if it does not it may have to pay over again at the instance of some equitable assignee of whose claim it had no notice, but whose equity was, among the assignees, prior to all others, and who could accordingly sue the company in the name of the assignor or his representatives if he or they were still entitled to sue at law; and the fact that the company had no notice of the equity, and had paid on the discharge of another equitable assignee, would be no defence to the action. The safest course, therefore, for a life company to adopt is to assume that the Policies of Assurance Act alone applies, and not to pay on the sole receipt of an assignee, unless he has, as far as notice to them is concerned, both the right in equity to receive the money and the right to sue in his own name, and, if he has not both, to insist on a discharge from the assignor or his personal representatives as well as from the assignee.

Whether Judicature Act can be relied on in settlement of life policies.

(*e*) *West of England Bank* v. *Batchelor* (1882), 51 L. J. Ch. 199.

A mortgage in ordinary form with a proviso for redemption is an "absolute assignment" within the meaning of the Judicature Act, and entitles the mortgagee to sue in his own name (*f*). Such a mortgage does not purport to be "by way of charge only," because the property comprised in it does in fact pass to the mortgagee. A document given "by way of charge" is not one which transfers the property with a condition for reconveyance, but is a document which only gives a right to payment out of a particular fund or particular property without transferring that fund or property. Probably in this respect the Policies of Assurance Act and the Judicature Act, although expressed differently, apply to precisely the same class of assignments. A mere promise to assign would not be within the Judicature Act any more than it is within the Policies of Assurance Act, and an equitable charge or mere right to payment out of a fund would not be an assignment within the Policies of Assurance Act any more than it is an "absolute assignment" within the Judicature Act. An actual transfer of the right by way of mortgage is, however, within both Acts.

Meaning of absolute assignment.

Owing to conflicting decisions it must be considered a moot point as to whether a legal chose in action is divisible so that the legal right to sue for part of the debt can be assigned to A, and the legal right to sue for another part of the debt assigned to B. The most recent decision is that of Bray, J., in *Forster* v. *Baker*, where he held that part of a debt could not be assigned under the Judicature Act, and if this is right then by parity of reasoning the sum assured by a policy could not be divided and the legal right to sue for part only assigned under the Policies of Assurance Act. The case of bonuses might be distinguished on the ground that there were separate promises in respect of the principal sum and the bonuses added thereto, but *primâ facie* all sums secured by the same policy and payable on the same contingencies ought to be treated as one single debt and therefore indivisible if the principle enunciated by Bray, J., is correct.

Whether part of claim can be assigned so as to give assignee right to sue at law.

Skipper & Tucker v. Holloway, [1910] 2 K. B. 630

Certain disputes between A and B were settled in the terms *inter alia* that A should pay to B £125. B thereafter executed a deed of assignment in

Skipper & Tucker v. *Holloway.*

(*f*) *Tancred* v. *Delagoa Bay Ry.* (1889), 23 Q. B. D. 239.

favour of his solicitor who had acted for him in the matter, purporting to assign so much of the debt of £125 as would cover his proper costs, charges, and expenses not exceeding £30. The solicitor's bill amounted to £32. He gave written notice of the assignment to A, and thereafter sued him for £30. Darling, J., held that there was a valid assignment of the legal chose in action in respect of part of the original debt and that the solicitor was entitled to recover.

Forster v. Baker, [1910] 2 K. B. 636

Forster v. *Baker.*

A promissory note discounted by Baker was bought by Bowles. When the promissory note had become due Bowles sued Baker and recovered judgment for £675. Bowles then purported to assign to a Miss Forster the judgment debt to the extent of £560. Miss Forster thereafter obtained leave *ex parte* to issue execution on the judgment, and subsequently issued a bankruptcy notice against Baker. On an application to set aside the order giving leave to issue execution it was held by Bray, J., that the Judicature Act did not give a creditor any power to assign part of the debt with all its remedies to an assignee, and the order was accordingly set aside. On appeal the Court of Appeal held that whether or not part of a chose in action was capable of assignment under the Judicature Act, execution could not be issued on part of a judgment debt and therefore they dismissed the appeal.

Statutory provisions do not affect equitable claims to policy moneys.

Neither the Policies of Assurance Act nor the Judicature Act affects the equitable right of any assignee to receive the policy moneys. Although one assignee may, by giving notice in the prescribed form, acquire the right to sue the company in his own name, he acquires that right subject to all equities which would have been available against him if the Act had not been passed. The ultimate rights of competing assignees must therefore be decided on the old rules of equity relating to notice and priority without reference to the provisions of the statutes, and without reference to the question whether or not the notice upon which priority is claimed is a sufficient notice under the statutes (*g*).

Newman v. Newman (1885), 28 Ch. D. 674

Newman v. *Newman.*

A question of priority arose in connexion with certain claims on a life policy. It was contended that where a first assignee had given informal notice to the office his claim could be defeated by a second assignee giving a formal statutory notice. North, J., declined to accept that view, and said, "The Act was passed in order to avoid the necessity of joining the assignor of the policy in actions against the insurance office, and it provides that if a certain notice is given to the office then the assignee may sue without joining the assignor. Then these words occur, "And the date on which such notice shall be received

(*g*) *Newman* v. *Newman* (1885), 28 Ch. D. 674 *West of England* v. *Batchelor* (1882), 51 L. J. Ch. 199.

shall regulate the priority of all claims under any assignment." It was contended that these words went much further than was necessary for the protection of the insurance office, and affected the rights of the parties *inter se*. The argument goes as far as this, that A having given an insufficient notice, and B having afterwards given a statutory notice, their rights must for all purposes be governed by the terms of the statute as to priority, although B had at the time notice of A's charge. In my opinion that is not the meaning of the statute, which was not intended to affect the rights of persons claiming interests in the money outside the insurance office. It was intended to give a simpler remedy against an insurance office, and also to give facilities to insurance offices in settling claims by enabling them to recognise as the first claim the claim of the person who first gave such notice as is required by the statute. It was not intended in my opinion to enact that a person who had advanced money upon a second charge with notice of the first, and made subject to it should, by giving statutory notice to the office, exclude the person who had the prior incumbrance. In my opinion the Act does not apply to the present case."

Weniger's Policy, In re, [1910] 2 Ch. 291

Weniger's Policy, In re.

In 1892 the Royal Insurance Company issued a policy to Weniger on his own life, payable to him if alive on November 20, 1909, or to his personal representatives in the event of his death before that date. Weniger charged the policy as follows: (1) Deposit with the company to secure advances amounting to £250; (2) Memorandum of charge to Kapp to secure £146, and expressed to be subject to the company's charge erroneously stated as £240; (3) Charge in favour of Metropolitan Credit Company to secure £115 (4) Charge in favour of the Indo-European Telegraph Company to secure £600, including £250 and interest paid to the insurance company. The policy was handed to the telegraph company, and they paid premiums amounting to £115. (5) Memorandum of charge to Kapp to secure a further sum of £73; (6) Charge in favour of Cohen for £250, expressed to be subject to the first charge in favour of the company for £250; (7) Charge in favour of Ramsay expressed to be subject to the first charge in favour of the company for £250. No formal notices to the insurance company were given until all the above charges had been created. Formal notices were then given in the following order: (1) Metropolitan Credit Company, (2) Ramsay, (3) Kapp, (4) Cohen, (5) Telegraph Company. Weniger was alive on November 20, 1909, and the insurance company paid the policy moneys into Court under the Life Assurance Companies (Payment into Court) Act, 1896. Ramsay took out a summons to which the other incumbrancers were made respondents. He contended that the Telegraph Company came first, but only in respect of the £250, and that all the other incumbrances ranked in the order of notice to the company. Parker, J., held that in default of gaining priority by giving notice the incumbrances took according to the order of the dates of their charges. No incumbrancer by giving notice could gain priority over another of which he had actual or constructive notice at the time he advanced his money. An incumbrancer having taken a charge for a specific advance could not add subsequent advances to the charge so as to acquire priority over mesne incumbrancers. Such mesne incumbrancers owed no duty to the prior incumbrancer to give him notice of their incumbrances. If the prior

incumbrancer had taken a charge to cover further advances, he would have had a right to add them to the charge so as to acquire priority over mesne incumbrances of which he had no notice, but that was not the case before the Court. Having regard to the above principles the Court held that the proper order of payment was as follows: (1) Telegraph Company, £250 and premiums paid by it. It took this as coming in the shoes of the insurance company who had the first charge, and it was entitled to add the premiums as they were paid to preserve the security; (2) Metropolitan Company, who, by reason of its prior notice, took priority over Kapp, of whose charge it had no notice when it advanced its money; (3) Ramsay, who was entitled to payment up to the amount due to Kapp on his first charge, Kapp would take priority over the Telegraph Company in respect of his first advance, but not in respect of his second advance, because when he made the second advance he had constructive notice of the Telegraph Company's charge. The policy was in the Telegraph Company's hands, and if he had made inquiry he would have discovered the charge of £600. On the other hand, although Ramsay would also be postponed to the Telegraph Company because he had constructive notice of its charge, he took priority over Kapp by reason of prior notice, and therefore was entitled to stand in his shoes and take priority over the Telegraph Company to the extent of Kapp's first charge. (4) Kapp, if anything remained due to him on his first security after satisfying Ramsay; (5) Telegraph Company, for the balance of its charge, Cohen being also postponed by reason of constructive notice; (6) Kapp; (7) Cohen.

Notice of assignment.

It is convenient to deal here in brief with notice, the different reasons for giving notice, and the kind of notice requisite in each case. An assignee of a policy must give notice to the insurance company for the following reasons:—

(1) to give him the right to sue in his own name under the Policies of Assurance Act or the Judicature Act;

(2) to bind the company so that if they pay to another claimant they may be held responsible;

(3) to acquire priority over earlier assignees who have not given notice;

(4) to preserve priority against subsequent assignees.

To give assignee the right to sue at law.

In the case of (1) the notice must be strictly in accordance with the provisions of the respective statutes, that is to say, in the case of life policies it must be in accordance with the provisions of the Policies of Assurance Act, and the notice must therefore comply with the following requirements:—

(*a*) it must be in writing;

(*b*) it must give the date and purport of the assignment;

(*c*) it must be addressed to the company's principal place of business as specified in the policy;

(*d*) it must be received by the company before a similar formal notice has been received from any other assignee.

In order to establish beyond question the fact and date of service of notice it is usual to require an acknowledgment in writing from the company, either in the form of a separate receipt or (more conveniently) on a duplicate of the notice. For this acknowledgment (though not for registration) the office is entitled to charge a fee of 5*s*. (*h*).

To bind the company in equity.

In the case of (2) there is little doubt that before the Policies of Assurance Act, the company would have been bound by any definite information of an equitable claim upon the policy moneys, although not in writing, and not given by the claimant, and notice to any officer or servant of the company held out by them as having authority to receive such notices would have been sufficient. It is conceived that under the Act, although an informal or belated notice would not give the assignee a right to sue at law in his own name and to give a legal discharge, it would, if definite, bind the company in equity, and the company could not, in the face of such notice, safely pay the assignor or a subsequent assignee who had given a formal notice.

Condition requiring formal notice to be served at principal office.

Policies of life insurance usually contain a condition to the effect that "the agents of the company are not authorised to accept notice or intimation of any assignment of or charge upon any policy," and in accordance with the provisions of the Act it is notified that "the company's principal places of business at which alone notices of assignment may be given are . . . and the company will not recognise nor be held bound by any notice or intimation unless served on them at one of those places, and duly acknowledged by the manager, secretary, or other principal officer of the company." Such a condition is an intimation to policy holders and assignees that the company's agents are not persons authorised to receive notices of assignments, and therefore notice to an agent would not *primâ facie* be notice to the office, although it might be if the company had so conducted its business as to lead to the belief that notwithstanding the condition on their policy notice might properly be given to any agent, or to some one particular agent. Probably the condition does not protect the company if the notice is in fact communicated to the head office.

Notice to agent.

(*h*) If notice is given under the Judicature Act the company is apparently under no obligation to give an acknowledgment, which, however,

To acquire priority.

In the case of (3) assignees before the Act took priority primarily in order of date, but subject to the right of any assignee to acquire priority if he gave notice to the office before the office or he himself had notice of an earlier equity. Only a formal notice had the effect of giving the assignee precedence. Probably the notice had to be in writing. Neither the Policies of Assurance Act nor the Judicature Act has any bearing on the question of priorities among assignees, and incumbrancers *inter se*, and therefore priorities over earlier equities are still acquired by a notice which must be formally given to the company or its authorised agent, but which need not necessarily comply with tho terms of the Act or the conditions of the policy.

To preserve priority.

In the case of (4) an informal notice to the company of an equitable claim, although not sufficient to give that claim priority over earlier equities, is sufficient to prevent later equities acquiring priority by formal notice. Knowledge by the company's directors, principal officers, or any agent whose duty it is to communicate the matter to the directors is sufficient for this purpose.

Notice to be given by sub-assignee of policy.

A sub-assignee of a policy must give notice—

(*a*) to the company—

for the same reasons as the assignee ought to give notice. If the assignee has already given notice, no further notice is necessary to protect the sub-assignee against subsequent assignments by the assignor, but notice is necessary to protect him from subsequent sub-assignments or dealings with the office by the assignee.

(*b*) to the assignor—

in order to prevent the assignor, if he has received the moneys, paying the assignee, or, in the case of an assignment by way of mortgage, to prevent the mortgagor paying off the debt in whole or in part to the mortgagee.

Assignment in equity.

The right to the proceeds of an insurance policy or any part thereof has always been assignable in equity either by way of gift, sale, mortgage, or charge. The equitable right was enforceable by proceedings in equity against the assured or his legal representatives and the company for payment (*m*), or the assured

they are required to do under the Policies of Assurance Act, 1867.

(*m*) *Cook* v. *Black* (1842), 1 Hare, 390; *Brandt* v. *Dunlop*, [1905] A. C. 454, 462; *Mitchell* v. *City of London Assurance* (1888), 15 Ont. A. R. 262; *Kelly* v. *Larkin*, [1910] 2 Ir. R. 550.

or his legal representatives might upon the offer of a proper indemnity as to costs be compelled to allow the equitable assignee to sue the company at law in their name (*n*). If the assured or his legal representatives received payment or released the company from liability, the assignee could sue them at law for the proceeds of the policy or damages (*o*).

Under modern procedure, if the person entitled in equity has not also the right to sue the company at law in his own name under the Policies of Assurance or Judicature Acts, he may enforce his right by calling on the person who has the legal title to permit the use of his name, or, if he refuses, by suing such person and the company as joint defendants.

Assignees without interest in life.

Life insurance policies have long been held to be marketable commodities which can be validly assigned either voluntarily or for valuable consideration to persons who have no interest in the life (*p*).

Policies expressed to be "not assignable."

Where a life policy was expressed to be "not assignable in any case whatever," and provided that the company should not be bound by notice of any trust, equitable charge, or lien, it was held that that meant that an assignee would not have the benefit of the Policies of Assurance Act, 1867, as against the company, and that the company might obtain a complete discharge by payment to the representatives of the assured notwithstanding any adverse claims; but that there was nothing to prevent an assignment in equity which might be enforced against the representatives (*q*). It is clear in the case of an ordinary policy that the assured cannot, by taking a policy purporting to be "not assignable," restrain himself from anticipation. In the case, however, of a policy payable to a married woman as her separate property she may be restrained from anticipation, and thus, where a married woman effected an endowment policy payable at the end of ten years or on the death of her husband before the expiration of that period, and the policy was expressed to be "not assignable," it was held by the Court of Appeal in Ireland that that operated as a restraint on anticipation, and that therefore a mortgage made by the wife during the currency of the policy was void (*r*).

(*n*) *Ashley* v. *Ashley* (1829), 3 Sim. 149.

(*o*) *Gerard* v. *Lewis* (1867), L. R. 2 C. P. 305; *Patrick, In re*, [1891] 1 Ch. 82, 88.

(*p*) *Ashley* v. *Ashley* (1829), 3 Sim. 149.

(*q*) *Turcan, In re* (1888), 40 Ch. D. 5. Bunyon thought that notwithstanding the non-assignable condition the company could not safely disregard notices of equitable assignments (Life Insurance, 2nd edition, p. 256).

(*r*) *Lavender's Policy, In re*, [1898] 1 Ir. R. 175.

What constitutes an equitable assignment.

Except in the case of voluntary gifts which must be completed in order to be enforceable, and in the case of marriage settlements which must, under the provisions of the Statute of Frauds, be evidenced by some deed or written memorandum, no formality is necessary to pass the equitable right to the proceeds of an insurance policy. Questions of priority between equitable assignees may depend upon the giving of notice to the company, but a right enforceable in equity, whether it be a sale, mortgage, or charge, may be created in any manner which shows the intention of the parties (*s*), and an assignment or agreement to assign (*t*) is binding as between assignor and assignee without notice to the company (*u*), deposit of the policy (*x*), or any other act than the expression of intention *inter se* (*y*).

Brandt v. Dunlop, [1905] A. C. 454

Brandt v. *Dunlop.*

A firm of merchants were financed by a bank on condition that moneys becoming due from purchasers should be paid directly by such purchasers to the bank. The merchants having sold certain goods instructed their purchasers to pay the purchase money to the bank. It was held that there was a complete equitable assignment of the purchasers' debt to the bank.

Gorringe v. Irwell (1886), 34 Ch. D. 128

Gorringe v. *Irwell.*

A limited company being indebted to H. & Co. wrote to them, "We hold at your disposal the sum of about £425 due to us from C. & Co. for goods delivered by us." No notice was given to C. & Co., but it was held to be a good equitable assignment of the chose in action.

Mangles v. Dixon (1852), 3 H. L. C. 702

Mangles v. *Dixon.*

A. B. & Co., shipowners, being entitled to freight under a charter party from C. D. & Co. charterers, and being indebted to E. F. & Co., their bankers deposited the charter party with E. F. & Co. endorsed "To Messrs. C. D. & Co. Please to pay the amount of what is due from this date to Messrs. E. F. & Co. or their order. A. B. & Co." This was held to be a complete equitable assignment of the moneys becoming due on the charter party.

Myers v. United Guarantee (1855), 7 De G. M. & G. 112

Myers v. *United Guarantee.*

The depositees of a life policy having sub-mortgaged it commenced an action to recover the policy moneys from the company. Pending the action they gave notice to the sub-mortgagees to hold any balance at the disposal of a certain bank. This having been communicated to the bank was held to be a valid charge in its favour upon the policy moneys.

(*s*) *Brandt* v. *Dunlop*, [1905] A. C. 454, 462.
(*t*) *Cook* v. *Black* (1842), 1 Hare, 390.
(*u*) *Gorringe* v. *Irwell* (1886), 34 Ch. D. 128; *Justice* v. *Wynne* (1860), 12 Ir. Ch. R. 289; *Mangles* v. *Dixon* (1852), 3 H. L. C. 702, 730.
(*x*) *Chowne* v. *Baylis* (1862), 31 Beav. 351.
(*y*) *Myers* v. *United Guarantee* (1855), 7 De G. M. & G. 112.

Chowne v. Baylis (1862), 31 Beav. 351

Chowne v. *Baylis.*

A, who had insured his life, feloniously abstracted money from B. Before conviction, and in consideration of the money he had taken, A gave B the following letter addressed to the office: "Please take notice that I wish to transfer my interest in the policies No. to B." B sent this letter to the office who acknowledged it, but B did not obtain possession of the policy. Afterwards A formally assigned the policy, and handed it over to his solicitor to secure a debt of £500. It was held that the abstracted money was a debt due from A to B, and that there was therefore good consideration for the assignment to B; a felon could for valuable consideration assign his property before conviction unless merely colourably to avoid forfeiture (*d*); the notice to the office, although expressing only a desire to assign, was in equity a sufficient assignment, and B was held entitled to priority over A's solicitor. Sir John Romilly, referring to the letter, said, "It is impossible to say that such a transaction and such a document has no meaning, and that it was intended to have no meaning, and yet, unless it assigned his interest in the policy it means nothing. It is to be observed that no formal instrument is required for the purpose, all that is wanted is that the document should express the intention of the assignee thereby to make the assignment. I read it exactly as if it had been written, 'I hereby transfer, etc.' Unless it means this, what was there for the office to take notice of—a decision not fulfilled? It is, I think, absurd to suppose that any person who wrote and signed such a document could so intend it or that the office could so receive it."

Cook v. Black (1842), 1 Hare, 390

Cook v. *Black.*

A life policy contained a suicide clause that "if the assured commit suicide and the policy shall have been assigned" to any person having a *bonâ fide* interest in the life, the company would pay such person to the extent of such interest. The assured being indebted to C, the policy was deposited with him along with the following memorandum: "I will leave in your hands a policy . . . for collaterally securing to you the payment of the sum of £260 due, and owing by me to you . . . and I will assign the same to you whenever requested so to do." This was held to be a good equitable assignment of the policy and within the condition.

Direction to company not communicated to payee.

A direction by a creditor to his debtor to pay to a third person is a mere revocable mandate until communicated to such third person (*e*), and the mandate may be revoked by any dealing with the debt by the creditor which is inconsistent with the execution of the mandate (*f*). Therefore when the assured directs the company to pay the policy moneys to a particular person, that person cannot enforce payment unless the matter has been communicated to

(*d*) At the date of this decision a conviction for felony or treason involved the forfeiture of the felon's property to the Crown. Forfeiture, however, was abolished in 1870, 33 & 34 Vict. c. 23.

(*e*) *Morrell* v. *Wootten* (1852), 16 Beav. 197; *Field* v. *Lonsdale* (1850), 13 Beav. 78.

(*f*) *Scott* v. *Porcher* (1817), 3 Mer. 652.

him in such a way as to express the assured's intention of conveying to him the benefit of the policy (*g*).

Deposit of the policy without memorandum.

The mere delivery of a policy for valuable consideration is a sufficient equitable assignment of the chose in action, and no written memorandum or notice to the company is necessary (*i*). The nature of the transaction, whether a sale, mortgage, or charge, may be gathered from contemporaneous circumstances or parol evidence.

Priority of equitable claims.

In questions of priority among assignees and incumbrancers of a policy, it is submitted that, so long as the moneys are in the hands of the company or deposited in Court, all priorities *inter se* must be determined on the footing that all the assignees are equitable assignees. A well-known principle in the law of incumbrances is that whereas the equitable assignee takes subject to all prior equities, an assignee who has acquired the legal title takes priority over equities prior in time, but of which he had no notice at the time he acquired his title (*k*). Before the Policies of Assurance Act, 1867, and the Judicature Act, 1873, all assignments of policies were purely equitable assignments of the chose in action. Since those Acts the assignee may acquire the right to sue at law in his own name, but that does not, in questions of priority between him and other assignees, put him in the position of a person who has acquired the legal title (*l*). It follows that before the policy moneys have actually been paid over to an assignee he must, on questions of priority, be treated as having a purely equitable title. When the money has actually been paid to him, and he is in possession of it, he does get the advantage of being legal owner, and if he obtained possession without fraud is subject only to equities of which he had notice at the time he took possession (*m*).

Equitable assignees rank in order of date,

Equitable assignees rank primarily in order of date, and therefore take subject to all prior equities, whether or not they had notice of them at the date of their assignment (*n*).

(*g*) *Foster, In re* (1873), Ir. R. 7 Eq. 294; *Crozier* v. *Phœnix* (1870), 2 Hann. New Br. 200.

(*i*) *Maughan* v. *Ridley* (1863), 8 L. T. (N. S.) 309; *Le Feuvre* v. *Sullivan* (1855), 10 Moore P. C. 1.

In Scotland a written assignation is necessary. *Scottish Provident Inst.* v. *Cohen* (1886), 16 R. 117; *Brownlee* v. *Robb* (1907), 9 F. 1302.

(*k*) *Newman* v. *Newman* (1885), 28 Ch. D. 674; *Shropshire Union* v. *The Queen* (1875), L. R. 7 H. L. 496, 506.

(*l*) *Weniger's Policy, In re*, [1910] 2 Ch. 291.

(*m*) *Justice* v. *Wynne* (1860), 12 Ir. Ch. R. 289.

(*n*) *Shropshire Union* v. *The Queen* (1875), L. R. 7 H. L. 496, 506; *Capell* v. *Winter*, [1907] 2 Ch. 376.

An equitable assignee for value may, however, acquire priority over an equity prior in point of time provided he took the assignment without actual or constructive notice of such equity, and— or notice to company.

(1) has given formal notice to the company before the company had knowledge of the prior equity (*o*); or

(2) the holder of the prior equity by words or conduct misled him, and induced him to take an assignment which he would not otherwise have taken (*p*).

In order to acquire priority over an earlier equity an assignee must have given formal notice to the company (*q*). The notice must be given by or on behalf of the assignee to the company or its authorised agent. Probably it must be in writing and be given with the intention of perfecting the assignment. Priority acquired by formal notice only.

The fact that the company has received informal notice of an assignment does not give such assignment any priority over earlier equities. But informal notice coming in any way to the knowledge of the company or to the knowledge of an agent whose duty it is to communicate the matter to the company is, if definite, sufficient to fix the company with liability in equity to the assignee and to prevent any subsequent assignee from obtaining priority by giving a prior formal notice (*r*). Informal notice preserves priority.

Notice given in general terms of the fact that a policy has been assigned or charged by a particular deed is notice of the contents of the deed, and of the nature and extent of the assignment or charge (*s*). But where the notice states that a certain deed creates a particular charge specified in the notice, that is not notice of another charge which in fact the deed contains, but which is not specified in the notice, and priority may be acquired in respect of the specified charge, but lost in respect of the other charge (*t*). Notice of assignment without particulars.

Where a director or other officer or agent of the company is a party to the assignment or is so concerned with it that his interest is not to disclose his knowledge of the assignment, that knowledge is not the knowledge of the company so as to fix the company Knowledge of director or other officer.

(*o*) *Ward* v. *Duncombe*, [1893] A. C. 369; *Dearle* v. *Hall* (1828), 3 Russ. 1.

(*p*) *Shropshire Union* v. *The Queen* (1875), L. R. 7 H. L. 496, 506; *Justice* v. *Wynne* (1860), 12 Ir. Ch. R. 289.

(*q*) *Arden* v. *Arden* (1885), 29 Ch. D. 702.

(*r*) *Lloyd* v. *Banks* (1868), L. R. 3 Ch. 488, 490; *Humberstone* v. *Chase* (1836), 2 Y. & C. Ex. 208; and see cases on sufficiency of notice required to take a policy out of the order and disposition of the assignor.

(*s*) *Bright's Trusts, In re* (1856), 21 Beav. 430.

(*t*) *Bright's Trusts, In re* (1856), 21 Beav. 430; *Crawford* v. *Canada Life* (1897), 24 Ont. A. R. 643.

with liability, or to prevent subsequent equities acquiring priority (*u*).

Notice by sub-assignee.

In the case of a sub-assignee or sub-mortgagee of a chose in action, notice of the sub-assignment or sub-mortgage must be given to the holder of the fund in order to acquire or preserve priority among other sub-assignees or sub-mortgagees. For this purpose notice to the assignor or mortgagor is not necessary. If the assignee or mortgagee has given notice of his interest to the holder of the fund no further notice need be given by the sub-assignee or sub-mortgagee in order to acquire or preserve priority among other assignees and mortgagees (*x*).

Priority of sub-assignee.

A sub-assignee takes the same equity as the assignor from whom he took, and thus where an assignee or mortgagee has, by giving notice, acquired priority over assignments or incumbrances earlier in date, but of which he had no notice, a sub-assignee or sub-mortgagee gets the advantage of that priority notwithstanding that he had full notice of the earlier equities (*y*); and conversely if an assignee or mortgagee took with notice of an earlier equity a sub-assignee or sub-mortgagee from him cannot acquire priority over such equity although he took without notice of it (*z*).

Notice to one of several trustees.

Where notice of an assignment is required to be given to trustees as the holders of a fund, it should be given to all the trustees living at the time of the assignment. Where notice has been given to all the trustees or to a sole trustee it has been held that it need not be repeated to new trustees subsequently assumed into the trust (*a*). Notice to one of several trustees is probably sufficient so long as that trustee is alive, but on his death a new notice would have to be given, and in default a subsequent assignee giving notice to all the trustees would acquire priority (*b*).

Knowledge of carlier equities.

An equitable assignee for value cannot by giving notice to the company acquire priority over any earlier equity if he had notice of such earlier equity at the time he took his assignment (*c*), and this applies equally to the case where the earlier equity

(*u*) *Martin* v. *Sedgwick* (1846), 9 Beav. 333; *Browne* v. *Savage* (1859), 5 Jur. (N. S.) 1020.

(*x*) *Ex parte Barnett* (1845), De G. 194; *Jones* v. *Gibbons* (1804), 9 Ves. 407.

(*y*) *Lowther* v. *Carlton* (1741), 2 Atk. 241.

(*z*) *Ford* v. *White* (1852), 16 Beav. 120.

(*a*) *Wasdale, In re,* [1899] 1 Ch. 163. It is usual, however, and safer to give notice to the new trustee.

(*b*) *Phillips' Trust, In re,* [1903] 1 Ch. 183.

(*c*) *Newman* v. *Newman* (1885), 28 Ch. D. 674; *Le Feuvre* v. *Sullivan* (1855), 10 Moore P. C. 1; *Weniger's Policy, In re,* [1910] 2 Ch. 291.

is a purely voluntary assignment (*d*). If however an equitable assignee took his assignment without notice of an earlier equity he may acquire priority over that equity by giving first formal notice to the company notwithstanding that before he gave the notice he had become aware of the earlier equity (*e*).

The fact that an equitable assignee for value did not, on taking his assignment, make any inquiry as to the existence of earlier equities does not disentitle him from obtaining priority if neither he nor the company had any knowledge of an earlier equity (*f*).

Assignee may have constructive notice of prior equity.

An equitable assignee is deemed to have knowledge of a prior equity, not only when he has actual knowledge of the circumstances, but also when he has knowledge of facts which ought to have put him as a prudent man upon inquiry. Knowledge of such facts is constructive notice of any equitable assignment which reasonable inquiry would have disclosed. Thus, where a policy was deposited as security for a loan, but no notice was given to the company, and the assured subsequently mortgaged the policy by deed, the non-production of the policy to the mortgagee was held to be constructive notice to him of some earlier charge upon the policy, and even although the mortgagee had given notice to the company, and the depositee had not, the depositee was held to have the prior equity (*g*). An intending mortgagee should always insist on production of the policy or a satisfactory explanation of its non-production, and if he merely accepts the word of the mortgagor that he "left it at home by mistake" (*h*), or that it "was at his bank for safe custody" (*i*), he cannot acquire priority over an earlier depositee merely by taking a formal assignment and giving formal notice to the company.

Non-production of policy.

Priority over assignee who has negligently left policy in hands of assignor.

In the case of real estate a mortgagee or purchaser, even when he has got the legal estate, may be postponed to a subsequent equitable title if he has been negligent in leaving the title deeds in the possession of the mortgagor or vendor, and has so enabled him to commit a fraud by conveying the estate to another purchaser

(*d*) *Justice* v. *Wynne* (1860), 12 Ir. Ch. R. 289; *Holmes, In re* (1885), 29 Ch. D. 786.

(*e*) *Mutual Life* v. *Langley* (1886), 32 Ch. D. 460.

(*f*) *Dallas, In re*, [1904] 2 Ch. 385; *Meux* v. *Bell* (1841), 1 Hare, 73.

(*g*) *Weniger's Policy, In re*, [1910] 2 Ch. 291: *Spencer* v. *Clarke* (1878), 9 Ch. D. 137; *Hiern* v. *Mill* (1806), 13 Ves. 114.

(*h*) *Spencer* v. *Clarke* (1878), 9 Ch. D. 137.

(*i*) *Maxfield* v. *Burton* (1873), L. R. 17 Eq. 15.

or incumbrancer without notice of the former transaction (*k*). This principle, however, hardly applies to an assignment of a chose in action of which due notice has been given, because, although the document of title is in the hands of the assignor the assignee should not omit to make inquiry of the debtor whether the chose in action has already been assigned or charged. Thus, where an assignee of a policy by deed gave notice to the company but left the policy in the hands of the assured who subsequently obtained a loan by depositing it with a person who had no notice of the first assignment, it was held that the first assignee was not postponed to the depositee (*l*).

An assignee by deed who had neither given notice to the company nor taken possession of the policy would probably lose priority against a subsequent assignee who would thus take without means of ascertaining the existence of the assignment and would have been misled by the negligent conduct of the assignee by deed (*m*).

Voluntary assignee obtains no priority by notice.

A voluntary assignee cannot obtain priority over an earlier equity by giving formal notice to the company, and in a contest between one or more voluntary assignees they rank according to their priority in point of time without regard to priority of notice (*n*).

Money in Court; stop order.

If policy moneys have been paid into Court equitable assignees who have not previously given notice to the company must obtain a stop order which takes the place of notice to the company (*o*). A stop order operates to give the same but no greater priority than notice to the company when the moneys are in its hands (*p*).

If an insurance company has a charge on its own policy it will as a rule deduct the amount of such charge before payment into Court. If the company pays in the whole policy moneys it must obtain a stop order so as to preserve its charge as against puisne incumbrancers (*q*).

Notice by personal

Neither the personal representatives of a deceased person (*r*)

(*k*) *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*l*) *Neale* v. *Molineux* (1847), 2 Car. & K. 672.

(*m*) *Shropshire Union* v. *The Queen* (1875), L. R. 7 H. L. 496, 506; and see *Dallas, In re*, [1904] 2 Ch. 385.

(*n*) *Justice* v. *Wynne* (1860), 1 Ir. Ch. R. 289.

(*o*) *Pinnock* v. *Bailey* (1883), 23 Ch. D. 497; *Mutual Life* v. *Langley* (1886), 32 Ch. D. 460.

(*p*) *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26; *Holmes In re* (1885), 29 Ch. D. 786.

(*q*) *Swayne* v. *Swayne* (1848), 11 Beav. 463.

(*r*) *Russell's Policy Trusts, In re* (1872), L. R. 15 Eq. 26.

nor the trustee in bankruptcy of a bankrupt person (*s*) can obtain priority over assignees or incumbrancers by giving prior notice of their title; but an assignee without notice of a bankruptcy may acquire priority over the trustee in bankruptcy by giving notice of his assignment before notice is given by the trustee (*t*).

representative or trustee in bankruptcy.

When a person has an interest, by way of charge or otherwise, in a policy he is entitled to enforce his claim against the person who receives the money from the company notwithstanding that the policy was as against the company unenforceable, and the person receiving the money cannot allege as against his assignee or mortgagee that the policy was void or illegal (*u*). Where, however, a company makes a purely *ex gratiâ* payment in respect of a policy upon which they deny all liability, the person to whom such payment was made for his own benefit is not, unless he is in a fiduciary position, bound to account for it to the persons who would have been entitled to the policy moneys if the policy had been enforceable.

Effect of assignment where policy void or voidable.

A policy holder cannot get rid of liens or charges on a policy by surrendering it and taking a new policy in its place. The new policy will be subject to the same equities which attached to the old, and the company will be bound to the extent of its knowledge of these equities.

Policy surrendered in exchange for new policy equitable claims attach.

Nesbitt v. Berridge (1864), 10 Jur. N. S. 53

A mortgagor sold his equity of redemption on two policies. A sub-purchaser of the equity paid off the mortgagee and surrendered the two policies to the office and the office granted one new policy on the same terms. Afterwards the sale of the equity was set aside on the ground of insufficient value, and the mortgagor was held entitled to redeem the substituted policy on the same terms as he would have been entitled to redeem the old policies.

Nesbitt v. *Berridge.*

An assignment of a policy carries with it *primâ facie* the right to possession of the document. But the document and the right to the policy moneys are both property, and each is property of a different kind, and the right to the one may pass without the right to the other, and one person may be entitled to hold the document as against the person who has the sole right to the policy moneys.

Right to possession of the policy.

(*s*) *Wallis, In re*, [1902] 1 K. B. 719. *Ibbetson, Ex p.* (1878), 8 Ch. D. 519.

(*t*) *Russell's Policy Trusts, In re* (1872), L. R. 15 Eq. 26.

(*u*) *Worthington* v. *Curtis* (1875), 1 Ch. D. 419; *A.-G.* v. *Murray*, [1903] 2 K. B. 64.

Neale v. Molineux (1847), 2 Car. & K. 672

Neale v. *Molineux.*

A having a policy on his own life assigned it to B by deed, and due notice was given to the office. A was allowed to remain in possession of the policy, and subsequently deposited it with C as security for an advance. C had no notice of the assignment. On the death of A, B sued C in detinue for possession of the policy. C pleaded that B fraudulently allowed the policy to remain in the hands of A. The jury found that there was no fraud, but only negligence. As negligence was not pleaded, B, the plaintiff, had judgment, but no decision was given as to whether or not a plea of negligence would have been a good defence to the action.

Where assignee has negligently left policy in hands of assignor.

The case of *Neale* v. *Molineux* was argued on the analogy of title deeds to land. It has been held that the right to the title deeds runs with the legal ownership, and that a vendee is entitled to recover them notwithstanding that owing to his negligence they remained in the hands of the vendor, who subsequently deposited them by way of equitable mortgage (*x*). On the other hand, if a first mortgagee negligently leaves the title deeds in the possession of the owner and the owner mortgages the land again and deposits the title deeds with a second mortgagee without notice of the first mortgage, the first mortgagee cannot recover them without first paying off the second mortgagee. The analogy of the policy to title deeds of land is by no means complete, but it is submitted that a similar distinction applies. If the policy is assigned for value unconditionally, and not by way of mortgage or charge, in any manner sufficient to convey the equitable title, the presumption is that the property in the document passes at the same time, whether it is delivered or not. If so, the assignee can, notwithstanding his negligence in leaving it in the possession of the assignor, recover it from a subsequent assignee with whom it has been deposited without notice, even although by giving first notice such depositee may have priority in respect of the right to the policy moneys. On the other hand, if the policy is assigned by way of mortgage the property in the document remains in the assured, and if the first mortgagee has negligently left it in possession of the assured, and he has subsequently deposited it with a second mortgagee the first mortgagee will probably not be entitled to possession unless he undertakes to pay off the second mortgagee.

Possessory lien.

A possessory lien on the policy, such as a solicitor's lien, may be enforced against the assured or other person entitled to the policy

(*x*) *Harrington* v. *Price* (1832), 3 B. & Ad. 170.

moneys (*y*). The right to retain the document against assignees of the policy moneys does not depend upon the person exercising the lien having given notice to the company (*z*).

Although gift of policy moneys void, gift of document may be valid.

Where the intention of a donor by delivery of a policy was to make a gift of the policy moneys and incidentally of the document to the donee, the gift of the policy moneys may be void by reason of its being an imperfect voluntary assignment, but the gift of the document may nevertheless be good so that the donee can hold it against the person entitled to the policy moneys (*a*). When a voluntary or a fraudulent assignment is set aside as against a trustee in bankruptcy the trustee is entitled to delivery up of the policy.

West of England Bank v. Batchelor (1882), 51 L. J. Ch. 199

West of England Bank v. *Batchelor.*

A effected a policy on his own life. He mortgaged it to B, but this mortgage was paid off and the policy and reassignment remained in the hands of A's solicitors. A subsequently mortgaged his policy to the W. E. Bank, and thinking the original policy was lost, he delivered to them a certified copy which he obtained from the company. The Bank gave notice of their mortgage. Subsequently they ascertained that the policy was in the hands of A's solicitors, who claimed a lien on the document for their professional charges; but had never notified their claim to the company. The Bank brought an action against the solicitors claiming delivery up of the policy, and a declaration that they had a first charge on the policy. The Court held that they were not entitled to the policy. Fry, J., said, "The assignee of a chose in action takes subject to all the equities. It appears to me that that is in no way altered by the Policies of Assurance Act, 1867, or by the provisions of the Judicature Act. The one makes the right to receive the money a condition precedent to the right to sue at law, and the other makes an assignment of a chose in action subject to all existing equities. The plaintiffs then say that the priority of the equity constituted by the lien was repelled by the negligence in not giving notice of that lien to the insurance office. The question therefore arises whether such notice ought to be given in order that a solicitor may retain his lien. To answer that question one must inquire what is the nature of a solicitor's lien. It is merely a passive right, a right to hold the piece of paper or the piece of parchment as the case may be, until he is paid. In this case it gives the solicitor no right against the fund, but merely a right to embarrass the person who claims the fund by the non-production of the piece of paper . . . the fact that the assignor does not hold that piece of paper is notice to all the world that it is somewhere else than in the hands of the person with whom they are dealing, and therefore the fact of the solicitor holding the paper is notice to all the world that that paper is held by some one who is not

(*y*) *Head* v. *Egerton* (1734), 3 P. W. 280.

(*z*) *West of England Bank* v. *Batchelor* (1882), 51 L. J. Ch. 199; *Gibson* v. *Overbury* (1841), 7 M. & W. 555.

(*a*) *Rummens* v. *Hare* (1876), 1 Ex. D. 169.

present; and that is the only thing of which it is necessary to give notice . . . there is no possibility of a fraud being committed by reason of the solicitor not giving notice."

Rummens v. Hare (1876), 1 Ex. D. 169

Rummens v. *Hare.*

The holder of a policy on his own life handed it to his mother in circumstances which showed an intention to give her the benefit of it. Subsequently A married. On the death of A his widow, as executrix, claimed the proceeds of the policy. The company declined to pay without production of the policy, and the widow thereupon brought this action in detinue for the policy and premium receipts. It was argued for the widow that, as the benefit of the policy could not pass as a voluntary gift by mere delivery of the document, the right to the policy moneys was in the executrix, and incidentally she was entitled to the policy. The Court of Appeal held that, whoever might be entitled to the policy moneys, there was a good gift of the document by A to his mother. Lord Cairns said, "This was a gift of the policy, and although there was no consideration for it, yet it was a valid gift to the mother with whatever advantage she could obtain from it. It has been pointed out during the argument that the deceased could not have claimed to have the document returned to him nor can his administratrix now claim it. We have nothing to say as to the money which is secured by it. This is one of those cases in which the plaintiff may not be able to recover the document which is the evidence of the debt, while the person who holds that evidence may not be able to recover the debt itself; but with that we have nothing to do."

Gibson v. Overbury (1841), 7 M. & W. 555

Gibson v. *Overbury.*

A policy was deposited as security for money advanced, but no notice was given to the company. Subsequently the depositor became bankrupt, and the assignee in bankruptcy brought an action of trover against the depositee, claiming the delivery up of the policy on the ground that the property had passed to him as property in the order and disposition of the bankrupt. The Court held that the deposit was made by way of lien on the document, and not by way of charge on the policy moneys, and that although the assignee in bankruptcy might be entitled to the policy moneys he was not entitled to the document which remained subject to the lien. Apparently if the delivery of the policy to the depositee had been merely collateral to a charge on or mortgage of the policy moneys, and the charge or mortgage had been set aside as against the assignee in bankruptcy, he would have been entitled to recover the policy from the depositee.

Mortgagee's statutory right to possession of policy.

Under the Conveyancing Act, 1881 (*d*), a mortgagee with a power of sale may recover a policy from any person (other than a person having an interest in the policy moneys in priority to the mortgage), notwithstanding that such person has a lien on the document as against the mortgagor (*d*).

(*d*) 44 & 45 Vict. c. 41, s. 21 (7).

When a policy of insurance has been dealt with in a country other than the country by the law of which the original contract is governed there may be a conflict of law. The question as to which code of law ought to be applied to the particular circumstances, must be determined by the rules of private international law. Those rules are not very clearly defined, but the following may be accepted as more or less definite principles upon which an English Court will act :— Conflict of law.

1. The validity and effect of an assignment of chattels are *primâ facie* determined according to the law of the place where the chattels are situate at the time of the assignment (*e*). Rules of private international law.

2. The validity and effect of an assignment of a chose in action which is represented by a negotiable instrument is *primâ facie* determined according to the law of the place where the instrument is situate at the time of the assignment (*f*).

3. Assignments of a chose in action not represented by a negotiable instrument are subject to the following rules :—

(*a*) Where the question is the validity or effect of an assignment as between assignor and assignee, it will be determined according to the *lex contractus* of the assignment (*g*).

(*b*) Where the question is a competition between assignees, and the *lex contractus* of all the assignments is the same, the priority *inter se* will be determined according to that law (*h*).

(*c*) Where the question is a competition between assignees, and the *lex contractus* of the various assignments is different, the priority *inter se* will be determined according to the *lex contractus* of the original contract (*i*).

(*d*) Where the question is the liability of the original debtor to be sued in the name of an assignee, the right of the assignee to sue at law will be determined according to the *lex contractus* of the original contract (*k*).

4. The *lex contractus*, whether of an original contract or of an assignment, is the law which the parties intend shall govern

(*e*) *Inglis* v. *Robertson*, [1898] A. C. 616.

(*f*) *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677 ; *Alcock* v. *Smith*, [1892] 1 Ch. 238.

(*g*) *Lee* v. *Abdy* (1886), 17 Q. B. D. 309 ; *Scottish Provident* v. *Cohen* (1886), 16 R. 112 ; *Colonial Bank* v. *Cady* (1890), 15 A. C. 267 ; *North Western Bank* v. *Poynter*, [1895] A. C. 56.

(*h*) *North Western Bank* v. *Poynter*, [1895] A. C. 56.

(*i*) *Le Feuvre* v. *Sullivan* (1855), 10 Moore P. C. 1 ; and see *In re Queensland Mercantile and Agency Co.*, [1892] 1 Ch. 219.

(*k*) *North Western Bank* v. *Poynter*, [1895] A. C. 56 ; *O'Callaghan* v. *Thomond* (1810), 3 Taunt. 82.

the incidents of the contract (*l*). The *lex contractus* is *primâ facie* the law of the place where the contract is made (*m*), but the form of the contract (*n*), the residence or domicile of the parties, or the fact that the contract is to be performed in another place (o), affords evidence of the intention of the parties that the contract shall be governed by some law other than the law where the contract is made.

Applied to assignment of insurance policy.

It is submitted that the assignment of an insurance policy is not to be treated on the same footing as the assignment of a negotiable instrument, but that the rules 3 and 4 are the rules which ought to be applied in order to determine the validity or effect of the assignment of a policy in any case where there is a conflict of law. It has been suggested that a policy under seal stands upon a different footing, inasmuch as a specialty debt is deemed to be situate in the place where the document of title is, and that all assignments should be regulated by the law of that place. No doubt for certain purposes of English law a specialty debt is deemed to be situate in the place where the document of title is, as, for instance, in questions of probate and death duties (*p*). The distinction, however, between specialty and simple contract debts is not one which has any universality among the laws of the different nations, and, on a question of international law, the distinction ought to be disregarded. It is submitted, therefore, that, on the question as to which of two different codes of law ought to be applied to the assignment of a policy, a policy under seal stands upon precisely the same footing as a policy under hand only.

Lee v. Abdy (1886), 17 Q. B. D. 309

Lee v. *Abdy.*

A policy was issued by the Reliance Mutual Life Insurance Society from its head office in London, and purported to insure a person therein described as being resident in Cape Colony. The assured, while resident and domiciled in Cape Colony, purported to assign the policy to his wife. By the law of the Colony an assignment from husband to wife was void, and the question then arose whether the law of Cape Colony or of England should control its validity. The case was argued before a Divisional Court on points of law on the pleadings. Day, J., said it would be difficult on the facts then before them to determine where the original contract of insurance was made or where the policy moneys were payable, but that it was unnecessary to go into these

(*l*) *Spurrier* v. *La Cloche*, [1902] A. C. 446; *Le Feuvre* v. *Sullivan* (1855), 10 Moore P. C. 1.

(*m*) *Lee* v. *Abdy* (1886), 17 Q.B.D. 309.

(*n*) *Spurrier* v. *La Cloche*, [1902] A. C. 446.

(*o*) *Bankes, In re*, [1902] 2 Ch. 333; *Hansen* v. *Dixon* (1907), 96 L. T. 32.

(*p*) *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, 481; *Winans* v. *The King* (1908), 24 T. L. R. 445.

questions. The subject matter of the assignment was a chose in action which had no locality. The general rule was that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment, if it existed at all, must exist by virtue of the contract between assignor and assignee. That contract was made in Cape Colony by persons domiciled there, and it was invalid by the law of Cape Colony, and therefore the assignment was void. Wills, J., came to the same conclusion, and partly upon the same reasoning, but he also laid some stress upon the fact that the policy was issued to an assured resident in Cape Colony, and therefore the original contract was made, with knowledge that an assignment might be made elsewhere than in England, and the reasonable view to take was that the parties contemplated that any assignment should be controlled by the law of the country where it might be made.

Le Feuvre v. Sullivan (1855), 10 Moore P. C. 1

Le Feuvre v. *Sullivan.*

A policy was issued by an English insurance company to the assured, who was domiciled in Jersey. The policy was contained in the ordinary form of the company's policies issued in England, but the contract was presumably made, and the policy issued, through their agent in Jersey. The assured subsequently deposited the policy in England with a domiciled Englishman as security for a debt. No notice of this deposit was given to the company, and afterwards the assured obtained a duplicate policy from the company on the false assertion that the original was lost, and purported to assign it for valuable consideration to his wife. The wife gave notice to the company of her assignment, and on the death of the assured brought an action on the policy in Jersey. The depositee of the original policy claimed a lien for his debt. The question was whether the validity of the security should be decided by the law of Jersey or of England. The Privy Council held on appeal from the Royal Court of Jersey that the policy was an English instrument, and formed and evidenced an English contract, and that as the deposit was made in England to a domiciled Englishman the law of England must be applied. The deposit was therefore a valid security, and was preferable to the wife's claim unless the latter took without notice of the deposit.

Scottish Provident v. Cohen (1888), 16 R. 112

Scottish Provident v. *Cohen.*

A Scottish insurance office issued a life policy in Scotland to a domiciled Scotsman. The assured being subsequently resident in England deposited the policy with a domiciled Englishman as security for an advance, and notice of the deposit was given to the office. The assured was made bankrupt in Scotland, and in a question between his trustee in bankruptcy and the English depositee it was held that, although according to the law of Scotland the deposit would not have been a good assignment, yet in a transaction completed in England the law of England must apply and the deposit was good as against the trustee representing the general creditors in Scotland.

Inglis v. Robertson, [1898] A. C. 616

Inglis v. *Robertson.*

A domiciled Englishman was the proprietor of a parcel of whisky in a bonded warehouse situate in Scotland. He purported to create a charge

upon the whisky by pledging the delivery warrants in England to an English creditor; but no notice was given to the warehouseman. The whisky was arrested by a creditor in Scotland. In a competition between him and the English pledgee it was held that the rights of the parties must be decided according to Scots law, and that, as by the law of Scotland a pledgee of goods in a warehouse must make good his title by notice to the warehouseman, the title of the creditor in Scotland must prevail.

Embiricos v. Anglo-Austrian Bank, [1905] 1 K. B. 677

Embiricos v. *Anglo-Austrian Bank.*

A cheque was drawn in Austria upon a London bank in favour of a payee resident in London. The cheque was stolen in Austria and the payee's endorsement was forged, and it was discounted in Austria in good faith. It was afterwards endorsed to the defendants in London, and cashed by them in good faith. In an action by the payee for conversion it was held that the law of Austria must apply, and that as according to Austrian law a title upon a forged indorsement taken for value without gross negligence was a good title, the title of the defendants must prevail. The decision of the Court was based on the principle that the assignment of a movable which can be touched gives a good title thereto according to the law of the country where the movable is situate, and they adopted the reasoning in *Alcock* v. *Smith*, that in this respect the case of a negotiable instrument is not different from a sale of chattels, and the dictum of Romer, J., in that case, where he says, "Transfer in one country of a document of title to a debt or to an interest in personal property is governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in, a foreign country."

North Western Bank v. Poynter, [1895] A. C. 56

North Western Bank v. *Poynter.*

Merchants in Liverpool were owners of a cargo afloat on its way to a port in Scotland. They received the bills of lading, and a bank in Liverpool having agreed to advance them money on the cargo, the bills of lading were deposited with the bank. Afterwards the bills of lading were redelivered to the merchants so that they might sell the cargo on behalf of the bank. They sold the cargo to a firm in Glasgow. The merchants' creditors in Scotland arrested the proceeds in the hands of the Glasgow firm. In a competition between them and the English bank it was held that the title of the bank must prevail. Lord Watson said, "Where a movable fund situated in Scotland admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is *primâ facie* a question of English law."

Colonial Bank v. Cady (1890), 15 A. C. 267

Colonial Bank v. *Cady.*

The registered owner of certain share certificates in an American company died domiciled in England. His executor delivered the certificates and transfers signed in blank to a broker in London with the object of having himself registered an owner. The broker fraudulently deposited the certificates and transfers with a London bank in security for an advance. It was alleged that according to American law the executor would be estopped by his negligence

from claiming the shares against the bank. The Court held that in a question between the executor and the bank English law applied, and that the executor was entitled to recover the certificates and transfers from the bank. Lord Watson said, "The interest in the railway company's stock which possession of these certificates confers upon a holder who has lawfully acquired them must depend on the law of the company's domicile. But the parties to the various transactions by means of which the certificates passed from the possession of the respondents into the hands of the appellants are all domiciled in England, and it is, in my opinion, clear that the validity of the contract of pledge . . . and the right to retain and use the documents must be governed by rules of English law;" and Lord Herschell said, "I agree that the question what is necessary or effectual to transfer the shares in such a company or to perfect the title to them where there is, or must be held to have been, an intention to transfer them must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares must be determined by the law prevailing here."

Kelly v. Selwyn, [1905] 2 Ch. 117

Kelly v. *Selwyn.*

A was entitled to a reversionary interest under an English trust. He was resident and domiciled in the United States, and while there purported to assign his reversionary interest to his wife. No notice of this assignment was given to the trustees. Afterwards A, being in England, purported to assign his reversionary interest by way of mortgage to X, who gave notice to the trustees. In a competition between A's wife and X, it was held that as the trust was an English trust, the question of priority must be decided according to English law, and as A's wife had failed to complete her title by notice the claim of X must prevail.

English policy assigned in Scotland or other "foreign" country.

In the great majority of cases the rules above stated will not be difficult to apply. Thus, in the case of an English policy issued by a company with its principal office situate in England, an assignment, say, in Scotland (which is a foreign country for purposes of private international law) must, as between assignor and assignee be *primâ facie* determined according to Scots law, and if the assignee takes a good title by Scots law, that must prevail against the assured and his personal representatives or general creditors, whether in Scotland or England. If the assured assigned his policy twice over in Scotland to domiciled Scotsmen, a competition between such assignees would *primâ facie* be decided according to Scots law. If the assured assigned his policy first in Scotland and then in England, the validity of each assignment would *primâ facie* be decided according to the law of the country where it was made, but a competition between the two

assignees on a question of priority would be determined according to English law. In any claim made against the company, the right of any assignee to sue at law in his own name, and so his ability to give a legal discharge; would be determined according to English law. The company, however, would not on that account be entitled to disregard claims made by an assignee holding a good title by Scots law in a case where Scots law prevailed between the claimants. Such title would be good in equity in an English Court, and the company could not pay the person entitled to sue at law and disregard the equitable title.

Section VI.—Voidable Assignments

Misrepresentation as ground for rescission.

An assignment or agreement to assign a policy of insurance may be rescinded on the ground of misrepresentation. Specific performance of an agreement to assign will not be granted if there was any misrepresentation of material fact made by or on behalf of the assignee (*r*). Fraudulent misrepresentation is ground for rescission if each party can restore what he has received under the contract (*s*). Innocent misrepresentation is ground for rescission if (i) the agreement to assign is still incomplete for want of a formal assignment, and (ii) the party against whom rescission is claimed can be placed *in statu quo ante*.

A beneficiary under a settlement cannot enforce his claim against the trustees if the settlement in his favour has been obtained by his fraudulent misrepresentation (*t*).

Damages for fraud.

Where an assignment is induced by the fraud of one party, the other party may, as an alternative to his remedy by way of rescission, bring an action for damages for the loss sustained (*u*).

Mutual mistake or error *in essentialibus*.

An assignment or agreement to assign is void *ab initio* if it is made under a mutual mistake or error *in essentialibus* (*x*). The mere ignorance of material facts is not in itself sufficient to vitiate an assignment, but if the facts go to the root of the contract the assignment is void on the ground that the essential basis of the contract as concluded was non-existent (*y*).

(*r*) *Brealey* v. *Collins* (1831), You. 317.
(*s*) *Jones* v. *Keene* (1841), 2 Mood. & Rob. 348.
(*t*) *Rosier's Trust, In re* (1877), 37 L. T. 426.
(*u*) *Barber* v. *Morris* (1831), 1 Mood. & Rob. 62.
(*x*) *Scott* v. *Coulson*, [1903] 2 Ch. 249.
(*y*) *Thomson* v. *Lambert* (1868), Ir. R. 2 Eq. 433; *Turner* v. *Harvey* (1821), Jac. 169.

An assignment or agreement to assign is also void *ab initio* if the assignor was induced to execute the document by a false representation as to the character of the document he was signing (*z*). *Primâ facie* a man is presumed to be acquainted with the contents and effect of a document which he signs; he cannot afterwards say that he did not read it, or that he was told the effect of it was something other than its true effect (*a*). But the rule does not apply when a misrepresentation is made as to the character of the document as a whole, and the person signing it is thereby put off inquiry as to the precise contents.

False representation as to nature of document.

Thomson v. Lambert (1868), Ir. R. 2 Eq. 433

A man knowing that his father had met with an accident, and was ill, and knowing that that fact was material for the purpose of valuing a policy of insurance on his father's life, agreed to purchase the policy without disclosing the fact to the vendor. A Court of Equity refused the application of the vendor for an injunction to restrain the purchaser from enforcing the agreement at law. The judge held that mere concealment of a material fact was not sufficient to invalidate the agreement, but that if the concealment had been of a fact which formed an essential element of the contract as if the purchaser had known that his father's death was imminent or if he had made any false statement to the vendor he would have set the contract aside and restrained the proceedings at law.

Thomson v. *Lambert.*

Jones v. Keene (1841), 2 Mood. & Rob. 348

A purchaser sent his agent to negotiate for the purchase of a life policy for £999. The person whose life was insured was then *in extremis*. The vendor, who had no knowledge of this fact, asked the purchaser's agent how much he thought the policy was worth, and he said £60. The vendor thereupon sold him the policy for that amount. Upon the death of the assured the vendor brought this action in trover against the purchaser, and the judge, in summing up the case to the jury said that if they were of opinion that the vendor and his agent knew that the person insured was then in extreme danger when the agent said the policy was worth £60 the plaintiff was entitled to a verdict. The plaintiff had a verdict and judgment for the value of the policy.

Jones v. *Keene.*

Scott v. Coulson, [1903] 2 Ch. 249

An agreement to purchase a life policy was made under the mutual belief that the life insured was then in being. As a matter of fact the life had already dropped, and the purchaser became aware of that fact before completion. He did not disclose it to the vendor, but took a deed of assignment. Subsequently the insurance company paid the moneys into Court, and the vendor brought an action against the purchaser claiming to have the contract and deed of assignment set aside, and to have the policy moneys paid out

Scott v. *Coulson.*

(*z*) *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Bagot* v. *Chapman*, [1907] 2 Ch. 222.

(*a*) *Howatson* v. *Webb*, [1907] 1 Ch. 537.

to him. The Court of Appeal held that he was entitled to the relief asked: the agreement was void on the ground of mutual mistake as to the basis of the contract, and the assignment made in pursuance of it could not be supported.

Barber v. Morris (1831), 1 Mood. & Rob. 62

Barber v. *Morris.*

The vendor of a policy did not disclose the fact that the annuity which constituted his interest in the life was redeemable. After the policy had been assigned the annuity was, in fact, redeemed, and the vendor's interest in the life thereby ceased. The purchaser then alleged that the policy was worthless in accordance with the judgment in *Godsall* v. *Boldero* (*c*), and brought an action for damages. Lord Tenterden, in summing up, said that the question for the consideration of the jury was whether at the time of the sale the defendant made any improper concealment of facts within his knowledge, and if he did so the contract was void and the plaintiff was entitled to recover. He then pointed out that although the policy was unenforceable, as the law then stood, yet the practice of the companies was to pay, notwithstanding that the interest had ceased, and the defendant might well have thought the matter was of no importance. The jury gave a verdict for the defendant.

Bagot v. Chapman, [1907] 2 Ch. 222

Bagot v. *Chapman.*

A married woman was entitled to a reversionary interest. To secure a loan of £12,000 made to her husband the husband and wife executed a joint mortgage deed whereby they assigned the reversionary interest and covenanted to repay the money advanced. In an action by the mortgagees for foreclosure the wife pleaded *non est factum*, alleging that her husband, who was a solicitor, told her that the mortgage deed which he requested her to sign was a document which would enable him to raise money at some future time should he require it; but that he was not going to use it, and she should not suffer. She understood that if her husband did raise money it would be out of her reversionary interest, but she had no idea that any present charge was created or that she was making herself liable to pay anything. Swinfen Eady, J., held that, as the nature of the deed was wholly misrepresented to her it was not her deed, and was void against her.

Duress and undue influence.

An assignment of a policy of insurance may also be set aside on the ground that it was obtained by duress or undue influence. An assignment so obtained is not void *ab initio*, but is voidable (*d*). Duress implies some kind of physical coercion or threat of personal violence, inducing a party to make a contract against his free will (*e*). Undue influence is the exercise of that authority which a person in a strong position can exercise over a person in a relatively weak

(*c*) (1807), 7 East, 72, afterwards overruled in *Dalby* v. *India and London Life* (1854), 15 C. B. 365.

(*d*) *Ormes* v. *Beadel* (1860), 2 D. G. F. & J. 333.

(*e*) Leake on Contracts, 5th Edition, p. 279.

position (*f*). In the case of certain transactions, undue influence is presumed (*g*). Thus, in any sale of a reversionary interest by a poor or ignorant person acting without independent advice, and in all transactions between trustees and beneficiaries, solicitors and clients, medical man and patient, parent and child, husband and wife, the onus is on the purchaser of the reversionary interest, or on the trustee, solicitor, medical man, parent and husband to show that the transaction was fair and reasonable. In the case of a sale of a reversionary interest, that cannot now be set aside on the sole ground of undervalue (*h*), but where the vendor is a poor or ignorant person acting without independent advice the onus is still on the purchaser to show that it was a fair and reasonable transaction (*i*).

Right to rescind as against purchasers from assignee.

When an assignment of a policy is set aside as between assignor and assignee on the ground of fraud, mistake, duress, or undue influence, persons claiming under the assignee take no better title than the assignee himself, notwithstanding that they may have been purchasers for value and without notice of the defect in the original assignment (*k*). An assignee of a chose in action takes subject to all prior equities (*l*) and the equity of an assignor to set aside his assignment on the ground of fraud is prior to the equity of the purchaser for value from his assignee. The fact that by written assignment and notice to the company, such purchaser has a right to sue the company in law in his own name does not, it is submitted, give him any priority (*m*).

Lawrence v. Galsworthy (1857), 3 Jur. N. S. 1049

Lawrence v. *Galsworthy.*

A solicitor bought his client's policy at an auction for less than the full value. The solicitor subsequently deposited the policy with a third person to secure advances made by such person to him. The sale of the policy to the solicitor was set aside on the ground of the confidential relationship between solicitor and client, and it was held that the client was entitled to the policy moneys subject to the price given by the solicitor and any premiums paid by him being a first charge thereon. To that amount but no further the depositee was entitled to be paid in respect of his charge, and the client was entitled to receive the balance.

As against trustee in

A trustee in bankruptcy takes subject to all equities, and

(*f*) *Baudains* v. *Richardson*, [1906] A. C. 169.

(*g*) Leake on Contracts, 5th Edition, pp. 283 *et seq.*

(*h*) Sales of Reversions Act, 1867 (31 Vict. c. 4).

(*i*) *Fry* v. *Lane* (1888), 40 Ch. D. 312.

(*k*) *Lawrence* v. *Galsworthy* (1857), 3 Jur. (N. S.) 1049.

(*l*) *Athenæum Life* v. *Pooley* (1858), 3 De G. & J. 294; *Graham* v. *Johnson* (1869), L. R. 8 Eq. 36, 43.

(*m*) *Ante*, p. 432.

bankruptcy of assignee.

accordingly an assignment to a bankrupt may be set aside on the ground of misrepresentation or mistake both against the bankrupt and the trustee in bankruptcy, and the assignor may elect to set aside the assignment even after the date of the receiving order and with full knowledge of the bankruptcy (*n*).

Validity of voluntary assignments.

A voluntary assignment *inter vivos* of a policy of insurance will not be enforced against the assignor or his personal representatives unless—

(1) the assignment is complete as between assignor and assignee, or

(2) the assignor has constituted himself a trustee for the assignee.

Equity will not complete imperfect gift.

The old Chancery doctrine was that no Court of Equity would compel the completion of a voluntary conveyance of property (*o*). If the owner of property capable of being assigned in law agreed or purported to assign it for a valuable consideration, but did not actually transfer the property in law, a Court of Equity would treat the equitable right as having been transferred to the assignee, and would compel the assignor to complete the assignment by transferring the property in law. But if a similar agreement or assignment was made voluntarily, a Court of Equity would not assist the volunteer by completing the transaction. If, however, the intending assignor having the legal title had declared himself to be a trustee of the property for the intended assignee, a Court of Equity would enforce the trust against him, although purely voluntary (*p*). Where, therefore, a voluntary assignment of property was incomplete and insufficient by lack of formality to transfer the property in law, the Court was sometimes astute to find a declaration of trust in an incomplete assignment. A mere promise to assign *in futuro* was never deemed sufficient, but many judges held, and particularly in the case of gifts from a man to his wife, that, where words purporting to assign the property *de presenti* were used, but the form was not sufficient to convey the property in law, the Court ought to presume a declaration of trust in favour of the donee (*q*). In the case of gifts between strangers, those decisions cannot be reconciled with the judgments of the

Declaration of trust.

(*n*) *Eastgate, In re*, [1905] 1 K. B. 465.

(*o*) *Duffield* v. *Elwes* (1827), 1 Bligh (N. S.) 497.

(*p*) *Pye, Ex parte* (1811), 18 Ves. 140, 149.

(*q*) *Grant* v. *Grant* (1865), 34 Beav. 623; *Richardson* v. *Richardson* (1867), L. R. 3 Eq. 686; *Morgan* v. *Malleson* (1870), L. R. 10 Eq. 475; *Baddeley* v. *Baddeley* (1878), 9 Ch. D. 113; *Bridge* v. *Bridge* (1852), 16 Beav. 315.

Lords Justices in *Milroy* v. *Lord* (*r*), where it was held that an imperfect gift could not be construed as a declaration of trust unless there was something besides the mere intention to give to show that the donor intended to constitute himself a trustee. In the case of *Breton* (*s*), Hall, V.C., applied the principle of *Milroy* v. *Lord* to an intended gift of furniture from a husband to his wife. It may be that, as before the Married Women's Property Acts a husband could not have transferred the legal estate in any property to his wife, a document in the form of an assignment might properly have been construed as a declaration of trust (*t*), but since those Acts, there seems to be no reason why such an assignment should be construed differently from an assignment between strangers, or why a trust should be presumed unless there is, apart from an imperfect assignment, some evidence to show that the husband intended to constitute himself a trustee.

Assignment to wife.

In the preceding paragraph the equitable doctrine against completing a voluntary assignment has been considered solely as applied to assignments of property which is assignable at law. But policies of assurance, being choses in action, were not assignable at law, and they, together with purely equitable rights, such as the interest of a *cestui que* trust, could only be assigned in equity. On the one hand, it was argued that as an assignment of those rights could only be enforced by resorting to a Court of Equity, the equitable doctrine ought to apply, and that the Court would not give its assistance to a voluntary assignee (*u*). On the other hand, it was argued that (1) the rule only applied where an assignee had to come to a Court of Equity for assistance to complete his assignment, and that where a right was only assignable in equity, the assignment was complete by any form of words purporting to transfer the property *de presenti*, and as no assistance was required from the Court to complete the assignment, it would be enforced, although voluntary (*x*); (2) an assignment *de presenti* of an equitable right or of a right assignable only in equity, was tantamount to a declaration of trust (*y*).

The rule against assisting volunteers applied to assignments of policies and other choses in action.

(*r*) (1862), 4 De G. F. & J. 264, followed in *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11; *Heartley* v. *Nicholson* (1875), L. R. 19 Eq. 233.

(*s*) (1881), 17 Ch. D. 416; and see *Moore* v. *Moore* (1874), 18 Eq. 474.

(*t*) *Ex parte Whitehead* (1885), 14 Q. B. D. 419.

(*u*) *Bridge* v. *Bridge* (1852), 16 Beav. 315; *Ward* v. *Audland* (1845), 8 Beav. 201.

(*x*) *Ellison* v. *Ellison* (1802), 6 Ves. 656.

(*y*) *Magawley's Trust, In re* (1851), 5 De G. & Sm. 1.

Authorities summed up.

The result of the decisions appears to be that a voluntary promise *de futuro* to assign a chose in action, such as an insurance policy, is not enforceable against the promisor or his representatives (*z*); but if written words have been used purporting to assign the right *de presenti*, there is a complete assignment which is enforceable, although voluntary (*a*). No delivery of the policy or notice to the company is necessary to complete the assignment between assignor and assignee (*b*). A more difficult question is whether oral words purporting to assign the policy *de presenti* can ever amount to a complete assignment enforceable in equity against the assignor. As an assignment an oral declaration is, no doubt, incomplete. The assignee has no means of perfecting his title to sue in law. The assignor has not done everything which is necessary to give the assignee a title as complete as possible. As an assignment, therefore, it ought not to be enforced in equity. But equity will enforce an oral declaration of trust of personalty (*c*), and if it was clearly proved that the donor expressly constituted himself a trustee of the policy, that would be sufficient without writing. In the absence of an express declaration of trust, it might be argued that a trust ought to be implied from words of present but imperfect gift. Although some of the older cases, like *Kekewich* v. *Manning* (*d*), support this view, the trend of modern authority is against it, and it is submitted that an oral trust, even between man and wife, can only be constituted by words which clearly indicate the intention of the donor to retain the property in his own hands for the benefit of the donee (*e*). It follows that a bare oral statement by a policy holder that he gives it to another confers upon that other no interest which can be enforced in law or equity (*f*). Delivery of the policy to the intended donee does not carry the matter any further as regards

Oral gift of policy.

(*z*) *D'Angibau, In re* (1880), 15 Ch. D. 228, 235; *King, In re* (1879), 14 Ch. D. 179; *Vavasseur* v. *Vavasseur* (1909), 25 T. L. R. 251. Even where the promise is under seal it creates no legal or equitable interest in the policy. The only effect of the seal is to give the promisee a right of action for damages on the covenant (*Ward* v. *Audland* (1846), 16 M. & W. 862; *Cox* v. *Barnard* (1850), 8 Hare, 310).

(*a*) *King, In re* (1879), 14 Ch. D. 179; *Pearson* v. *Amicable* (1859), 27 Beav. 229; *Griffin, In re*, [1899] 1 Ch. 408; *Brownlee* v. *Robb* (1907), 9 F. 1302.

(*b*) *Fortescue* v. *Barnett* (1834), 3 My. & K. 36; *Justice* v. *Wynne* (1860), 12 Ir. Ch. R. 289; *Patrick, In re*, [1891] 1 Ch. 82.

(*c*) *McFadden* v. *Jenkins* (1842), 1 Ph. 153, 157.

(*d*) (1851), 1 De G. M. & G. 176.

(*e*) *Vavasseur* v. *Vavasseur* (1909), 25 T. L. R. 250.

(*f*) *Howes* v. *Prudential* (1883), 49 L. T. 133.

the policy moneys (*ff*), but it may give him a good title to the policy as a document (*g*).

Fortescue v. Barnett (1834), 3 My. & K. 36

Fortescue v. *Barnett.*

The holder of a life policy executed a voluntary deed whereby he purported to assign the policy to trustees for the benefit of his sister and her children, This deed was delivered to the trustees, but the policy remained in the hands of the grantor. No notice of the settlement was given to the insurance office, and subsequently the grantor surrendered his policy to the company for a cash payment. Leach, M.R., held that as the assignment of the policy was complete between assignor and assignee without delivery of the policy or notice to the company, the assignment was valid in equity, and he ordered the grantor to find security for the amount of the policy and bonuses.

Kekewich v. Manning (1851), 1 De G. M. & G. 176

Kekewich v. *Manning.*

Money in Government Stock was bequeathed by a testator in trust for his widow for life, and thereafter to his daughter absolutely. The daughter executed a marriage settlement, and assigned her interest under the will to trustees for the benefit of the issue of her marriage and her niece. There was no issue of the marriage and the daughter contracted a second marriage, and purported to settle the same interest for the benefit of the issue of that marriage. On the death of the testator's widow the trustees of the second settlement contended that, as the first trust in favour of the niece was voluntary, a Court of Equity could not enforce it. The daughter, it was contended, did not constitute herself a trustee, and the assignment to the trustees of the settlement was incomplete, as no legal right passed to them. It was only equivalent to an agreement to transfer, and a Court of Equity would not enforce such an agreement if it was voluntary. Wigram, V.C., acceded to this argument, but his decision was reversed by the Lords Justices, who held that the Court would enforce the voluntary settlement in favour of the niece. They were of opinion that a purely equitable title might be effectually assigned by a voluntary deed, but they would not decide whether notice to the legal owner was necessary to complete such a transaction; but whatever rule there might be against volunteers, it did not apply to the case of one who, in the language of the Court, was termed a *cestui que* trust claiming against his trustee, for a trust might certainly be created gratuitously. This case, therefore, was decided, not on the ground that there was a complete assignment to the trustees of the settlement, but on the ground that there was a declaration of trust, and apparently that, inasmuch as the legal estate had not been conveyed to the trustees, the settlor constituted herself a trustee.

Pearson v. Amicable (1859), 27 Beav. 229

Pearson v. *Amicable.*

The holder of a policy executed a voluntary deed whereby he assigned the policy to two trustees upon certain trusts for his father, mother, brothers and sisters. On the death of the holder his executors claimed the policy moneys on the ground that they had the legal title and a Court of Equity would

(*ff*) *James* v. *Bydder* (1841), 4 Beav. 600; *Maggison* v. *Foster* (1843), 2 Y. & C. 336.

(*g*) *Rummens* v. *Hare* (1876), 1 Ex. D. 169.

not enforce a voluntary assignment where the settlor had not constituted himself a trustee. Romilly, M.R., held that the settlement was valid and complete and that a Court of Equity would enforce it. In giving judgment, he said, "No person can state too strongly to command my assent the proposition that if a voluntary assignment of any property is imperfect and incomplete and the assistance of a Court of Equity is required to give effect to it, this Court will not interfere to perfect the instrument. I also fully admit that in these cases there is a distinction between that species of instrument which by assignment passes the property, and that which simply operates as a declaration of trust. The question is whether this is a complete instrument or whether it requires the assistance of a Court of Equity for its enforcement. I am of opinion that it is a complete and perfect instrument. If this were an assignment of the policy for value and the purchaser had come into this Court for its assistance to render the assignment more complete, what would remain to be done? The assignor would say, 'What can I do more than I have already done? If you had told me out of Court what further assurance, or what further deed or assignment was necessary to make this instrument more complete, I would have executed it.' The question whether anything remains to be done to complete the assignment of a policy is exactly the same whether it arises upon a voluntary instrument or upon one for valuable consideration: whether it be one or the other, the question must be, What is there that the assignee can require the assignor to do to make the instrument more complete? The error in the argument of the executors is this: it is assumed that this is a suit in which an assignee has come here to ask the aid of the Court in making this instrument more complete; but he does nothing of the sort. It is said by the executors, 'If the plaintiffs do not require the assistance of this Court, why do they not proceed at law?' but the proceeding suggested in this case would be against the executors; this is not a suit against the executors, it is a suit against the insurance company. The insurance company say, 'We are perfectly ready to pay, we do not contest your claim; you want nothing to make the instrument more complete, and we are ready to pay the amount, but we must not remain open to two suits; and therefore, as the executors raise an adverse claim to the policy, it is not for us to decide whether it is a valid claim or not, and we require the assistance of this Court to prevent our being doubly vexed by two suits, and to determine which of the two claimants is entitled to the money due on the policy. We admit the claim respecting it, there is the money which we are ready to pay into Court.' The trustees of the settlement say, 'Our instrument is perfect and complete; we do not ask for any relief against the executors, why should we not have the money? The insurance office is right in paying to us; it is for the executors to make out their claim.' If the assignment had been made for value it is clear that the assignor could not have prevented the assignee from using his name in suing the insurance company, if they had resisted the demand, and this Court would not and could not have allowed the assignor to say his name should not be made use of. The executors can stand in no better situation than the assignor; this Court would not have prevented the assignee from making use of the name of the assignor if the insurance company had resisted payment. But here the assignment is voluntary: it is irrevocable, and in the form usual in all these instruments, and the Court will not allow the grantor to contradict his deed. The Court will not assist a volunteer, but it

does not say, on the other hand, that it will assist an assignor in defeating his voluntary deed. The argument has been founded on the supposition that by this suit the trustees are asking the assistance of a Court of Equity, but in truth they come here only to resist the executors of the assignor, who have raised a claim which the assignor himself was not entitled to raise, and which they, standing in his shoes, are not entitled to raise, but which, nevertheless, makes it impossible for the trustees to receive the money until the claim of the executors is disposed of."

Justice v. Wynne (1860), 12 Ir. Ch. R. 289

Justice v. *Wynne.*

The holder of a policy executed a voluntary settlement, whereby he assigned the policy to trustees in trust for A. No notice of this settlement was given to the office, and the holder afterwards executed a voluntary deed whereby he purported to assign the policy to X. On the death of the holder X obtained possession of the policy from the trustees and obtained the policy moneys from the company. A thereupon brought this action against X for the proceeds of the policy. X contended that as he had possession of the money a Court of Equity would not enforce against him the claim of a voluntary assignee of the chose in action. The Court held that as the policy had been duly and formally assigned to trustees as fully and irrevocably as it was possible for the holder to do, the title of the *cestui que trust* was complete as against the assignor. The Court further held that X obtained the policy with knowledge of the trust, and that he got possession of the policy on a false pretence. He, therefore, took no better title to the money than his assignor, and the Court would enforce the trust against him.

King, In re (1879), 14 Ch. D. 179

King, In re.

The holder of six life policies wrote to one of the two trustees of his marriage settlement as follows: "I am desirous of making a settlement upon my children of six policies of assurance upon my life (giving particulars). In order to carry my desire into effect, I send you herewith as one of the trustees of the proposed settlement the three policies in the London Life. The other three policies are at present mortgaged to the Hand-in-Hand, but I undertake to pay off the amount of their claim. The trusts will be precisely the same as those contained in my marriage settlement, and I hereby undertake and agree . . . to execute to you and another trustee to be named by me, but whom I have not yet decided upon, an assignment by way of settlement of the six policies . . . such assignment to contain covenants by me to keep up the policies, and to pay the mortgage debt and all such other clauses and provisions as may be necessary . . . and until the settlement is executed I am to be bound by this agreement in the same manner as if the settlement were actually executed." Two days after writing this letter the settlor enclosed it with the three policies in the London Life, and the following letter: "The enclosed is the formal letter of assignment previous to a deed, and as binding. Please take charge of it, and I shall see you again upon it by-and-by." No notice of this settlement was given to the offices, and no formal settlement was executed. The settlor subsequently made a will. On his death his executors obtained payment of the three London Life policies, but the Hand-in-Hand having, since the settlor's death, had notice of the settlement, declined to pay until

the conflicting claims of the beneficiaries under the will and those under the settlement should be determined. The question was raised by a special case. The beneficiaries under the will contended that the deceased had not declared himself a trustee, and had not completed the intended voluntary settlement, and a Court of Equity would not assist the beneficiaries thereunder by completing it. Hall, V.C., held that the letters contained a complete assignment of the policies, and that the beneficiaries of the settlement were entitled to the proceeds. In his judgment he said "Mr. Romer disputes its being an intended settlement at all; he says that it was not a settlement in itself, but an agreement at a future time to settle the policies. . . . If the matter had remained on the first letter it might well have been contended that, although the letter mentioned the policies, there was not an assignment of them as contemplated, but two days afterwards Mr. King sent the previous letter, which he called 'the formal letter of assignment and as binding,' to the trustee, and asked him to take charge of it. A deed was necessary because of the covenants. He by the previous letter undertook to execute a deed which should contain covenants to keep up the policies, and to pay the mortgage debt. A deed of assignment of what? Of the six policies. I do not know what more is wanted. The settlor said that he meant to execute a deed, and that was consistent with his anxiety to make the settlement, and also with his having parted with the policies. The fact that the undertaking to execute a settlement was in part incomplete does not, to my mind, show that the other part was not complete. There was no intention of reserving to himself the power of retiring from that which was complete so far as it could under the circumstances be completed by handing over the three policies, and he could not hand over the other three because they were in the hands of the mortgagee. But he bound himself to pay off the mortgage debt. The settlor not having executed the contemplated deed the case is not one in which there can be an action for specific performance to enable the parties to get the benefit of the undertaking. It was pointed out that there was to be 'another trustee to be named by me, but whom I have not yet decided upon,' but it is manifest that the settlor meant that the one trustee of his marriage settlement should be a trustee until some other person should be associated with him. . . . With reference to the point argued, that no notice was given to the offices of the assignment, I think the answer to it is the case of *Fortescue* v. *Barnett*."

Howes v. Prudential (1883), 49 L. T. 133

Howes v. *Prudential.*

A man, having taken out a policy in his own name upon his own life for £100, handed the policy to his wife, saying that it was for her sole use and benefit on condition that she paid the premiums. She did pay the premiums until her husband's death. He left a will whereby he devised the whole of his effects to his children. Lopes, J., held that the policy, being a chose in action, did not pass to the wife by delivery without a written assignment, and therefore passed to the children under the will.

Patrick, In re, [1891] 1 Ch. 82

Patrick, In re.

A creditor for certain specialty debts secured by bills of sale executed a voluntary settlement whereby he purported to assign the debts to trustees with power to sue for them and to execute all assurances that might be

expedient. The bills of sale were not expressly assigned nor handed over to the trustees, and no notice was given to the debtors. The settlor afterwards received payment of the debts and died intestate. In an action for the administration of the estate and the trusts of the settlement it was held by the Court of Appeal that the debts had been completely assigned to the trustees, and that the intestate's estate was therefore liable to make good to the trust the debts which the settlor had got in. Lindley, L.J., said, "The appeal raised two questions, viz. (1) Whether the debts referred to were so completely assigned by the settlement that the assignees of them could have recovered them from the persons who owed them to the settlor without any further assistance from him. (2) Whether the settlor having himself got them in was liable to make good to the trustees of the settlement the amount received by him. . . . The settlement must be read to carry out and not to defeat the intention of the settlor, and, although the settlement does not in terms assign either the bills of sale or the goods, it directs the trustees to get in the debts, and it empowers them to do whatever is necessary for that purpose. Under these wide words the trustees could, in my opinion, put in force either in the name of the settlor, or, if necessary, in their own name, all or any of the powers contained in the bills of sale or could do whatever might be necessary to revest the goods in their respective grantors on payment off of the moneys due on their respective securities. Indeed, if it were necessary to imply an assignment to the trustees of the bills of sale and of the goods comprised in them I am by no means sure it would be going too far to imply such an assignment. Be this as it may, in my opinion the settlement amounted to a complete, and not to an incomplete, assignment of the debts mentioned in the schedule to it within the principle of *Kekewich* v. *Manning*, which is the leading case on this subject. The fact that notice of the assignment was not given to the debtors did not render the gift incomplete. See *Fortescue* v. *Barnett*; *Donaldson* v. *Donaldson*. If once the conclusion is arrived at that the assignment of the debts was complete, and not incomplete, it follows that the settlor having got in the debts himself is accountable to the trustees of the settlement for the amount he so got in. This was decided in *Fortescue* v. *Barnett*. There is no question here of following trust money, and the right of the plaintiffs is only to rank as creditors against the estate of the deceased for the amount of the debts he got in."

Brownlee v. Robb (1907), 9 F. 1302.

Brownlee v. Robb.

A butcher residing in Scotland was insured in the Scottish Provident. With the assistance of a police constable he executed the following document:— "I, J. R., hand over my policy to my daughter, E. S. R., now wife of G. B., dairyman. Signed by J. B." It was witnessed by five witnesses, and in their presence handed to E. S. R., together with a certified copy policy, which had been obtained from the insurance company on the allegation that the original was lost. The Court of Session held that if they construed the document in the light of surrounding circumstances there was a written assignment, sufficient according to Scots law to transfer the title in the policy moneys to E. S. R. Lord Ardwall, dissenting, held that the document did no more than record the fact that the assured had delivered the corpus of the policy, that was not sufficient to convey the title to the policy moneys, and

parole evidence was incompetent to show what the intention of J. R. was in delivering the document to his daughter.

Vavasseur v. Vavasseur (1909), 25 T. L. R. 250

Vavasseur v. *Vavasseur.*

After the death of his wife the assured, being old and infirm, asked two daughters to assist him in the management of his affairs. In order to do this, one of them had to give up remunerative employment. While assisting their father he called them, and said, "I want to speak to you very specially. Now I am getting old I am very anxious you should understand your own affairs. Your two other sisters are married and provided for by their husbands, but for you, my two dear daughters, I wish to make special provision. When I am gone you are to take my insurance money out of the Equitable, and you will be able to live very comfortably. Will you promise me to do it?" The daughters promised. On several occasions afterwards their father reminded them that they were to have the policies. The policies were not mentioned in the father's will. After his death the daughters claimed them on the following grounds: (1) imperfect gift which equity would enforce; (2) declaration of trust; (3) contract whereby their father promised to give them the policies in consideration for their services. It was held that they had no claim to the policy moneys. There was no gift *de presenti*, but merely a promise *de futuro*. There was no declaration of a trust, but merely an expression of a wish, and when to that was added the fact that the wish was to be acted upon after the testator's death it was clear that all that was proved amounted only to an oral will. There was no evidence to show that the daughters had given their services to their father in consideration of a promise in regard to the policies.

Exceptions to rule against imperfect gift.

The rule that an oral gift of a policy is an imperfect gift which will not be enforced is subject to two exceptions: (1) where the donee is afterwards appointed executor of the donor; (2) where the gift is a *donatio mortis causâ* and the policy is delivered to the donee.

Where donee appointed executor.

Where there is an imperfect gift and the donor appoints the donee an executor of his will, the passing of the legal title by operation of law to the executor completes the gift, and gives him, as against creditors and beneficiaries under the will as good a title as if the gift had been complete in the first instance. The rule applies, although the donee is only one out of several executors. He must show that the intention of the testator at the time of the alleged gift was to make a gift *de presenti*, and that his intention remained unaltered down to the date of his death.

Stewart, In re, [1908] 2 Ch. 251

Stewart, In re.

The plaintiff was the widow, and one of four executors appointed by the will of her late husband. A few days before his death the husband purchased through his brokers three bonds to bearer for £500 each. He paid his brokers

for the bonds, but they had not been delivered at the time of his death. Shortly before his death, which occurred suddenly, he called his wife into the dining-room and told her that he had something to show her that would interest her. He thereupon handed her an envelope containing the broker's letter, and the bought note, at the same time saying to her, "I have bought these bonds for you." He died before anything further was done. It was held that legal title of the plaintiff as executor completed the gift, and that she was beneficially entitled to the bonds.

Donatio mortis causâ

Where a document which represents or is the evidence of a chose in action is delivered by a person *in extremis* on condition that it shall be the property of the donee in the event of his death, there is a *donatio mortis causâ* of the chose in action which the Court will enforce against the donor's representatives (*i*). A policy of insurance has been held to be a subject of *donatio mortis causâ* (*k*). If the policy is delivered by a person in the extremity of sickness and in contemplation of death under circumstances which indicate an intention to give, the Court will assume that it was given to be retained only in the event of death (*l*). The uncorroborated evidence of the donee may be sufficient to establish the gift, but it is the duty of the Court to sift such evidence very carefully (*m*).

Assignments for illegal consideration.

An assignment of a policy made for an illegal consideration will not be enforced against the assignor.

Settlements in consideration of unlawful cohabitation.

Settlements are frequently made in favour of a woman by a man who has illicitly cohabited with her. A settlement in fact made in consideration of future illicit intercourse is void for illegality, although *ex facie* the settlement is voluntary and no illegal purpose appears in the deed (*n*). A settlement made in consideration of past unlawful intercourse is not void for illegality, because past consideration is no consideration, and the settlement stands in law as a voluntary settlement unaffected by the illegality (*o*). Thus, a settlement made by a man on his mistress and children born by her is unimpeachable if made after the intercourse has been discontinued (*p*). And a settlement made during unlawful cohabitation is not void unless it can be

(*i*) *Ward* v. *Turner* (1751), 2 Ves. Sen. 431; *Duffield* v. *Elwes* (1827), 1 Bligh (N. S.) 497; *Dillon, In re* (1890), 44 Ch. D. 76.

(*k*) *Amis* v. *Witt* (1863), 33 Beav. 619; *Witt* v. *Amis* (1851), 1 B. & S. 109.

(*l*) *Gardner* v. *Parker* (1818), 3 Madd. 184.

(*m*) *Dillon, In re* (1890), 44 Ch. D. 76.

(*n*) *Benyon* v. *Nettlefold* (1850), 3 Mac. & G. 94.

(*o*) *Hill* v. *Spencer* (1767), Amb. 641.

(*p*) *Skarf* v. *Soulby* (1849), 1 Mac. & G. 364.

proved that a promise express or implied to continue the illicit intercourse formed part of the consideration (*q*).

Settlements providing for separation of spouses.

Settlements of property made in separation deeds between husband and wife may be void for illegality. A deed of separation providing for the wife and made after the spouses have definitely agreed to separate is valid and enforceable during the separation (*r*). But a deed between husband and wife providing for a prospective separation will, as a general rule, be illegal, and a deed providing for present separation is annulled upon the subsequent reconciliation of the spouses (*s*). No implied condition of chastity attaches to a provision in favour of the wife made in a deed of separation.

Settlements in restraint of marriage.

Agreements made in general restraint of marriage are void, and where a gift is made on condition that the donee does not marry, the condition will not be enforced, and the donee takes the gift freed from the illegal condition (*t*). Agreements in partial restraint of marriage are not void where the restraint is reasonable, as where the agreement is not to marry under a specified age or a specified person or without the consent of a specified person or persons (*t*). A restraint upon remarriage in the case of a widow or widower is not illegal (*u*). Similar conditions attached to a gift will be enforced if there is a gift over in the event of the condition being broken (*t*). Where there is no gift over, the condition will be treated as merely *in terrorem*, and therefore inoperative.

Settlements on illegal consideration completed by transfer of property to trustees.

Where the legal estate in property is vested in the trustees of a settlement, the fact that the settlement was made on an illegal consideration does not entitle the settlor to come into a Court of Equity and have the settlement set aside, and therefore where a settlement was made before the Deceased Wife's Sister Act, by a man in consideration of an intended cohabitation with his deceased wife's sister, and property consisting of shares was assigned to the trustees of the settlement in trust for the beneficiaries, it was held that the personal representatives of the settlor

(*q*) *Gray* v. *Mathias* (1800), 5 Ves. 286; *Hall* v. *Palmer* (1844), 3 Hare, 536; *Vallance, In re* (1884), 26 Ch. D. 353.

(*r*) *Jones* v. *Waite* (1842), 9 Cl. & F. 101.

(*s*) *Westmeath* v. *Salisbury* (1831), 5 Bli. (N. S.) 339. But where husband and wife were at the time living separate under a justice's order against the husband, and the object of the deed was to enable them to live together again under reasonable security to the wife in case of the husband again being guilty of conduct which would result in a separation order being made against him, the settlement was held to be legal (*Harrison* v. *Harrison*, [1910] 1 K. B. 35).

(*t*) *Whiting's Settlement*, [1905] 1 Ch. 96.

(*u*) *Allen* v. *Jackson* (1875), 1 Ch. D. 399.

after his death had no right to have the settlement set aside, or to claim any interest in the fund (*x*). This rests on the principle that in cases of illegality where the illegal object has been effected, the Courts will not interfere in favour of either party, so that possession becomes the most important consideration. In the case of a settlement of a policy the legal estate cannot be vested in the trustees, and therefore the principle of the case just cited has no application. The trustees may have the right to sue the insurance company in their own names, but the settlement would necessarily form part of their title to sue, and if the personal representatives disputed their claim on the ground of illegality, and the insurance company paid into Court, the personal representatives could defeat the trustees' claim by showing that the settlement was made for an illegal consideration.

Assignment to money-lenders.

An assignment of a policy of insurance by way of security for money lent may be set aside or varied under the Money-lenders Act, 1900 (*y*).

Money-lenders Act, 1900, secs. 1, 2, 6

63 & 64 Vict. c. 51. Reopening of transactions of money-lender.

1.—(1) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any Court in which proceedings might be taken for the recovery of

(*x*) *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 282.

(*y*) 63 & 64 Vict. c. 51.

money lent by a money-lender shall have and may at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

(3) On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender.

(5) Nothing in the foregoing provisions of this section shall affect the rights of any *bonâ fide* assignee or holder for value without notice.

(6) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

(7) In the application of this Act to Scotland this section shall be read as if the words " or is otherwise such that a Court of Equity would give relief " were omitted therefrom.

Registration of money-lenders, &c.

2.—(1) A money-lender as defined by this Act—

(*a*) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name (*z*), and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

(*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

(*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money or take any security for money in the course of his business as a money-lender, otherwise than in his registered name.

* * * * * *

Definition of money-lender.

6. The expression " money-lender " in this Act shall include every person whose business (*a*) is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include—

(*a*) any pawnbroker in respect of business carried on by him in accordance

(*z*) Means the name in which he was carrying on business at the time of registration (*Whiteman* v. *Sadler*, [1910] A. C. 514).

(*a*) The mere fact that a person has on several occasions lent money at remunerative rates of interest is not sufficient to make him a money-lender. The question is whether there is sufficient continuity about the transactions to show that they are part of the lender's business (*Newton* v. *Pyke* (1909), 25 T. L. R. 127; *Newman* v. *Oughton*, [1911] 1 K. B. 792).

with the provisions of the Acts for the time being in force in relation to pawnbrokers (*aa*); or

(*b*) any registered society within the meaning of the Friendly Societies Act, 1896, or any society registered or having rules certified under sections two or four of that Act, or under the Benefit Building Societies Act, 1836, or the Loan Societies Act, 1840, or under the Building Societies Acts, 1874 to 1894; or — 59 & 60 Vict. c. 25. 6 & 7 Will. 4, c. 32. 3 & 4 Vict. c. 110.

(*c*) any body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such special Act; or

(*d*) any person *bonâ fide* carrying on the business of banking or insurance or *bonâ fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money (*b*); or

(*e*) any body corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade.

The effect of the Act upon assignments of policies and the settlement of claims thereon may be briefly summarised as follows :—

Harsh and unconscionable transaction may be reopened.

When an assignment of a policy is made to a money-lender as security for a loan, the transaction may be reopened by the Court on the ground that the charges are excessive, and that the transaction is harsh and unconscionable, and the amount of the debt charged on the policy may be extinguished or reduced.

Valid until reopened,

Until the Court has reopened the transaction the assignment is valid for the agreed amount of loan and interest, and provided the transaction was not wholly illegal the money-lender can give a good discharge for the policy moneys to the amount of the debt and interest charged on the policy (*c*).

and in hands of purchaser for value.

If before the Court has reopened the transaction the money-lender has transferred the policy to a third person *bonâ fide* and for value the transaction cannot be set aside as against him, and therefore provided the transaction was not wholly illegal such a transferee can give a good discharge for the policy moneys to the extent of his interest in the policy notwithstanding that as against the money-lender the assignment to him may have been set aside.

(*aa*) Such business may include loans by a pawnbroker of above ten pounds (*Newman* v. *Oughton*, [1911] 1 K. B. 792).

(*b*) An art dealer discounting bills of customers and friends was held to be within this exception (*Litchfield* v. *Dreyfus*, [1906] 1 K. B. 584).

(*c*) But if the company on a policy becoming payable had a claim from a money-lender as mortgagee and notice from the assured or his representatives that he or they intended to apply to the Court to have the transaction reopened the company would not be justified in making payment to the mortgagee pending such application.

What is harsh and unconscionable ?

Excessive interest on a loan may by itself be sufficient to render the agreement harsh and unconscionable (*d*). What amounts to excessive interest is to be determined by the tribunal in each case, and the question of risk is the most important factor in the decision (*d*). If the interest is shown to be excessive the onus is then on the money-lender to show it was not harsh and unconscionable (*d*). An interest at the rate of seventy-five per cent. per annum is not necessarily harsh and unconscionable, and in a case where the borrower was a man of business and understood the transaction and had reason for not disclosing his temporary embarrassment to solicitor, banker, or friends, the Court refused to reopen the transaction and reduce the interest (*e*). When the borrower is an intelligent person not under undue influence the amount to which he has in fact agreed is very good *primâ facie* evidence of what is reasonable under all the circumstances (*f*).

Illegal transactions void *ab initio*,

But an assignment of a policy to a money-lender may be not only voidable on the grounds already discussed, but may be absolutely void *ab initio* as part of an illegal transaction. Transactions with money-lenders are illegal and absolutely void

(*a*) if the money-lender is unregistered (*g*);

(*b*) if the money-lender entered into the transaction in a name other than his registered name (*h*);

(*c*) if the money-lender was carrying on business at a place other than his registered address (*i*).

and against purchaser for value.

When a transaction with a money-lender is void upon one of those grounds the assignment of a policy to him in security is

(*d*) *Samuel* v. *Newbold*, [1906] A. C. 461; *Harris* v. *Clarson* (1910), 27 T. L. R. 30.

(*e*) *Carringtons* v. *Smith*, [1906] 1 K. B. 79.

(*f*) *Fieldings* v. *Pawson*, [1907] W. N. 231.

(*g*) *Bonnard* v. *Dott*, [1906] 1 Ch. 740. Where a firm of money-lenders carry on business in a firm name the persons who are in fact partners must be so registered. If the persons registered in the firm name are not in fact the actual partners in the firm then the firm is unregistered and all transactions with the firm are void even although carried out in the name which appears on the register (*Robinson, in re*, [1911] 1 Ch. 230).

(*h*) Means the name in which in fact the money-lender has been registered by the Commissioners of Inland Revenue. Even if the name registered was not the name in which the money-lender ought to have been registered, all transactions in the name actually on the register at the time are valid (*Whiteman* v. *Sadler*, [1910] A. C. 514).

(*i*) *Staffordshire Financial Co.* v. *Valentine*, [1910] 2 K. B. 233. If the business is *boná fide* carried on at the registered address, the conclusion of a single transaction at the address of the borrower is not a violation of the Act (*Kirkwood* v. *Gadd*, [1910] A. C. 422).

equally void, even although such assignment is *ex facie* unconditional (*j*), and no person claiming through the money-lender has any title to the policy moneys or can give a good discharge even although he is a purchaser for value without notice of the illegality (*k*). The result is that the payment of policy moneys to a money-lender or to any person claiming title through a money-lender must always be attended with the risk that the assignment may afterwards be declared void, and the company be held liable to pay the assignor. The company therefore is not safe unless a discharge be obtained from the assignor or his personal representatives as well as from the money-lender or person claiming through him.

Right of debtor to declaration and return of securities.

When the transaction with a money-lender is void the debtor is entitled to come to the Court for a declaration to that effect without offering to return the money advanced to him (*l*). Where the debtor asked the Court to exercise its equitable jurisdiction and order a return of the securities the Court refused to do so unless the debtor himself was prepared to do equity by returning the money advanced (*m*). But probably a common law action in detinue would lie to recover the securities although no such offer was made, and in the case of policies of insurance assigned to a money-lender in security it is submitted that the assignor on proof that the transaction was illegal would be entitled without repaying the money advanced to a declaration that the assignment was void, and to the usual judgment in an action for detinue for the delivery up of the policies or damages for their detention.

Policy in schedule to bill of sale.

Sometimes a policy of insurance is found in the schedule to a bill of sale. A bill of sale is an instrument whereby subject to the provision of the Bills of Sale Acts, 1878 and 1882, the property in goods and chattels may be effectively assigned either absolutely or by way of security. The bill of sale must be registered, and it must be in the form provided by the Acts. The goods and chattels assigned must be specified in the schedule to the bill of sale, and if a bill of sale purports to assign any right or interest in property other than a chattel interest in goods it is void. A policy of insurance cannot therefore so far as the right

(*j*) *Robinson, in re* (No. 1) (1910), 27 T. L. R. 441.
(*k*) *Robinson, In re* (No. 2), [1911] 1 Ch. 230.
(*l*) *Chapman* v. *Michaelson*, [1909] 1 Ch. 238.
(*m*) *Lodge* v. *National Union*, [1907] 1 Ch. 301.

to the policy moneys is concerned be assigned by a bill of sale (*n*). If a policy is included in the schedule then if it appears from the whole instrument that the intention of the parties was to assign the chose in action or give a charge upon the policy moneys the bill of sale is entirely void, but if it appears that the intention was simply to assign the policy as a chattel then the bill of sale is not invalidated by the fact that the policy is included in it and will operate to pass the property in the document but will not affect the right to the policy moneys (*n*).

Assignment by deed of arrangement.

An assignment of a policy may be effected by a deed of arrangement made by the grantor for the benefit of his creditors. A deed of arrangement for the benefit of creditors generally is an act of bankruptcy and may become void as against the trustee upon the subsequent bankruptcy of the grantor.

Under the Deeds of Arrangement Act, 1887, a deed of arrangement for the benefit of creditors generally is absolutely void, whether the grantor become bankrupt or not, if it is not registered within the time limited in the Act. The fact that a deed is void under the statute for want of registration does not make its execution any less an act of bankruptcy available under the Bankruptcy Act. A deed for the benefit of certain named creditors without any provision enabling the general body of creditors to come in and take the benefit of it is not a deed of arrangement within the Act, and is therefore valid, and constitutes an effective assignment although not registered (*o*).

Deeds of Arrangement Act, 1887, secs. 2, 4, 5, 6, 7, 8, 17

Extent of Act.

2. This Act shall not extend to Scotland.

* * * * * *

Application of Act.

4.—(1) This Act shall apply to every Deed of Arrangement, as defined in this section, made after the commencement of this Act.

(2) A Deed of Arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—

(*a*) An assignment of property;

(*b*) A deed of or agreement for a composition;

And in cases where creditors of a debtor obtain any control over his property or business:—

(*n*) *Swanley Coal Co.* v. *Denton*, [1906] 2 K. B. 873.

(*o*) *Saumarez, In re*, [1907] 2 K. B. 170.

(*c*) A deed of inspectorship entered into for the purpose of carrying on or winding up a business;

(*d*) A letter of licence authorising the debtor or any other person to manage, carry on, realise, or dispose of a business, with a view to the payment of debts; and

(*e*) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business, with a view to the payment of his debts.

Avoidance of unregistered deeds of arrangement.

5. From and after the commencement of this Act a Deed of Arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof, and unless the same shall bear such ordinary and *ad valorem* stamp as is under this Act provided.

Mode of registration.

6. The registration of a Deed of Arrangement under this Act shall be effected in the following manner:—

(1) A true copy of the deed, and of every schedule or inventory thereto annexed, or therein referred to, shall be presented to and filed with the registrar within seven clear days after the execution of the said deed (in like manner as a bill of sale given by way of security for the payment of money is now required to be filed), together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business in carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors:

(2) No deed shall be registered under this Act unless the original of such deed, duly stamped with the proper inland revenue duty, and in addition to such duty a stamp denoting a duty computed at the rate of one shilling for every hundred pounds or fraction of a hundred pounds of the sworn value of the property passing, or (where no property passes under the deed) the amount of composition payable under the deed, is produced to the registrar at the time of such registration.

Form of register.

7. The registrar shall keep a register wherein shall be entered, as soon as conveniently may be after the presentation of a deed for registration, an abstract of the contents of every Deed of Arrangement registered under this Act, containing the following and any other prescribed particulars:—

(*a*) The date of the deed:

(*b*) The name, address, and description of the debtor, and the place or places where his business is carried on, and the title of the firm or firms under which the debtor carries on business, and the name and address of the trustee (if any) under the deed:

(*c*) A short statement of the nature and effect of the deed, and of the composition in the pound payable thereunder:

(*d*) The date of registration:

(e) The amount of property and liabilities included under the deed, as estimated by the debtor.

Registrar and office for registration.

8.—(1) The Registrar of Bills of Sale in England and Ireland respectively shall be the registrar for the purposes of this Act.

(2) In England the Bills of Sale Department of the Central Office of the Supreme Court of Judicature, and in Ireland the Bills of Sale Office of the Queen's Bench Division of the High Court of Justice, shall be the office for the registration of Deeds of Arrangement.

* * * * * *

Saving as to Bankruptcy Acts.

17. Nothing contained in this Act shall be construed to repeal or shall affect any provision of the law for the time being in force in relation to bankruptcy, or shall give validity to any deed or instrument which by law is an act of bankruptcy, or void or voidable.

Section VII.—Mortgages

Definition of mortgage.

A mortgage of a policy is an assignment of the assured's right to recover the policy moneys, but an assignment by way only of security to the assignee for a debt due to him from the assignor.

No formality necessary.

No formality is necessary to create a mortgage of a chose in action, and subject to difficulties of proof and questions of priority it may be created by an oral agreement between the parties without writing, deposit of the policy, or notice to the company.

Usual form.

The most formal way of creating a mortgage is by deed of mortgage assigning the policy in security with the usual conditions for redemption and powers of sale; but a policy is frequently mortgaged by depositing the policy with the creditor together with a memorandum of deposit or letter specifying the extent and conditions of the charge which it is intended to create.

Mortgage by deposit.

A policy may be mortgaged by mere deposit of the policy without notice, without writing, without even word of mouth passing between the depositor and depositee (*p*). The circumstances under which the deposit was made may be sufficient to show that it was the intention of the parties that a charge on the policy moneys should be created, and, if so, nothing else is necessary. But mere possession of the policy by a third person is not sufficient to support a claim by him to a charge on the policy moneys (*q*). The deposit of a policy is by itself an equivocal

(*p*) *Shaw* v. *Foster* (1872), 5 H. L. 321, 340.

(*q*) *Chapman* v. *Chapman* (1851), 13 Beav. 308.

act; it may be delivered with some other intention than that of creating a charge on the moneys which it represents. Thus the intention may be (1) to deliver it to the depositee for safe custody; (2) to pledge the policy as a piece of paper, that is to say, to give the depositee a right to retain the piece of paper until his debt was satisfied, but without giving him any right to receive the policy moneys (*s*); or (3) to deliver it to the depositee for the purpose of enabling his solicitor to draw up a formal mortgage, but without any intention of giving him a present charge (*t*). *Primâ facie*, however, when a debtor deposits a policy with his creditor that is evidence of an intention to charge the policy moneys and not merely to deposit the piece of paper by way of pledging the chattel (*u*).

Deposit without memorandum.

When there is no memorandum or other writing accompanying the deposit the extent of the charge must be ascertained as well as possible from the circumstances and parol evidence. Thus where the financial transactions between the parties are frequent and there is a constantly varying balance of account, a deposit of a policy may readily be construed as intended to secure not only the balance at the date of the deposit, but also any further balance of account (*x*).

Deposit with memorandum.

When the terms upon which a deposit of a policy is made are contained in a memorandum or other writing, that writing cannot be contradicted by parol evidence (*y*). Therefore, if it is stated in the memorandum that the policy is deposited to secure a specified debt, parol evidence is inadmissible to prove that the parties also intended it to secure future advances (*z*). But when the memorandum is ambiguous, the circumstances in which the deposit was made may be proved to show what the intention of the parties really was (*a*). Thus where a life policy was deposited by a debtor with his creditor and was accompanied by the following letter: "I hereby authorise and empower you to hold the policy of insurance you hold upon my life for £600 as security in case of death or otherwise for any notes of hand or bills of exchange you may have

(*s*) *Carter* v. *Wake* (1877), 4 Ch. D. 605; *Gibson* v. *Overbury* (1841), 7 M. & W. 555.

(*t*) *Norris* v. *Wilkinson* (1806), 12 Ves. 192.

(*u*) *Harrold* v. *Plenty*, [1901] 2 Ch. 314; *Glaholm* v. *Rowntree*, [1837] 6 A. & E. 710.

(*x*) *Maugham* v. *Ridley* (1863), 8 L. T. (N. S.) 309; *Langston, Ex parte* (1810), 17 Ves. 227.

(*y*) *Shaw* v. *Foster* (1872), 5 H. L. 321.

(*z*) *Vandezee* v. *Willis* (1789), 3 Bro. C. C. 21.

(*a*) *Jones* v. *Consolidated Investment* (1858), 26 Beav. 256.

cashed for me," evidence was admitted to show that the creditor was in the habit of making advances to the debtor from time to time, and it was held that the security was intended to cover the future balance of account and not merely the balance due at the time the deposit was made (*a*).

Subsequent additions to the charge.

A deposit having originally been made to secure a specified debt, the charge may afterwards be enlarged so as to secure other debts without any formality such as a surrender and redeposit of the policy (*c*). And even although the nature and extent of the charge created by the first deposit are defined in a written memorandum, the charge may nevertheless be enlarged by a subsequent parol agreement (*d*). In the case of a legal mortgage of land it has been held that future advances cannot be added to the charge by parol agreement, but this decision appears to turn on the fact that the mortgage deed conveyed the legal estate, and there was therefore no room for an equitable charge (*e*). The reasoning does not apply to a mortgage of a chose in action such as a policy, and therefore it is conceived that even in the case of a formal mortgage of a policy by deed subsequent advances may be added to the charge by parol evidence. But, when there is first a deposit of the policy upon terms orally agreed between the parties and subsequently a formal mortgage of the policy by deed to secure a specified debt, the original agreement must be deemed to have merged in the subsequent agreement under seal, and the policy can be held as security for the debt therein specified and no other; so when a solicitor first took a deposit of his client's policy under an oral agreement that he should hold it to secure his bill of costs then due, and subsequently took a deed of mortgage to secure certain advances, it was held that he could no longer charge his bill of costs on the policy (*f*).

Assignment *ex facie* absolute may be a mortgage.

An assignment of a policy *ex facie* absolute and unconditional may be shown by parol evidence to be neither a sale nor gift but a mortgage. This is so even where an apparent sale is by a deed under seal purporting to transfer the policy unconditionally for a price. But when the assignment is clearly stated in the deed to

(*a*) *Jones* v. *Consolidated Investment* (1858), 26 Beav. 256.

(*c*) *Whitbread, Ex parte* (1812), 19 Ves. 209.

(*d*) *Kensington, Ex parte* (1813), 2 V. & B. 79; *Ede* v. *Knowles* (1843), 2 Y. & C. 172.

(*e*) *Hooper, Ex parte* (1815), 19 Ves. 477.

(*f*) *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 289.

be a sale there is a strong presumption that the deed sets forth the true nature of the transaction, and very cogent evidence would be required to overcome this presumption (*g*).

Murphy v. Taylor (1850), 1 Ir. Ch. R. 92

Murphy v. *Taylor.*

A having effected a policy on the life of X for £999 executed a deed whereby he purported to assign it to B for an expressed consideration of £144, a receipt for which was endorsed on the deed. Evidence disclosed a contemporaneous deed whereby A executed a bond for £144 in favour of B. At the time the deeds were executed A was liable to B on bills of exchange due or about to become due amounting to £119, and the only consideration for the execution of the deeds was this liability and £25 in cash then paid to A. After the assignment, B tendered the premium to the insurance office, but they declared that the policy was void, and refused to accept it. Thereupon B brought an action against the office, which was compromised by payment to him of £600. A sued B for the balance after deducting his debt. The Court held that the policy was mortgaged and not sold, and that A was therefore entitled to redeem.

Equity of redemption.

If upon the whole evidence the Court comes to the conclusion that the transaction was in fact a mortgage in security for a debt, the mortgagee is entitled to redeem the security on payment of the debt. The equity of redemption is an essential element of a mortgage, and the Court will not recognise any agreement made by the mortgagor at the time of the mortgage to forgo his right to redeem or to postpone it for an unreasonable period (*i*). The mortgagor may afterwards lose his right to redeem by selling it or surrendering it to the mortgagee or by being foreclosed, but he cannot contract himself out of the right as incidental to the original transaction.

Salt v. Marquess of Northampton, [1892] A. C. 1

Salt v. *Marquess of Northampton.*

A desired to borrow money on his reversionary interest in his father's estate. Trustees for an insurance office advanced £10,000 on a bond and disposition in security (Scottish form of mortgage), whereby A promised to repay the same with interest, together with an annual premium of £435 5*s.* on a policy on his life as against that of his father for £34,500 to be effected in the insurance office by the trustees in their own name, and in security he assigned his reversionary interest with a condition for redemption. By a minute of agreement of even date with the bond it was agreed between the trustees and A that the trustees should effect a policy for £34,500; that the interest on the loan and the annual premiums should be allowed to accumulate for five years at compound interest at the rate of 5½ per cent.; that in the

(*g*) *Barton* v. *Bank of New South Wales* (1890), 15 A. C. 379.
(*i*) *Salt* v. *Marquis of Northampton*, [1892] A. C. 1; *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620; *British South Africa Co.* v. *De Beers*, [1910] 2 Ch. 502.

event of A paying off the loan before his father's death the trustees would assign the policy to him ; and that in the event of A predeceasing his father without having paid off the loan, and all sums due under the bond the policy should belong absolutely to the trustees. The trustees effected a policy of insurance in their own name as agreed. A predeceased his father without having paid anything. It was held that his representatives were entitled to the policy moneys less the amount due under the bond. As the debtor agreed to pay the premiums the policy belonged to him and must be treated as being in the hands of the trustees only as a security. The majority of the House of Lords felt that they were bound by the old equity doctrine that a debtor must be permitted to redeem notwithstanding his own express agreement to the contrary. Lord Bramwell said, "I regret to have to come to this decision. I think the equitable rule unreasonable, and I regret to have to disregard the express agreement of a man perfectly competent and advised by competent advisers. If, however, the trustees have insured in another office, they really have no claim in fairness on the whole proceeds of the policy. And if they have not insured their claim seems hardly better."

Who may redeem.

Those entitled to redeem a mortgaged policy are the mortgagor or any person interested in the equity of redemption including subsequent mortgagees, each mortgagee being entitled to redeem from other mortgagees who have a prior charge.

Redeem up in order of priority.

A mortgagee can only redeem from prior mortgagees in the order of their priorities, beginning with the mortgagee immediately prior to himself.

What is payable on redemption.

They are entitled to redeem on payment of the debt and interest due to the mortgagee and charged on the policy, and of any expenses and other debts which the mortgagee is entitled in equity to add to his charge.

Time for redemption.

The right of redemption may be exercised even after the policy moneys have become due, notwithstanding that the mortgagor has not fulfilled his covenant to pay the premiums and all the premiums have been paid by the mortgagee.

When a mortgage is made by formal deed the money secured is usually made payable on a future named day, and there is a proviso for redemption of the security on payment. The mortgagor cannot redeem before the day named and on that day he has a legal right to redeem. After that day he has only an equitable right to redeem, and the rule has long been established that if he wishes to redeem he must give the mortgagee six months' notice or six months' interest in lieu of notice (*l*). The rule applies to the mortgage of an equitable interest such as a reversionary interest in a trust fund, and even although the parties may

(*l*) *Browne* v. *Lockhart* (1840), 10 Sim. 420.

naturally contemplate repayment upon the falling in of the reversion the mortgagor must nevertheless give the mortgagee the customary notice (*m*). The same is no doubt applicable to the mortgage of a life policy when no express provision is made for repayment upon the life falling in. Thus, where on the death of the assured the policy moneys are paid into Court and the representatives of the assured petition for it to be applied in payment of the mortgage debt, the creditor is entitled to six months' interest from the date on which the petition was served on him (*n*). If, however, the creditor applies for payment in the first instance, he is not entitled to interest beyond the day of payment (*o*). The rule requiring six months' notice or interest applies only to formal mortgages where the money is made repayable at a future date (*p*). That is to say, where the just inference from the transaction is that the loan on mortgage is intended to be of a permanent character it is reasonable to infer that the parties intended that after default the mortgagee should be entitled to six months' notice; but when the just inference from the transaction is that the loan on mortgage is temporary, as is the case when the mortgage is by deposit of the policy merely, then it is not reasonable to infer that the parties intended that such long notice should be given (*q*). In the case of mortgage by deposit and other temporary transactions the mortgagor is only required to give the mortgagee a reasonable time to get the policy and deliver it up (*q*).

Equity of redemption and Statutes of Limitations.

The mortgagor's equity of redemption in a chose in action is not barred by any Statutes of Limitations, and therefore when a policy is mortgaged as the only security for a debt, or is mortgaged along with other choses in action, the mortgagor's right to pay off the mortgage and have a reassignment of the policy does not lapse through the non-recognition of the mortgagor's title for any specific period. Possibly the Court might under certain circumstances exercise its discretion to refuse the equitable right of redemption on the ground of laches or the staleness of the claim.

Policy mortgaged with real property.

Where a policy is mortgaged along with real estate to secure one indivisible sum the mortgagor's right to redeem the real estate becomes barred under section 7 of the Real Property

(*m*) *Smith* v. *Smith*, [1891] 3 Ch. 550.
(*n*) *Smith* v. *Smith*, [1891] 3 Ch. 550.
(*o*) *Letts* v. *Hutchins* (1871), L. R. 13 Eq. 176.
(*p*) *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385.
(*q*) *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385.

Limitation Act, 1874, after twelve years without any acknowledgment of the mortgagor's title, and it has been held by Kekewich, J., that his right to redeem the policy is also barred because, it having become impossible for the mortgagor to require a reconveyance of the real estate, it has become equally impossible according to the rules regulating the administration of mortgages in a Court of equity for him to require a reassignment of the policy, the real estate and the policy together constituting one security for the debt (*r*).

Premiums on mortgaged policy.

Primâ facie when a policy of life insurance is mortgaged there is an implied agreement that the mortgagor shall keep the policy alive by paying the premiums, and that in default the mortgagee may pay the premiums and add them with interest from the date of payment to the amount chargeable on the policy on redemption (*s*). It has been doubted whether the mortgagee, having paid the premiums, could in the absence of an express agreement by the mortgagor to repay them recover the amount as damages for the breach of the mortgagor's express or implied agreement to pay the premiums to the insurers, or whether the only amount which the mortgagee could recover by way of damages is damages for the loss of the security if the policy were allowed to drop (*t*). Clearly if the mortgagee did not in fact pay the premiums to the insurers the amount of the premiums could not be the measure of damages suffered by reason of the mortgagor's breach.

Damages for non-payment.

National Assurance v. Best (1857), 2 H. & N. 605

National Assurance v. *Best.*

Trustees lent money on behalf of an insurance company and the debtor having insured his life in the office assigned the policy to the trustees by way of security, and covenanted to repay the loan with interest, and to pay the annual premiums on the policy. The debtor made no payments and after three years the company sued for the debt and interest, and the amount of three years' premium. The Court of Exchequer gave judgment for the company for the amount of the debt and interest. The Court held that on the claim for premiums the company were only entitled to nominal damages for breach of the debtor's covenant to pay them. If the insurance had been in another company and they had paid the premiums, they might have been entitled to substantial damages, but the policy had dropped, no premiums were paid, and there was nothing but the loss of the security and in respect of that the company had not proved any damage.

(*r*) *Charter* v. *Watson*, [1899] 1 Ch 175.
(*s*) *Hodgson* v. *Hodgson* (1837), 2 Keen, 704.
(*t*) *National Assurance* v. *Best* (1857), 2 H. & N. 605.

If the terms of a mortgage deed give the mortgagee express power to pay the premiums and add the amount to the charge the express remedy may exclude the remedy of an action for repayment of the premiums.

Epxress power to add premiums to charge.

Brown v. Price (1858), 4 C. B. N. S. 598

Brown v. *Price.*

In order to secure a loan made by trustees on behalf of an insurance company the borrower assigned to them (1) a life interest in certain property and a reversion to which he would become entitled in the event of his dying without male issue by his then wife, and (2) a policy on his life in the same office payable in the event of his dying leaving male issue by his then wife. He covenanted to keep the policy on foot and pay the premiums, and in default the trustees had power to pay them and charge them on the mortgaged property. The debtor paid the premiums until his wife was fifty-six, and possibility of issue was extinct, and thereafter the annual premiums were placed by the office to the credit of their Policy Premium Account, and debited against the mortgage account of the debtor. The trustees brought this action against the debtor for the amount of these premiums. The Court of Common Pleas held that as there was no covenant to pay the premiums to the trustees they could not sue directly on the covenant for the specific amounts, but only for damages resulting to them as mortgagees from the non-payment of the premiums to the company. Treating them as independent of the company, and assuming that the entries in the books amounted to payment of the premiums by them to the company, which was considered doubtful: the Court held that they could not recover this amount as damages because the mortgage deed gave them the express remedy of adding the amount to the charge on the property, and by implication excluded the remedy by way of an action for damages.

Where an insurance company makes a loan on the security of a policy in its own office the transaction is commonly carried out in the name of trustees for the company who contract with the assured as if they were third persons taking the company's policy in security for a loan by them. In such transactions the fact that the trustees and the company are the same contracting party is not to be disregarded. The substance of the matter must be considered, and the legal rights of the debtor and the company *inter se* may depend more on this than on a strict interpretation of the formal documents.

Where company is mortgagee of its own policy.

Fitzwilliam v. Price (1858), 4 Jur. N. S. 889

Fitzwilliam v. *Price.*

The same transaction which gave rise to the common law action for damages in *Brown* v. *Price* (*x*) was the subject of a redemption action in Chancery. It was contended on behalf of the debtor's representatives that they were entitled to redeem the reversionary interest without paying the unpaid premiums on the life policy. They argued firstly that as the trustees and the company were

(*x*) *Vide supra.*

the same, there was no policy in existence because the company could not insure themselves, and secondly that if there was a policy the premiums had not been paid by the trustees, and therefore could not be added to the charge. The Court held that the substance of the transaction must be regarded, and that there was in substance an agreement between the debtor and the company that if he did not pay the amount of the annual premiums the company might add that amount to the charge, and it must accordingly be paid as the price of redemption.

Where the company, being creditor, is its own insurer.

An agreement between a debtor and an insurance company to pay the premiums on a life policy does not bind him to pay the premiums on a policy effected by the company in its own office unless such a policy was contemplated at the time the agreement was made.

Grey v. Ellison (1856), 1 Giff. 438

Grey v. *Ellison.*

A loan transaction with an insurance company was effected by the company purchasing an annuity from the debtor, the annual payment being equivalent to the interest on the purchase money and the premiums on a life policy. The debtor as security assigned his life interest in a trust fund and covenanted that in the event of the company insuring his life for a certain sum, and having to pay any additional rate of insurance by reason of his going beyond seas, such additional premium should be a further charge on the property. The company went through the form of insuring the life of the debtor in their own office, a policy being issued by the insurance department to the annuity department. The debtor afterwards went abroad. On the question whether the company were entitled to charge the additional premiums on redemption it was held that they were not, as they never did insure the debtor's life; the document called a policy was an empty formality, and meant nothing.

Right of mortgagee by deposit to charge premiums and interest.

When a life policy is deposited to secure payment of a debt there is, in the absence of anything to the contrary in the memorandum, or in the oral agreement if there is no memorandum, an implied agreement by the debtor to pay interest and premiums, and the creditor may without express agreement charge on the policy any premiums paid by him to save the policy from lapsing and legal interest on the debt and on each premium from the date on which it was paid (*y*).

Where the mortgagee's solicitor had deducted a commission from the premiums on the policy paid to the company on behalf of his client the mortgagee was held entitled to charge the full premiums in account with the mortgagor (*z*).

Capitalisation of arrears of interest.

When it is desired to capitalise arrears of interest so that the company may get compound interest on such arrears this must be done by express provision in the deed or memorandum. The

(*y*) *Kerr's Policy, In re* (1869), L. R. 8 Eq. 331; *Bellamy* v. *Brickenden* (1861), 2 John & H. 137.

(*z*) *Leete* v. *Wallace* (1888), 58 L. T. 577.

capitalisation of all interest in arrear should be made part of the original bargain, that is to say, the company should not merely reserve an option to capitalise interest but the primary agreement should be that all interest should be capitalised and charged on the security. A mere option to capitalise interest might be held void as a clog on the equity of redemption (*zz*).

Costs and expenses of mortgagee.

A mortgagee is entitled to the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs as between solicitor and client incurred by him and properly incident to an action for foreclosure and redemption, though he may forfeit those costs by misconduct, and may have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably (*a*).

In an Irish case (*b*) where the assignee of a policy had sued the insurance office, and afterwards in a redemption action brought by his assignor, had contended that he was entitled as unconditional assignee to the whole proceeds of the policy, the Court, although finding that the transaction was a mortgage and that the assignor was entitled to redeem, held that the assignee as mortgagee was entitled to his costs of the proceedings against the office, and his costs of the redemption suit.

Present practice as to costs of action.

In the case last cited a large part of the costs incurred must have been occasioned by the mortgagee denying the mortgagor's right to redeem, and notwithstanding this he was apparently allowed his whole costs. The present practice in England in a case of this kind when the mortgagee's contention has not been vexatious or frivolous is to allow him the ordinary costs of a redemption action in which the only question would be the taking of an account between the parties, but to disallow such costs as are fairly attributable to the mortgagee having put forward a case which has failed (*c*).

Priority of incumbrancers.

The general rules dealing with priority among equitable assignees have already been dealt with (*d*). Briefly incumbrancers take in the order of the dates when the charges have been created,

(*zz*) *Noakes* v. *Rice*, [1902] A. C. 24; *Jarrah Timber, &c.* v. *Samuel*, [1903] 2 Ch. 1.

(*a*) *Bank of New South Wales* v. *O'Connor* (1889), 14 A. C. 273, 278.

(*b*) *Murphy* v. *Taylor* (1850), 1 Ir. Ch. R. 92.

(*c*) *Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610.

(*d*) *Ante*, p. 440.

but a puisne incumbrancer may acquire priority over an earlier incumbrancer if he first gives formal notice to the office, and if he had at the time he advanced his money no actual or constructive notice of the earlier charge (*e*). The fact that the policy is not in the hands of the assured is sufficient to put a lender on inquiry, and if he advances his money without making inquiry he is deemed to have constructive notice of all charges which a reasonable inquiry would have revealed (*f*). Where a charge is created to cover a present advance only, and a further advance is afterwards made by the same incumbrancer, such further advance cannot be added to his charge so as to give him priority over mesne incumbrancers, and the mesne incumbrancers, even although they took with knowledge of the first charge, owed no duty to the first incumbrancer to give him notice of their puisne charges (*g*). When a charge is created to cover present and future advances, and a further advance is made by the same incumbrancer without notice of a mesne incumbrance, it takes priority over such mesne incumbrance (*h*), but a further advance made with knowledge of a mesne incumbrance is postponed to such mesne incumbrance (*i*).

Tacking.

Tacking is the right whereby an incumbrancer who has the legal estate in the property mortgaged may acquire priority in respect of debts charged upon the property over all other incumbrancers of whose charge he had no notice at the time his debt was incurred. If a mortgagee has the legal estate and afterwards makes further advances on the security of the same property he acquires priority over mesne incumbrances of which he had no notice. Or a puisne incumbrancer by paying off the first mortgagee and taking a transfer from him of the legal estate may acquire priority over mesne incumbrances of which he had no notice. Notice at the time the legal estate is acquired is not material. Although a mortgagee had no notice of a prior incumbrance when he advanced his money he may afterwards acquire priority by getting in the legal estate, even although he has then full notice of the other incumbrance (*k*). When a mortgagee has

(*e*) *Weniger's Policy, In re*, [1910] 2 Ch. 291; *Newman* v. *Newman* (1885), 28 Ch. D. 674.

(*f*) *Spencer* v. *Clarke* (1878), 9 Ch. D. 137.

(*g*) *Weniger's Policy, In re*, [1910] 2 Ch. 291.

(*h*) *Calisher* v. *Forbes* (1871), L. R. 7 Ch. 109.

(*i*) *Hopkinson* v. *Rolt* (1861), 9 H. L. C. 514.

(*k*) *Sharpe* v. *Foy* (1868), 4 Ch. 35.

not actually the legal estate, but has by a declaration of trust in his favour or by possession of the documents of title the best right to call for a transfer of the legal estate he acquires except as against those who have in fact obtained such transfer the same priorities as if the legal estate had vested in him (*l*).

Notice of intervening incumbrance.

There can be no tacking against an incumbrance of which the mortgagee desiring to tack had notice at the time his own charge was created. And therefore a first mortgagee cannot claim the benefit of his security for further advances in priority to a second mortgagee of whose mortgage he had notice before the further advances were made (*m*). And this is so even although the first mortgagee agreed to make further advances when the first mortgage was executed (*n*).

Tacking applied to mortgages of policies.

The doctrine of tacking has very little application to mortgages of insurance policies because the titles of contending incumbrancers must all rank as purely equitable titles notwithstanding that the legal right to sue has vested in one of them by virtue of the Policies of Assurance Act, 1867, or the Judicature Act, 1873. A mortgagee is therefore not in the position of a legal mortgagee until he has got the insurance moneys into his own hands. When he has done so he is probably entitled to tack, but not until then.

Right of mortgagee to tack unsecured debts.

A debt which has not been specifically charged on the property cannot be tacked against the mortgagor, but remains in the position of an unsecured debt. It has, however, been said that on the death of the mortgagor the mortgagee may as against the executors tack all his unsecured debts to the security. In the case of *Haselfoot's Estate* (*o*), Lord Romilly, M.R., following a previous decision of his own (*p*), held that when the mortgagee of a life policy received the insurance moneys on the death of the mortgagor he was entitled as against other creditors to retain not only the debt charged on the policy, but also other unsecured debts due to him by the deceased. In *Beyer* v. *Adams* (*q*), Stuart, V.C., held that when the form of a mortgage of a life policy was an assignment in trust, firstly to indemnify the mortgagees against their liability as sureties and after payment thereof in trust for

(*l*) *Maundrell* v. *Maundrell* (1804), 10 Ves. 246, 271.

(*m*) *Hopkinson* v. *Rolt* (1861), 9 H. L. C. 514; and notice to one of several trustees who were joint mortgagees was held notice to all (*Freeman* v. *Laing*, [1899] 2 Ch. 355).

(*n*) *West* v. *Williams*, [1899] 1 Ch. 132.

(*o*) (1872), L. R. 13 Eq. 327.

(*p*) *Spalding* v. *Thompson* (1858), 26 Beav. 637.

(*q*) (1857), 3 Jur. (N. S.) 710.

the mortgagor his executors, administrators, and assigns, the mortgagees were not entitled as against other creditors to satisfy their unsecured debts from the proceeds of the policy. The money was received under and must be applied in accordance with the trusts of the deed. In *Talbot* v. *Frere* (*r*), Jessel, M.R. refused to follow the decision of Lord Romilly in *Haselfoot's Estate*, and held that in the case of a mortgage, in ordinary form, of a life policy to solicitors to secure a bill of costs, the solicitors, having on the death of their client insolvent received the policy moneys, and discharged their bill of costs, were not entitled as against other creditors to retain the balance in payment of an unsecured debt. The mortgagee was in the position of a trustee of the policy moneys for the estate. His right to retain the balance of the moneys after paying his secured debt was a right merely against the executors to avoid circuity of action if the estate was solvent. There was no such right against other creditors. This seems to be now acknowledged to be the correct view of the matter, and there is therefore no right in a mortgagee on the death of the mortgagor to tack his unsecured debts to the security to the prejudice of either subsequent mortgagees or general creditors.

Consolidation.

The right of consolidation in its simplest form is the right of a mortgagee who holds separate securities for separate debts of the same mortgagor to refuse to be redeemed in respect of any one mortgage unless all the mortgages are redeemed. That is to say, the mortgagee is entitled to be put in the same position as if the several mortgages were one mortgage of all the properties for the total amount of the indebtedness.

Application to mortgages of policies.

This right applies to equitable as well as legal mortgages, and is therefore applicable to mortgages of a chose in action such as a policy of insurance (*s*).

Statutory restriction of right to consolidate.

The right of consolidation is now restricted by statute.

Conveyancing Act, 1881, sec. 17.

44 & 45 Vict. c. 41, sec. 17.

Restriction on consolidation of mortgages.

17.—(1) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(*r*) (1878), 9 Ch. D. 568.

(*s*) *Pledge* v. *White*, [1896] A. C. 187, 192; *Tassell* v. *Smith* (1858), 2 De G. & J. 713.

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Express reservation of right.

As it is not uncommon for mortgage deeds to contain a clause expressly reserving the right of consolidation the rules of equity relating thereto must still be considered.

Notice to mortgagor to pay off one mortgage only.

In cases where the right to consolidate exists the mortgagee does not lose his right by giving notice to the mortgagor, under section 20 of the Conveyancing Act, to pay off one only of the mortgages, for the doctrine of election has no application, and even when the mortgagor has tendered the money in pursuance of such notice the mortgagee can still insist that all the mortgages shall be paid off as the price of redemption (*u*).

Right to consolidate against assignees of the equity of redemption.

The right of consolidation may be exercised not only against the mortgagor, but against subsequent mortgagees and other assignees of the equities of redemption (*x*). Thus if A mortgages to X first policy M and then policy N and afterwards grants second mortgages on M and N to Y and Z respectively, X cannot be redeemed either by A or Y or Z without payment of the total sum charged on M and N.

Where equity assigned before second mortgage created.

But the assignee of an equity of redemption takes subject only to such equities as his assignor was liable to at the time of the assignment, and therefore if the mortgagor has assigned his equity of redemption in one mortgage before he created the other mortgage the mortgagee cannot consolidate these two mortgages as against the assignee of the equity of redemption. Thus if A mortgages to X policy M and then grants a second mortgage of policy M to Y and subsequently mortgages policy N to X, and then grants a second mortgage of policy N to Z, X can be redeemed by Y by payment only of the sum charged on M, but he cannot be redeemed by A or Z without payment of the total sum charged on M and N. And even although the mortgage of M to X expressly provides that the mortgagor shall not be entitled to redeem without first paying all moneys that might be secured to the mortgagees by any other mortgage executed by the mortgagor that does not disentitle Y to redeem M upon payment only of what is charged on M if at the time of the subsequent mortgage of N, X had notice of Y's second mortgage on M. Apparently

(*u*) *Griffith* v. *Pound* (1890), 45 Ch. D. 553.

(*x*) *Pledge* v. *White*, [1896] A. C. 187.

if X had not such notice the express provision in the mortgage deed would entitle him to consolidate even as against Y.

Right of transferee of mortgage to consolidate

The right of consolidation may be exercised by the transferee of a mortgage as well as by the original mortgagee, and when several properties have in the first instance been mortgaged by one mortgagor to several mortgagees, but are ultimately united in the hands of one mortgagee or transferee, he may *primâ facie* consolidate (*y*).

as against assignees of the equities.

Such a mortgagee or transferee may consolidate against an assignee of all the equities of redemption without regard to whether the union of his titles took place before or after the assignment of the equities (*z*); but he cannot consolidate against an assignee of one equity of redemption if the equities were separated before the union of the transferee's titles (*a*). Thus, if A mortgages policy M to X and policy N to Y, and subsequently grants a second mortgage on M to Z, W having obtained a transfer of both the first mortgages from X and Y can only consolidate against Z if he acquired the right to both mortgages before the date upon which A granted the second mortgage on M to Z.

There is no right to consolidate where the mortgages were originally granted by separate mortgagors and the equities have afterwards become united in the same hands (*aa*).

No consolidation before default in payment.

The right of a mortgagee to consolidate is part of the price which a mortgagor has to pay for being in default and having to resort to a Court of equity to redeem his property. It follows that a mortgage is only subject to consolidation if the mortgagor is in default, and therefore when the time of payment expressed in the mortgage deed has not arrived and the mortgagor's right to redeem is still legal, that mortgage cannot be consolidated with other mortgages (*b*).

Marshalling.

The right of marshalling is the right of a puisne incumbrancer or other assignee for value of an equity of redemption to insist that a prior mortgagee who has got other available security shall be first satisfied from that other security before resorting to the property in respect of which they have a common interest (*c*).

(*y*) *Jennings* v. *Jordan* (1881), 6 A. C. 698.
(*z*) *Pledge* v. *White*, [1896] A.C. 187.
(*a*) *Minter* v. *Carr*, [1894] 3 Ch. 498.
(*aa*) *Sharp* v. *Rickards*, [1909] 1 Ch. 109.
(*b*) *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699.
(*c*) *Gibson* v. *Seagrim* (1855), 20 Beav. 614; *Lanoy* v. *Athol* (1742), 2 Atk. 444, 446.

Lawrence v. Galsworthy (1857), 3 Jur. N. S. 1049

Lawrence v. *Galsworthy.*

A effected a policy on his own life, and mortgaged it to B, together with all his household effects. Subsequently A mortgaged to C "all personal estate and effects whatsoever and wheresoever in possession reversion expectancy or otherwise excepting all book debts and securities for money." It was held that the mortgage to C did not include the policy being "security for money" and that C could compel B to satisfy his debt out of the policy before resorting to the household effects.

Ford v. Tynte (1872), 41 L. J. Ch. 758

Ford v. *Tynte.*

A mortgaged a life estate, and policies of insurance on his life to X, and then mortgaged the life estate only to Y. Subsequently X obtained judgments against A, which being registered became charges on the life estate under 1 & 2 Vict. c. 110. In a suit to realise the securities X's first mortgage having been discharged out of the life estate it was held that Y was entitled to be paid out of the policies. Y had a right to marshal X's securities, and insist that X's first mortgage be discharged as far as possible from the policies. But as it had been paid out of the life estate Y was entitled to be satisfied out of the policies, and X could not by consolidating his subsequent charges with his first mortgage defeat Y's right.

Notice of prior charge.

A puisne incumbrancer can insist on the prior incumbrancer marshalling his securities notwithstanding that at the time he took his charge upon the property he had notice that it was subject to the prior charge (*d*).

Where there are postponed incumbrancers on other security.

The right to marshal the securities of a prior incumbrancer cannot be enforced against third parties who have a charge upon the property out of which it is sought to satisfy such prior incumbrancer (*e*).

Equity between subsequent incumbrancers to have debt of common prior incumbrancer apportioned.

Thus where properties A and B are mortgaged to X, and subsequently A is mortgaged to Y and B is mortgaged to Z, neither Y nor Z can insist as against the other on having the whole of X's debt paid out of the property in which the other is interested, and the priority of their charges or the question whether each has or had notice of the other's charge is not material. The equity between Y and Z is to have X's debt apportioned between A and B according to the respective values of the properties (*f*).

Right to securities of prior mortgagee on redemption.

When a mortgagee redeems a prior mortgagee by paying off his debt he is entitled to a transfer of his security, and thus succeeds to his priority in respect of the debt paid off.

Where a prior mortgagee compels a subsequent mortgagee as the price of redemption to pay off debts other than those originally

(*d*) *Flint* v. *Howard*, [1893] 2 Ch. 54, 73.

(*e*) *Barnes* v. *Racster* (1842), 1 Y. & C. Ch. 401; *Bugden* v. *Bignold* (1843), 2 Y. & C. Ch. 377; *Moxon* v. *Berkeley Mutual* (1890), 59 L. J. Ch. 524.

(*f*) *Flint* v. *Howard*, [1893] 2 Ch. 54.

constituting a prior charge on the property over which the subsequent mortgagee has got a puisne charge the subsequent mortgagee is entitled to a transfer of all the securities for the debt which he has paid off, and he may then in his turn by consolidation, subject to the limitations already stated, compel the mortgagor or other mortgagees subsequent to him to pay off as the price of redeeming any one security what he has been compelled to pay to the prior mortgagee as well as what was due to him on the mortgage originally made to himself (*f*).

The following cases illustrate some of the principles governing priorities in the redemption of mortgages.

Mutual Life v. Langley (1886), 32 Ch. D. 460

Mutual Life v. Langley.

The mortgagor was entitled to A (a reversionary interest under a will) and B (a life interest under a marriage settlement). He granted the following mortgages on these properties:—

(1) both properties to X, who gave notice to the trustees,

(2) A to L (who gave notice to the trustees of the fund, but part only of the fund was in the hands of the trustees, the other part being deposited in Court, and L did not obtain a stop order),

(3) both properties to Y (who took without notice of L's mortgage on A, and gave notice to the trustees),

(4) A to L, in respect of further advances (no notice being given to the trustees or stop order obtained),

(5) B to M, who gave notice to the trustees.

M bought in the mortgages (1) and (3), and subsequently receiving notice of mortgage (2) obtained a stop order. In an action by M to foreclose the securities L claimed the right to redeem M on paying off (1), and to a transfer of both securities, without being first obliged to pay off (3) and (5). M contended that L was not entitled to a transfer of B, upon which L had no mortgage until he paid off all M's mortgages upon it, and that in any case L was bound to pay off (3), as by reason of the stop order it took priority over (2). The Court of Appeal held, firstly, that (2) had priority over (3) in respect of the funds in the hands of the trustees by reason of the prior notice to them, but that (3) had priority over (2) in respect of the funds in Court by reason of the stop order. Secondly, that upon L waiving his partial priority of (2) over (3) and paying off (1) and (3) he was entitled to a transfer of both securities from M without paying off (5). The reason given for this part of the decision was that, as at the time A was mortgaged to L he had the right to redeem and obtain a transfer of the two securities on the payment of the prior charges then existing upon them, the mortgagor could not subsequently by dealing with the equity of redemption on B do anything to prejudice L's rights, and M could not by taking a charge on the equity of redemption on B prejudice the position of a previous mortgagee on A. In other words M could only get priority in respect of (5) by tacking to or consolidating with (1) or (3). Tacking

(*f*) *Titley* v. *Davies* (1743), 2 Y. & C. Ch. 399.

was out of the question because there was no legal estate, the properties mortgaged being purely equitable interests. M could not consolidate (5) with (1) or (3) because the mortgagor had assigned the equity of redemption on (1) and (3) in so far as it related to A before mortgage (5) was created. Thirdly, the Court held that as between (4) and (5) L was entitled to priority in respect of (4) notwithstanding the absence of notice to the trustees because M had no subsequent charge upon A which by priority of notice could gain priority over (5), and the doctrine of priority by notice would not be extended so as to give a charge on one property priority over a charge on another. M therefore could only in his turn redeem the two securities by paying what L had paid to him, and the amount of L's charges upon (2) and (4).

Flint v. Howard, [1893] 2 Ch. 54.

Flint v. *Howard.*

The mortgagor was the owner of certain paper mills, and of a reversionary interest in personalty. He mortgaged these properties as follows:—

(1) both properties to H for £6000,
(2) both properties to F for £5000,
(3) paper mills to F for £2500,
(4) both properties to M for £1700.

Subsequently, by a deed between the mortgagor H and F—

(*a*) F transferred mortgage (3) to H,
(*b*) F released the paper mills from mortgage (2),
(*c*) H advanced a further £4000 to the mortgagor, who charged both properties in his favour to secure £6500.

Subsequently the mortgagor mortgaged the paper mills to R for £2500.

The incumbrances then stood—

(1) £6000 on both to H,
(2) £5000 on reversion to F,
(3) £2500 on paper mills to H,
(4) £1700 on both to M,
(5) £6500 on both to H (which included £2500 on (3)),
(6) £2500 on paper mills to R.

F brought an action to foreclose M and other persons interested in the equity of redemption in the reversion, and obtained an order absolute for foreclosure, thus becoming absolute proprietor of the reversion subject to (1).

F then brought this action claiming to redeem H by paying off the £6000 on (1), and to have a transfer of the mortgage on the paper mills. H resisted this claim on the ground that it would give F a charge on the paper mills in priority to (3) and (5), which would be contrary to the intention of the deed to which the mortgagor, H and F were all parties. The Court held that F was entitled to a transfer of both properties on paying off the £6000, as to the reversion absolutely, and as to the paper mills subject to the other equities of redemption. His duty was then to apportion the £6000 between the two properties, and the subsequent mortgagees of the paper mills, that is to say H or failing him M or R would be entitled to redeem the mortgage on the paper mills by paying F the proper proportion of £6000.

It was pointed out that as there was no longer any subsisting mortgage on or equity of redemption in the reversion F could not insist on both properties being redeemed for his total debt of £11,000, nor could he insist on the whole of the £6000 being charged on the paper mills. On the other hand the subsequent mortgagees on the paper mills had no right of marshalling so as

to compel F to satisfy his debt as much as possible out of the reversion, and the only fair and reasonable course to adopt was to apportion the £6000 between the two properties.

Foreclosure and sale by order of the Court.

The equity of redemption may be extinguished by foreclosure or sale. Doubt has sometimes been expressed as to whether a chose in action such as a policy of insurance can be foreclosed, or whether the only remedy of the mortgagee is sale. This depends on how far the remedies of a mortgagee of land are available to a mortgagee of a chose in action.

Question whether mortgagee of policy can foreclose.

The right of a legal mortgagee of land is primarily a right to foreclose (*g*). Primarily the right of an equitable mortgagee is to have a judicial sale, but as an equitable mortgage of land implies an obligation to execute a legal mortgage the Court has given such a mortgagee the same remedy as if he had a legal mortgage, that is foreclosure. Where a person has an equitable charge on land, but no right to an assignment of the legal estate, as where there is a charge created by will, it is clear that his proper remedy is a decree of sale, and that he has no right to a decree of foreclosure (*h*).

The above principles are equally applicable to a mortgage or charge upon personal property which can be the subject of a legal mortgage, and thus the remedy of an equitable mortgagee of shares in a limited company is held to be primarily at least foreclosure (*i*).

A chose in action, however, cannot be the subject of a legal mortgage. No legal property or estate can be assigned, and therefore the reasons for conceding the right of foreclosure to an equitable mortgagee of land do not apply to the case of an equitable mortgagee of a chose in action. Jessel, M.R., held in the case of a deposit of mortgage bonds that the depositee had no right to foreclose, but the case appears to have been treated as a mere pledge of chattels rather than as a deposit giving an equitable charge on the moneys represented by the bonds (*k*). Wigram, V.C., in one case said that the proper remedy of a mortgagee of a policy of insurance was sale (*l*). On the other hand, Kekewich, J., in the case of debentures constituting a floating security upon

(*g*) *Owen, In re*, [1894] 3 Ch. 220.
(*h*) *Owen, In re*, [1894] 3 Ch. 220.
(*i*) *Redmayne* v. *Forster* (1866), L. R. 2 Eq. 467; *Wayne* v. *Hanham* (1851), 9 Hare, 62.
(*k*) *Carter* v. *Wake* (1877), 4 Ch. D. 605.
(*l*) *Dyson* v. *Morris* (1842), 1 Hare, 413.

the land, chattels, goodwill, and book debts, of a company has granted the ordinary decree of foreclosure upon the whole security (*m*). If this last-mentioned decision is right, then the mortgagee of a policy of insurance is entitled to a decree of foreclosure subject to the statutory right of the mortgagor or other person entitled to the equity of redemption to require a sale (*n*), and in practice foreclosure orders are frequently made (*o*).

When policy is assigned to a creditor in trust to pay debts.

When a security upon a policy takes the form of a trust and not a mortgage the ordinary rights of a mortgagee of foreclosure and sale are not applicable, and the terms of the trust must be strictly adhered to. Thus, where a policy was assigned by a debtor to his creditor in trust to retain the policy and receive the policy moneys, and to apply the same first in payment of expenses, secondly in paying off the debt and other advances, and thirdly as to the balance to the use of the debtor, it was held that the creditor had no power to enforce his security by sale or foreclosure of the policy (*q*). But in another case, where the trust was for the creditor to stand possessed of the policies, and all moneys which should come to his hands in respect thereof, upon trust to discharge the debt and expenses, and hold the balance to the use of the debtor, the Court thought that the creditor had the right to sell if there were no available funds of the debtor out of which premiums could be paid, and was prepared to order a sale (*r*).

Where a security is partly by way of mortgage and partly by an assignment in trust which does not permit of an immediate sale, as where real property is mortgaged and a policy assigned in trust to retain and pay the debt out of the policy moneys, the position in an action to foreclose is not very satisfactory. The Court will not order foreclosure or sale in respect of the policy, and if a decree of foreclosure is made as to the real estate the security of the policy is practically lost because, if the creditor afterwards resorts to it for payment of any part of his debt the foreclosure must be opened up, and if the mortgagee has in the meantime sold the estate his right to any of the policy moneys is absolutely barred because he cannot open up the foreclosure (*s*).

(*m*) *Sadler* v. *Worley*, [1894] 2 Ch. 170; *Oldrey* v. *Union Works*, [1895] W. N. 77.

(*n*) *Infra*, p. 497.

(*o*) *Beaton* v. *Boulton*, [1891] W. N. 30.

(*q*) *Stamford Banking Co.* v. *Ball* (1862), 8 Jur. (N. S.) 420; *Jenkins* v. *Row* (1851), 5 De G. & Sm. 107.

(*r*) *Ford* v. *Tynte* (1872), 41 L. J. Ch. 758.

(*s*) *Dyson* v. *Morris* (1842), 1 Hare, 413.

The proper course in such a case would be for the mortgagee to request a judicial sale of the real estate so that his debt might be discharged *pro tanto* out of the proceeds without prejudice to his security on the policy as to the balance (*t*).

Proceedings to enforce foreclosure or sale.

A foreclosure or judicial sale is effected by a foreclosure action or originating summons brought by the mortgagee. The mortgagor and subsequent mortgagees or other assignees of the equity of redemption must be made parties to the action or served with the summons. An account of what is due and chargeable on the security is ordered to be taken, and if the proper decree is foreclosure, then an order is made for payment of what may be found due within six months (or, where there are subsequent mortgagees, within successive periods, giving each mortgagee in turn a definite period, usually three months, to redeem), and in default of payment that the mortgagor and other persons interested in the equity of redemption be foreclosed. On default of payment before the expiration of the specified period or periods the decree of foreclosure is made absolute on the application of the mortgagee, who thereby becomes owner of the property subject only to any prior charges upon it. If he finds that the property is not sufficient to satisfy his debt he may still sue on the personal covenant or realise other securities which, from their nature, could not be sold or foreclosed, but if he does so he must open up the foreclosure and the mortgagor's equity of redemption revives (*u*). If having foreclosed he sells the property he can no longer sue on the covenant or realise any other security, because it is too late to open up the foreclosure, and the mortgagee must be satisfied with what the sale realised (*u*). When the proper order is sale the Court will order the property to be sold under the approbation of the Court to the best purchaser that can be got, and the proceeds will be paid into Court and applied in whole or part discharge of the mortgagee's debt, or otherwise in accordance with the priority of the equities of those having an interest in the property. Where the proper order as to part of the security is foreclosure and as to another part sale, the Court will order a sale of the property which ought to be sold, in the first instance, and make a decree of foreclosure as to the other property in respect of the balance of the debt left undischarged (*x*).

(*t*) *Infra*, p. 497.

(*u*) *Huntington* v. *Commissioners of Inland Revenue*, [1896] 1 Q. B. 422.

(*x*) *Dyson* v. *Morris* (1842), 1 Hare, 413.

Foreclosure opened up after decree absolute.

The mortgagor's right of redemption is not absolutely barred even by an order of foreclosure absolute. The Court has still a discretion to open up the foreclosure order, and, where it is fair and equitable that it should be opened up, will do so at the instance of the mortgagor or other person entitled to redeem (*y*). In a proper case it may even be opened up as against a purchaser from the mortgagee. No definite rules can be laid down as to when the Court will open up a foreclosure absolute. The nature of the estate, the possibility of placing the mortgagee or a purchaser from him *in statu quo ante*, the amount of the debt and the diligence of the mortgagor in attempting to raise the money, and the value of the property in excess of the debt are all vital considerations. The case of a policy becoming payable immediately after the order for foreclosure absolute is a good example of the kind of case where the Court ought to open up the foreclosure, particularly if the policy moneys are considerably in excess of the debt and the debtor was unable to raise the money for redemption.

Beaton v. Boulton (1891), W. N. 30

Beaton v. *Boulton.*

In December, 1889, the first mortgagees of a policy of insurance for £4000 obtained a foreclosure order. In March, 1890, the chief clerk made his certificate, fixing September 17, 1890, as the date of payment. The time was afterwards extended to December 22, 1890. On December 29, 1890, the life dropped, and the policy moneys became payable. On December 31, 1890, the first mortgagees applied *ex parte* for foreclosure absolute, and the chief clerk made the order, although he was informed of the death of the assured. The amount of the policy moneys exceeded the amount of the first mortgagee's debt, but the report does not state the amount of the excess. On the application of the mortgagor's trustee in bankruptcy, supported by the second mortgagees, the Court reopened the foreclosure, and ordered a subsequent account, and a further period of one month for redemption.

Statutory right to require sale instead of foreclosure.

The right of a mortgagor or mortgagee to require an order for sale of the mortgaged property instead of an order for redemption or foreclosure is now defined by the Conveyancing Act.

Conveyancing Act, 1881, sec. 25

44 & 45 Vict. c. 41, sec. 25.

25.—(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

(*y*) *Campbell* v. *Holyland* (1877), 7 Ch. D. 166.

(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrances.

(5) This section applies to actions brought either before or after the commencement of this Act.

(6) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed (*a*).

(7) This section does not extend to Ireland.

An equitable mortgagee by deposit is entitled to require a sale under this section (*a*). Any mortgagor or mortgagee may, if the Court thinks fit, obtain an order for sale at any time before foreclosure absolute (*b*). When the mortgagee demands foreclosure and a sale is requested by a person interested in the equity of redemption, the order for sale will be subject to a deposit to meet the expenses of the sale, and, if the sale is by auction, subject to a reserve price sufficient to cover the mortgagee's debt (*c*).

Mortgagee's power of sale without the authority of the Court.

Besides the right of foreclosure and judicial sale a mortgagee may have the right to sell the mortgaged property without resorting to the Court. This right is derived either from the express terms of the mortgage or from the provisions of the Conveyancing Act, 1881 (*d*).

Conveyancing Act, 1881, secs. 2 (vi), 19, 20, 21

44 & 45 Vict. c. 41, secs. 2, 19, 20, 21.

2. In this Act—

* * * * * *

(vi) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth,

(*z*) 15 & 16 Vict. c. 86, sec. 48.

(*a*) *Oldham* v. *Stringer* (1884), 51 L. T. 895.

(*b*) *Union Bank* v. *Ingram* (1882), 20 Ch. D. 463.

(*c*) *Whitfield* v. *Roberts* (1859), 5 Jur. (N. S.) 113.

(*d*) 44 & 45 Vict. c. 41.

secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

* * * * * *

Powers incident to estate or interest of mortgagee.

19.—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby;

* * * * * *

(2) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed, and to the provisions therein contained.

(4) This section applies only where the mortgage deed is executed after the commencement of this Act.

Regulation of exercise of power of sale.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Conveyance, receipt, &c., on sale.

21.—(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in

the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

(2) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(4) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Notice to mortgagor required by statute.

The power of sale under the Conveyancing Act, section 19, arises when default has been made in payment of the capital according to the tenor of the deed. Section 20, however, limits the exercise of the power by providing that where the only default is the failure to repay the capital the power of sale shall not be exercised until notice is given requiring payment, and there is a further default for three months after service of the notice. A notice requiring repayment before the capital has become due under the mortgage deed is an insufficient notice (*e*). A notice given after the capital has become due and requiring the mort-

(*e*) *Selwyn* v. *Garfit* (1888), 38 Ch. D. 273.

gagor to pay within three calendar months is a sufficient notice, and does not operate to enlarge the time given by the statute. The mortgagor continues to be in default notwithstanding the terms of the notice and the power of sale can be exercised at the end of the three months (*f*).

Conditions in mortgage deed defining power of sale.

Where the mortgage deed imposes conditions on the exercise of the power of sale the power will be subject to the conditions named in the deed, and not the conditions prescribed by the statute. Conditions will be construed liberally in favour of the power of sale.

Berry v. Halifax Commercial Banking Co., [1901] 1 Ch. 188

Berry v. *Halifax Commercial Banking Co.*

A customer of a bank mortgaged to the bank a life policy to secure any overdraft on his current account, and the mortgage provided that the statutory power of sale should be exercisable by the bank if default should be made in payment of the balance owing on the said current account or other moneys due from the mortgagor or some part thereof for the space of one calendar month after the said account current had been closed, or after notice in writing demanding such payment should have been given by or on behalf of the bank to the mortgagor, or left for him at his usual or last known place of abode. The account current became much overdrawn, and the bank wrote to the customer pointing out the position, and saying, "I must request your immediate attention to this, and hope to receive a good amount during the week in absolute reduction. When may I expect a settlement of the accounts as promised?" Shortly afterwards the customer called a meeting of his creditors, and on November 9 he wrote to the bank, "There was a meeting of creditors yesterday. I was not aware but you had a circular calling the meeting. They agreed to accept all the assets I had. I gave them to understand that I was insured in the Royal, and that you held the policy and £300 worth of shares as security for your account. . . . There was a trustee appointed yesterday." On November 17 the customer assigned all his property to a trustee under a deed of arrangement for the benefit of his creditors. The bank had notice of this deed on November 28, and on December 18, purporting to act under their power of sale, sold the policy. On the question whether the power of sale had arisen, Kekewich, J., held that it had. The deed of arrangement would not amount to the closing of the account until notice had been given to the bank, but the letter of November 9 amounted to a closing of the account, and therefore the power of sale was properly exercised.

Express power of sale subject to reasonable notice.

When the mortgage gives the mortgagee an express power of sale without defining the length of notice or other conditions upon which the power may be exercised the mortgagee can sell at any time after, but not before default (*g*) upon giving the mortgagor

(*f*) *Barker* v. *Illingworth*. [1908] 2 Ch. 20.

(*g*) *Brougham* v. *Squire* (1852), 1 Drew. 151.

notice, and a reasonable time to find and pay the money due (*h*).

Obligation on mortgagee to obtain a proper price.

A mortgagee in exercising his power of sale must take reasonable precautions to obtain a proper price (*i*). If he does so the mortgagor has no redress on the ground that he did not obtain the best price, or that by postponing the sale he might have obtained more. A mortgagee is not a trustee of a power of sale for the mortgagor (*i*). The mortgagee's right is to look after his own interests first, but he must not wholly neglect the interests of the mortgagor and others entitled to the equity of redemption, and therefore he is not at liberty fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor (*i*). The mortgagee must *bonâ fide* sell to a third party, and neither the mortgagee nor his solicitor or agent acting for him in the matter of the sale can purchase the property on his own account (*j*).

Whether surrender of policy is a valid exercise of power of sale.

In the case of a policy of insurance the mortgagee's power of sale is usually most conveniently exercised by surrendering the policy to the company. The question has been raised whether a surrender of the policy to the company is legally within the power of sale, and consequently whether the mortgagee can give the company a sufficient discharge from further liability on the policy. Strictly speaking, a surrender is perhaps not a sale. It is a release of the obligor upon a chose in action, and differs from a sale in that the obligation is extinguished instead of the right being transferred to another person. From the point of view of the mortgagor, however, there is no practical distinction. In either case he is deprived of all further interest in the policy, and the surrender value is equivalent to the purchase price. It may not be the best price obtainable, but as we have seen the mortgagor cannot object to the transaction solely on that account. In substance, therefore, the surrender is a sale, and if it were made technically in the form of a sale by assignment to trustees on behalf of the company, and then surrendered to the company by the trustees it would be absolutely unimpeachable. It is submitted that even although the assignment to trustees is omitted and the surrender is made directly by the mortgagee to the company it is a valid exercise of the power of sale, and gives the

(*h*) *Ex parte Official Receiver* (1886), 18 Q. B. D. 222.

(*i*) *Farrar* v. *Farrars, Limited* (1888), 40 Ch. D. 395, 411; *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*j*) *Martinson* v. *Clowes* (1882), 21 Ch. D. 857; *Nutt* v. *Easton*, [1899] 1 Ch. 873; *Hodson* v. *Deans*, [1903] 2 Ch. 647.

company a good discharge. When the mortgage is by deed and the mortgagee is exercising his statutory power of sale under the Conveyancing Act the company would obtain the most satisfactory discharge by taking a conveyance to trustees for the company. They would thus obtain the protection of section 21 (2) of the Act against the consequences of an improper or irregular exercise of the power of sale. In practice, however, most companies do not insist upon such a conveyance, but are content to accept the mortgagee's receipt for the surrender value and a statutory declaration from him that the conditions precedent to the exercise of the power of sale have been fulfilled as required by section 20 (*k*).

When title of purchaser from mortgagee may be impeached.

Notwithstanding the provisions of the above section 21 (2) a purchaser's title may be impeached if he had notice that the mortgagee exceeded his power of sale, or exercised it irregularly (*m*). Further, the section only makes a *bonâ fide* purchaser's title unimpeachable after conveyance, and if having contracted to purchase he afterwards discovers that the mortgagee had no power of sale, or acted irregularly, he may decline to complete on the ground of want of title in his vendor (*n*). The provisions relating to an express power of sale in a mortgage deed may, however, be wider than the provisions of the Act, as where the deed provided that "notwithstanding any impropriety or irregularity in the sale the same shall, so far as regards the safety and protection of the purchaser, be deemed to be within the foresaid power, and to be valid and effectual accordingly." This was held to enlarge the power of sale where the purchaser had acted in good faith, and such purchaser would probably have been protected and bound to complete whether the original power of sale was exceeded or not (*o*).

Whether a mortgagee without legal title to chose in action can give good title to purchaser.

The statutory power of sale is given in the case of all mortgages by deed. An instrument under seal creating a charge on the policy is a mortgage, although it does not purport to assign the chose in action. The question arises whether a mortgagee under such a deed can, by exercising his power of sale, give a complete legal title to a purchaser or a legal discharge to the office in the case

(*k*) It has been held in Canada that a mortgagee of a life policy has no right as against the company to exercise the assured's election to take the surrender value (*Fisken* v. *Marshall* (1905), 10 Ont. L. R. 552).

(*m*) *Selwyn* v. *Garfit* (1888), 38 Ch. D. 273; *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 30 As to what is notice, see Conveyancing Act, 1882, s. 3, *ante*, pp. 441, 486.

(*n*) *Life Interest* v. *Hand-in-Hand*, [1898] 2 Ch. 230.

(*o*) *Dicker* v. *Angerstein* (1876), 3 Ch. D. 600.

of a surrender. It is submitted that he cannot. The legal chose in action still remains in the mortgagor, and was never "the subject of the mortgage." The subject of the mortgage is an equitable interest in the chose in action equivalent to the amount charged on the policy. Section 21 gives the mortgagee exercising the power of sale power "to convey the property sold for such estate and interest therein as is the subject of the mortgage." This does not seem to give the mortgagee power to transfer the legal chose in action when it has never vested in him.

Power of sale exercised by mortgagee's agent under power of attorney.

The mortgagee's power of sale may be exercised under a properly framed power of attorney, but where a principal granted a power of attorney to his agent and thereby authorised the agent to sell any real or personal property then or thereafter belonging to the principal, and to receive and give a discharge for any moneys then or thereafter owing to the principal by virtue of any security, it was held that the agent had no authority to sell property held by his principal as mortgagee (*p*). Section 21 (4) of the Conveyancing Act, which provides that the power of sale conferred by that Act upon mortgagees may be exercised by any person for the time being entitled to give a discharge for the mortgage money refers to the administrators executors and assigns of the mortgagee, and does not extend to a person entitled generally to give a discharge as agent (*p*).

Purchaser from mortgagee entitled to policy and mortgage deed.

The purchaser from a mortgagee exercising his power of sale is entitled to demand delivery of the policy and the mortgage as documents of title. And where a mortgagee under a mortgage, which comprised real estate and policies of insurance, sold the real estate and retained the policies, it was held that in the absence of any stipulation in the contract that he might retain the mortgage deed he was bound to deliver it to the purchaser of the real estate (*q*). Rule 5 in section 2 of the Vendor and Purchaser Act, 1874, that "when the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents," applies only to land (*q*).

Mortgagee's receipts and discharges.

The following section of the Conveyancing Act, 1881, provides that in certain cases the receipt in writing of a mortgagee shall be

(*p*) *Dowson's and Jenkin's Contract, In re*, [1904] 2 Ch. 219.

(*q*) *Williams' and Duchess of Newcastle's Contract, In re*, [1897] 2 Ch. 144.

a sufficient discharge for moneys payable in respect of the mortgaged property.

Conveyancing Act, 1881, sec. 22 (*r*)

22.—(1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage. 44 & 45 Vict. c. 41, sec. 22.

(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Before Conveyancing Act and in absence of receipt clause.

Before this statutory provision was made it is probable that a company liable to pay moneys under a mortgaged policy (or any other debtor liable in respect of a mortgaged chose in action) was, where the mortgage contained no receipt clause (*s*), under some obligation to inquire as to what sum, if any, remained due on the mortgage, and was bound to pay to mortgagor and mortgagee the exact amount of their respective interests, or, in the event of any dispute, to interplead or pay the moneys into Court.

Practice of companies since the Conveyancing Act.

Since the Conveyancing Act was passed it has become the practice of the principal insurance companies to rely on section 22, and if satisfied that the original mortgage is valid, to pay the policy moneys on the sole receipt of a mortgagee, without inquiring as to the state of account between mortgagor and mortgagee (*t*) and disregarding any dispute between mortgagor and mortgagee as to whether the whole or what part of the debt has been paid off.

Receipt of mortgagee a good discharge.

This practice appears to be fully justified. Until there has been a formal reconveyance of the policy to the mortgagor, the

(*r*) This section should be compared with section 36 of the same Act relating to the receipt of trustees now repealed but re-enacted in the Trustee Act, 1893 (56 & 57 Vict. c. 53, s. 20). See also Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 23), which stands unrepealed.

(*s*) The receipt clause expressly empowers the mortgagee to receive the money and to give an effectual discharge without any obligation on the party paying the same to see to the application thereof, and was probably sufficient to enable an insurance company to get a complete discharge from the mortgagee (*Brasier* v. *Hudson* (1837), 9 Sim. 1; *Ottley* v. *Gray* (1847), 16 L. J. Ch. 512).

(*t*) Article by Mr. A. R. Barrand in Journal of the Institute of Actuaries, vol. xxxiii. p. 211.

receipt of the mortgagee is a good discharge in respect of any claim which is or may be made by the mortgagor or by any person claiming through him or deriving title from him after the date of the mortgage. The section of the Conveyancing Act in question is not confined in its application to mortgages by deed, and it is submitted that it is equally applicable to a mortgage by an instrument under hand only (*u*). It has also been suggested that it is applicable to mortgages by deposit (*x*). It is submitted, however, that in the case of mortgages by deposit and any other purely equitable mortgage that is where, owing to the want of a written assignment or otherwise, the right to sue in law has not passed to the mortgagee under the Policies of Assurance Act, 1867, it would not be safe for an insurance company to pay the mortgagee on his sole receipt. The practice of making such payments would be contrary to the general rule that a discharge from the person entitled to sue in law should always be obtained, and it is submitted that the Conveyancing Act is not so clear in its terms as to justify the grave course of departing from that rule. It may well be open to question whether a merely equitable mortgagee would ever be able to give a valid discharge beyond the amount of the debt owing to him and charged on the policy at the time of payment. He is only an equitable assignee of the chose in action to that amount. If the whole debt has been paid off he no longer holds the policy as mortgagee, but is merely in possession of the document as bailee, and has no claim either legal or equitable to the chose in action, and it is difficult to conceive that the effect of the Conveyancing Act is to enable such a person to give a complete discharge for the whole policy moneys.

Mortgage not under seal.

Mortgage by deposit.

Where property has been mortgaged to more than one person jointly or to secure a sum expressed to be advanced from money belonging to them on a joint account, a good discharge may be obtained from the survivor or survivors alone in the event of one or more having died, and there is no necessity to obtain any receipt or discharge from the representatives of those who have predeceased.

Mortgage to two or more mortgagees on joint account.

(*u*) This, however, has been doubted; Wolstenholme's Conveyancing and Settled Land Act (9th edition, p. 81).

(*x*) Article by Mr. A. R. Barrand, *supra*.

Conveyancing and Law of Property Act, 1881, sec. 61

61.—(1) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account. 44 & 45 Vict. c. 41, sec. 61.

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

When a mortgage is expressed as indicated in section 61 (1) payment of the mortgage money to one of the mortgagees during the life of the others is a good discharge of the debt at law, but it only discharges the security to the extent of the payee's beneficial interest even although the payee ultimately becomes the survivor on the joint account (*y*). It follows that during the lifetime of several joint mortgagees an insurance company can only get a good discharge for the policy moneys upon the receipt of all of them.

When a mortgage to two or more persons is not expressed as indicated in section 61 (1) the mortgagees are entitled to the policy moneys as tenants in common and not jointly (*z*). It is therefore necessary to get a discharge from each mortgagee and from the representatives of any who have died.

Company not bound to pay mortgagee more than amount of his debt.

Whether or not the receipt of a mortgagee would in law be a sufficient discharge to an insurance company, they are not necessarily bound to pay the whole insurance moneys to him, and when they have notice that the mortgagor or persons claiming through him are in equity entitled to the whole or any part of the insurance moneys they are entitled to distribute it among them according to their equitable rights. In a case where a mortgage

(*y*) *Powell* v. *Brodhurst*, [1901] 2 Ch. 160.

(*z*) *Jackson, In re* (1887), 34 Ch. D. 732.

of a share in certain trust moneys contained a receipt clause, giving the mortgagee the fullest power of receiving the money and giving discharges, it was held by the Court of Appeal that the trustees were not bound to pay the whole fund to the mortgagee, but were entitled to distribute it among the persons equitably entitled to it (*a*).

Where there is doubt as to the equitable claims company may pay into Court.

If there is any reasonable doubt at all as to the ultimate distribution in equity of policy moneys between the mortgagee and the mortgagor, or persons interested in the equity of redemption as second mortgagees or otherwise, the company may pay it into Court, and notwithstanding the fact that the mortgagee could have given a complete discharge under the Conveyancing Act, the company will not be rendered liable to the costs of subsequent proceedings (*b*), although if a mortgagor or other person was to make a claim adverse to the mortgagee which, on the face of it was absolutely untenable and nevertheless the company paid into Court, they might be rendered liable in costs (*c*).

In action by mortgagee Court may dispense with appointment of legal representatives of mortgagor.

Where the mortgagee has not the right to sue in law and it is therefore necessary or at least advisable for the company to obtain a legal discharge from the mortgagor or his representatives and the mortgagor is dead and no personal representatives have been appointed, the company may either pay into Court or retain the money. If they take the latter course and an action is brought against them by the mortgagee, the Court may, if satisfied that the mortgagee's debt exceeds the amount of the insurance money, order that the appointment of personal representatives be dispensed with, and give the mortgagee judgment against the company for the money without interest, and subject to the deduction by the company of their taxed costs in the action (*d*).

Mortgagee's right to receive and give discharge for bonus.

Where a bonus declared on a mortgaged policy is payable in cash, the mortgagee's right to receive it and ability to give a complete discharge is the same as his right to receive and give a discharge for the principal policy moneys, that is to say he cannot compel payment except to the amount of his debt charged on the policy, but he can give a complete discharge for the whole bonus if the mortgage was constituted by an assignment passing the right

(*a*) *Bell, In re, Jeffery* v. *Sayles*, [1896] 1 Ch. 1.

(*b*) *Hockey* v. *Western*, [1898] 1 Ch. 350.

(*c*) *Desborough* v. *Harris* (1855), 5 De G. M. & G. 439.

(*d*) *Curtius* v. *Caledonian Fire and Life* (1881), 19 Ch. D. 534; *Crossley* v. *City of Glasgow Life* (1876), 4 Ch. D. 421; *Webster* v. *British Empire Mutual* (1880), 15 Ch. D. 169.

to sue at law under the Act of 1867. Where a bonus is declared as an addition to the principal policy moneys payment can only be obtained, before the policy falls in, by surrendering it to the company for its surrender value. This is in effect a sale of part of the policy and the mortgagee can only surrender the bonus if he has a power of sale (*e*). In practice the companies usually insist upon the mortgagor's consent.

When mortgagee is declared a trustee for the mortgagor.

Where a security is in the form of a trust, and a policy is assigned by a debtor to his creditor in trust to receive the policy moneys and to pay off the debt and expenses, and as to the balance in trust for the debtor, a company liable on the policy may, subject to any question as to the validity of the document creating the trust, pay the creditor without regard to any question between him and the debtor, or to any claims by persons having assignments or charges on the policy created subsequently to the creation of the trust. All these must come in as beneficiaries under the trust, and the company has no concern with them (*f*). Probably in a clear case of a trust created in favour of a creditor the company would not be entitled to pay into Court, and if they did so the creditor would be entitled to costs against them on an application by him for payment out.

Transferee of mortgage takes subject to account between mortgagor and mortgagee.

A submortgagee or transferee of a mortgage takes subject to the actual state of account between mortgagor and mortgagee at the date of the submortgage or transfer, and therefore if as between mortgagor and mortgagee the mortgage has been paid off the submortgagee or transferee has no right to the property against the mortgagor notwithstanding he took for value and without notice that the debt had been discharged (*g*). Similarly, if the mortgage has been paid off in part he can only hold the property against the mortgagor as security for the balance (*h*).

Where mortgagor never received money acknowledged.

But if a mortgage deed acknowledges the receipt of a certain sum by the mortgagor in respect of which the property is mortgaged, the mortgagor cannot afterwards allege as against a transferee for value and without notice that he, in fact, received only

(*e*) Article by Mr. A. R. Barrand in Journal of the Institute of Actuaries, vol. xxxiii. p. 214. *Vide supra*, p. 502.

(*f*) *Curtin* v. *Jellicoe* (1863), 13 Ir. Ch. R. 180. *Vide supra*, p. 410.

(*g*) *Turner* v. *Smith*, [1901] 1 Ch. 213.

(*h*) *Matthews* v. *Wallwyn* (1798), 4 Ves. 118.

a smaller sum and that he is entitled to redeem on payment of that smaller sum (*i*).

Notice of transfer to mortgagor and company.

A submortgagee or transferee ought to give notice to the company in order to acquire or preserve priority, but he ought also to give notice to the mortgagor because if he does not, and the mortgagor, without notice, pays off the whole or part of the debt due to the mortgagee, the submortgagee or transferee cannot hold the security against him for more than the balance, if any (*k*). The fact that the mortgagee was no longer in possession of the policy or mortgage deed might be constructive notice to the mortgagor of the submortgage, but the mortgagor might, under certain circumstances, be justified in paying off the whole or part of the debt without calling for production of the documents, and therefore express notice ought always to be given.

Right of transferee to exercise power of sale.

A transferee of a mortgage is a mortgagee within the meaning of section 2 (vi) of the Conveyancing Act, 1881, and is therefore entitled to exercise the statutory power of sale where the mortgage is by deed. But a transferee of a mortgage cannot exercise an express power of sale contained in the mortgage where the power is reserved to the mortgagee and no mention is made of his assigns (*l*).

Title of mortgagor after debt discharged.

When the whole debt upon a mortgage has been discharged, the question arises whether it is safe for an insurance company to pay the mortgagor without insisting upon a formal reconveyance of the policy from the mortgagee. This depends on the form of the mortgage. If the mortgage was by deposit or otherwise purely equitable, as in the case of a second mortgage, and the right to sue at law under the Policies of Assurance Act, 1867, never passed to the mortgagee, the company can safely pay, on production of the mortgagee's receipt or other satisfactory evidence that the whole moneys charged on the policy have been repaid, and no formal reconveyance or discharge from the mortgagee is necessary. If the mortgage was formal (not necessarily by deed) and passed the right to sue at law to the mortgagee, the right to sue at law will not revert to the mortgagor unless there has been a reassignment in writing to satisfy the Policies of Assurance Act. A mere receipt

(*i*) *Bickerton* v. *Walker* (1885), 31 Ch. D. 151.
(*k*) *Jones* v. *Gibbons* (1804), 9 Ves. 407.
(*l*) *Rumney and Smith, In re*, [1897] 2 Ch. 351.

for the repayment of the mortgage money indorsed on the mortgage would not be sufficient. There ought to be a specific reconveyance of the policy either by indorsement on the mortgage or by a separate instrument. If the matter is to be strictly in order, the company should insist upon having this before paying the mortgagor or any person claiming through him. It has been suggested that when the mortgage is by deed a reconveyance by deed is necessary to revest the legal chose in action in the mortgagor, but it is submitted that that is not so. As any written assignment is sufficient to pass the legal right to sue and the right in equity has already revested on repayment of the debt, it is difficult to appreciate why in any case, a reconveyance by deed should be necessary (*m*). Apparently the practice of some companies is to disregard the strictly legal aspect of the case and to pay any mortgagor upon satisfactory evidence that the mortgage debt has been paid off (*n*). It may be that experience justifies this practice, but at the same time it should be pointed out that a company must always run some risk in making a payment without getting a discharge from the person entitled to sue at law (*o*).

Right of surety to securities.

A surety is entitled to the benefit of all the securities held by the principal creditor at the time when the surety is called upon to pay and pays off the debt. He is entitled to insist upon the principal creditor retaining all securities, which he held at the time the contract of suretyship was made, and if the creditor releases any security without the consent of the surety, the latter is discharged from his liability as surety. If the creditor takes additional security after the date when the contract of suretyship was made, the surety cannot insist upon his retaining that additional security, but if the surety pays off the debt he is entitled

(*m*) Mr. A. R. Barrand, in his article in the Journal of the Institute of Actuaries, vol. xli. p. 149, says: "The general rule, at any rate of English law, is that where property has been assigned by deed and it is desired to cancel the operation of that deed a re-assignment should be executed in the same form." He suggests that in accordance with that rule a reconveyance of property mortgaged should be in the same form as the mortgage, but the rule is not really applicable because it is not a question of cancelling the operation of the mortgage deed, but merely of revesting a legal title in the mortgagor after the mortgage deed has fulfilled its function.

(*n*) Article by Mr. T. B. Sprague, Journal of the Institute of Actuaries, vol. xxxiii. p. 387.

(*o*) *Bickerton* v. *Walker* (1885), 31 Ch. D. 151.

to the benefit of such additional security if it is still held by the creditor (*p*).

Surrender by surety of his right.

A surety can only be deprived of the benefit of the creditor's securities if he has deliberately surrendered them. Where a surety took an express covenant from the debtor for an indemnity and security upon certain specified property, it was held that he did not thereby surrender his right to the benefit of a policy of insurance which, unknown to him, the debtor had deposited as additional security for the debt paid off by the surety (*q*). If, knowing that the creditor held several securities, he elected to take a covenant from the debtor in respect of one only, that might be held to be a surrender of the others.

Mortgagee cannot tack or consolidate against surety.

The creditor's duty to the surety is to preserve the securities intact for his benefit in case he should pay off the debt, and therefore he cannot, after the date on which the contract of suretyship was made, diminish the value of the security to the surety by consolidating or tacking other debts (*r*), except perhaps where the other debt existed and was known to the surety at the time he became surety, or where it was subsequently charged upon the security with the surety's knowledge and consent (*s*).

Mortgagee's unsecured debts.

It is obvious that an unsecured debt existing at the time the contract of suretyship was made, in respect of a secured debt cannot be tacked to the security to the prejudice of the surety, notwithstanding that he knew of the existence of the unsecured debt (*t*).

Person becoming liable as principal for mortgagee's debt not entitled to securities.

When a person who undertakes the payment of another's debt becomes, as between himself and the creditor, a principal and not a surety he is not entitled to the rights of a surety in respect of the creditor's securities notwithstanding that he may, as between himself and the original debtor, have a right of indemnity and a charge against his property (*u*). As against such a person the creditor is entitled to tack or consolidate to the same extent as he has that right against the original debtor (*x*).

Right of surety to

A surety in respect of one of several debts secured upon

(*p*) *Newton* v. *Chorlton* (1853), 10 Hare, 646; *Nicholas* v. *Ridley*, [1904] 1 Ch. 192, 211.

(*q*) *Lake* v. *Brutton* (1856), 8 De G. M. & G. 440.

(*r*) *Forbes* v. *Jackson* (1882), 19 Ch. D. 615.

(*s*) *Farebrother* v. *Wodehouse* (1857), 23 Beav. 18; *Nicholas* v. *Ridley*, [1904] 1 Ch. 192.

(*t*) *Jeffrey's Policy, In re* (1872), 20 W. R. 857.

(*u*) *Nicholas* v. *Ridley*, [1904] 1 Ch. 192.

(*x*) *Duncan, Fox and Co.* v. *North and South Wales Bank* (1880), 6 A. C. 1; *Toogood's Legacy* (1889), 61 L. T. 19.

different properties is entitled, upon paying the creditor, to have the creditor's claims marshalled so as to throw (as far as the creditor himself would have the right to do so) the least burden upon the property in respect of which the surety has made his payment.

compel creditor to marshal.

Heyman v. Dubois (1871), L. R. 13 Eq. 158

Heyman v. *Dubois.*

A effected three policies of insurance on his own life and mortgaged them successively to the office as security for loans. Policy 1, for £2000, was mortgaged for £1000; Policy 2 for £1000 was mortgaged for £500; and Policy 3 for £1000 was mortgaged with Policy 1 for £1500. B became surety in respect of this last debt. A became bankrupt, and the company recovered judgment against B for £1500, which was satisfied to the extent of about £1000. On the death of A, Policy 3 had lapsed, and only 1 and 2 became payable. Out of the £3000 the company satisfied the remainder of their debt and interest, and there was a balance of £800. About one-half of this was the balance on Policy No. 2, and the assignee in bankruptcy contended that B had no right to a charge upon that balance as Policy No. 2 was not held as security for the debt which he had been compelled to pay. It was held that as the company as mortgagees would have had the right to consolidate the securities and retain their debt out of either policy, the surety who had paid one debt was entitled to have the securities marshalled accordingly, and to have the whole balance applied to reimburse what he had paid. It will be noticed that the right of the surety here depended on the right of the mortgagee to consolidate, and in a similar case to-day if the right of consolidation was extinguished by the Conveyancing Act, 1881, the surety would have no right as against the assignee to marshal, but would have to be satisfied with the balance on Policy 1, and as to the rest would have to prove in the bankruptcy.

A surety becoming entitled to the creditor's securities may foreclose in default of payment.

Surety's right to foreclose.

Parker v. Marquess of Anglesea (1871), 25 L. T. 482

Parker v. *Marquess of Anglesea.*

A was indebted to B for £3000, and C was surety to the extent of £2000. A insured his life for £3000, and delivered the policy to B. B called upon C to pay, and he paid £2000, thereby becoming entitled to the security of the policy to that extent. A having failed to pay the premiums, B and C agreed that they should pay them in the proportion of two-thirds and one-third, and should be entitled to the proceeds of the policy in the same proportion. After some time C declined to pay further premiums, and B paid the whole. In a foreclosure action it was held that B was entitled to foreclose against C in default of payment of the arrears of his share of the premium and against A's assignee in default of payment of the debt remaining due.

A general power of attorney, given by a person going abroad, has been held to be sufficient authority to the attorney to

Power of attorney gives authority to

mortgage life policies.

raise money on behalf of such person by mortgaging his life policies (*y*).

Charge on policy enforceable although debt barred by Statutes of Limitations.

Where a policy has been charged with a debt, the charge may still be enforced and payment had out of the policy moneys, although action on the debt itself is barred by the Statutes of Limitations (*z*).

Section VIII.—Trustees and Settled Policies

Power of trustees to give a discharge for policy moneys.

Formerly a person liable to pay money to a trustee was under an obligation to the *cestui que trust* to see that the trust was performed except (1) where the trustee had express power to give receipts in full discharge ; (2) where such power might be implied from the fact that the trust was for the benefit of infants or persons unascertainable, or for a general purpose, such as the payment of all debts. Trustees have now a statutory power to give a complete discharge and to settle or compromise claims on behalf of the estate.

Trustee Act, 1893, secs. 20, 21, and 50

56 & 57 Vict. c. 53, secs. 20, 21, and 50.

Power of trustee to give receipts.

20.—(1) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section applies to trusts created either before or after the commencement of this Act.

Power for executors and trustees to compound, &c.

21.—(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(*y*) *Perry* v. *Holt* (1860), 6 Jur. (N. S.) 661.

(*z*) *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

* * * * * *

50. In this Act, unless the context otherwise requires,— Definitions.

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

Payment to trustees who have the legal chose in action.

Where trustees appear to have acquired the legal chose in action, that is the right to sue for the policy moneys in their own names, the only obligation of the company is to inquire into the validity of the settlement and the title of the trustees, and if satisfied that the settlement is unimpeachable and that the trustees making the claim have been properly appointed and invested with the legal chose in action, the company may safely pay the policy moneys to them, notwithstanding objections made by beneficiaries, or by purchasers or incumbrancers taking from the settlor after the creation of the trust. The company would not be justified in paying the money into Court merely on account of conflicting claims of beneficiaries who do not dispute the validity of the settlement or the title of the trustees.

Payment to trustees who have only an equitable title.

Where there is a trust, but without a complete assignment of the legal chose in action to the trustees, the company ought to obtain a discharge from the trustees and also from the person or persons entitled to the legal chose in action, and if that cannot be obtained they ought to pay into Court.

Payment of surrender value to trustees.

Persons paying money to trustees with knowledge that the trustees were going to apply it in breach of trust, would not be discharged by the receipt of the trustees, and in the case of trustees applying for the surrender of a policy or for the application of a bonus in a particular way the company must, before complying with the request, satisfy themselves that the trustees have power under the trust, or by order of the Court, to deal with the policy in the manner proposed (*a*).

Payment to agent for trustees.

Under section 17 of the Trustee Act, 1893, a company may safely pay policy moneys to a solicitor or banker as agent for the trustees upon such agent producing the policy with the receipt

(*a*) Article by Mr. A. R. Barrand in the Journal of the Institute of Actuaries, vol. xxxiii. p. 220. *Infra*, p. 533.

of the trustees, and no further authority or mandate from the trustees need be produced (*aa*). Speaking generally, trustees have no power to authorise either one of their own number, or any other person not being a banker or solicitor, to accept policy moneys on their behalf (*b*). Payment must therefore be made either to all the trustees personally, or in accordance with the provisions of the Trustee Act.

Trustee Act, 1893, sec. 17

56 & 57 Vict. c. 53, sec. 17. Power to authorise receipt of money by banker or solicitor.

44 & 45 Vict. c. 41.

17.—(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4) This section applies only where the money or valuable consideration or property is received after the twenty-fourth day of December one thousand eight hundred and eighty-eight (*c*).

(5) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

Payment of policy moneys directly to beneficiary under a trust.

Even where all the beneficiaries of a trust are ascertainable and are of full age and otherwise *sui juris*, the company cannot with safety make a direct payment on the receipt of such beneficiaries without a discharge from the trustees who have the legal

(*aa*) See *Hetting and Merton's Contract, In re*, [1893] 3 Ch. 269.

(*b*) *Flower, In re* (1884), 27 Ch. D. 592.

(*c*) This section re-enacts Trustee Act, 1882 (51 & 52 Vict. c. 59), sec. 2, which first gave the authority in question.

title. It is impossible for the company to know whether or not a beneficiary has charged or assigned his interest in the trust, and if he had done so the person entitled under the charge or assignment would be in a position to enforce payment against the company in the name of the trustees, and the company would have no defence even although they had paid the original beneficiary without any notice of the charge or assignment.

Title of trustees, appointment of new trustees and vesting of trust property.

A company before making payment to trustees ought to satisfy themselves that the trustees making the claim and giving the receipt have been regularly appointed, and that the legal chose in action has duly vested in them. New trustees may be appointed either (a) by the person or persons nominated for that purpose in the trust deed, or (b) by the surviving trustees or the personal representatives of the last surviving trustee in accordance with section 10 (1) of the Trustee Act, 1893, or (c) by the Court. When a new trustee is appointed by a person entitled to appoint, the deed of appointment should contain a declaration by the appointor to the effect that the trust property shall vest in the new trustees, and when the deed contains such declaration no further conveyance or assignment is necessary in order to vest the legal chose in action in the case of a policy. A similar declaration in a deed of retirement of a trustee operates in a similar way to vest the title to a policy in the continuing trustees.

Trustee Act, 1893, secs. 10, 11, 12

56 & 57 Vict. c. 53, secs. 10, 11, 12.

Power of appointing new trustees.

10.—(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

(2) On the appointment of a new trustee for the whole or any part of trust property—

(*a*) the number of trustees may be increased; and

(*b*) a separate set of trustees may be appointed for any part of the trust

property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

(*c*) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(*d*) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6) This section applies to trusts created either before or after the commencement of this Act.

Retirement of trustee.

11.—(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired form the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This section applies to trusts created either before or after the commencement of this Act.

Vesting of trust property in new or

12.—(1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate

or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right. continuing trustees.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

Appointment of trustees by Court and vesting orders.

When a trustee is appointed by the Court, a vesting order is commonly made whereby the legal chose in action in the case of a policy passes to the new trustee.

Where a trustee is incapable or refuses or neglects to enforce a chose in action, the Court may make a vesting order enabling some other person or persons to enforce it for the benefit of the trust.

The above powers are exercisable by the High Court or by the Palatine Courts of Lancaster and Durham in matters arising within their jurisdiction. When the value of the trust estate is less than £500 they may be exercised by a county court judge.

Trustee Act, 1893, secs. 25, 35, 37, 46, and 48

[56 & 57 Vict. c. 53, secs. 25, 35, 37, 46, and 48.

Power of the Court to appoint new trustees.

25.—(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

(2) An order under this section, and any consequential vesting order or

conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this section shall give power to appoint an executor or administrator.

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Vesting orders as to stock and choses in action.

35.—(1) In any of the following cases, namely :—

(i) Where the High Court appoints or has appointed a new trustee; and

(ii) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(*a*) is an infant, or

(*b*) is out of the jurisdiction of the High Court, or

(*c*) cannot be found; or

(*d*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

(*e*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

Provided that—

(*a*) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(*b*) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

(2) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The High Court may make declarations and give directions concerning

the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

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Powers of new trustee appointed by Court.

37. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

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Jurisdiction of palatine and county courts.

46. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

* * * * * *

Trust estates not affected by trustee becoming a convict.

33 & 34 Vict. c. 23.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

County Courts Act, 1888, sec. 67

51 & 52 Vict. c. 43, sec. 67. Jurisdiction in equity.

67. The Court shall have and exercise all the powers and authority of the High Court in the actions and matters hereinafter mentioned; (that is to say)

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(5) Under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of five hundred pounds.

Inherent jurisdiction of High Court.

Independently of the Trustee Act the High Court has inherent jurisdiction to appoint a trustee or trustees when it is expedient to do so (*b*). The County Court has no such jurisdiction and cannot therefore appoint a trustee or trustees except in cases to which the Trustee Act applies.

Liability for estate duty on settled policy.

When a policy is settled so that the legal interest is vested in the trustees of the settlement and therefore does not pass to the assured's legal representatives on his death, the company may

(*b*) *Dodkin* v. *Brunt* (1688), L. R. 6 Eq. 580.

become liable to pay the estate duty. The following statutory provisions must be considered.

Finance Act, 1894, secs. 1, 2 (1) (3), 3 (1), 8 (4), 9 (1)

57 & 58 Vict. c. 30, secs. 1, 2 (1) (3), 3 (1), 8 (4), 9 (1). Grant of Estate duty.

1. In the case of every person dying after the commencement of this Part of this Act there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called "Estate duty," at the graduated rates hereinafter mentioned . . .

What property deemed to pass.

2.—(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say :—

(*a*) Property of which the deceased was at his death competent to dispose.

(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office or recipient of the benefits of a charity, or as a corporation sole.

(*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if these sections were herein enacted and extended to real property as well as personal property and the words "voluntary" and "voluntarily" and a reference to a volunteer were omitted therefrom.

(*d*) Any annuity or other interest purchased or provided by the deceased either by himself alone, or in concert, or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship, or otherwise on the death of the deceased.

* * * * * *

(3) Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person under a disposition not made by the deceased or under a disposition made by the deceased more than six months before his death, where possession and enjoyment of the property was *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise.

Exception for transactions for money consideration.

3.—(1) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes. . . .

* * * * * *

Supplemental provisions as to collection.

8.—(4) Where property passes on the death of the deceased and his executor (*c*), is not accountable for the Estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also to the extent of the property actually received or disposed of by him every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested . . . shall be accountable for the Estate duty . . .

9.—(1) A rateable part of the Estate duty on an estate in proportion to the value of any property which does not pass to the executor (c), as such shall be a first charge on the property in respect of which duty is leviable, provided that the property shall not be so chargeable as against a *bonâ fide* purchaser thereof for valuable consideration without notice.

Charge of Estate duty on property.

Customs and Inland Revenue Act, 1881, sec. 38, amended by Customs and Inland Revenue Act, 1889, sec. 11

38.—(2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz. :—

44 Vict. c. 12, sec. 38. 52 Vict. c. 7, sec. 11.

(*a*) Any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June, one thousand eight hundred and eighty-one, or taken under a *voluntary* disposition made by any person so dying purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made twelve months before the death of the deceased, and property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immmediately on the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

* * * * * *

(*c*) Any property passing under any past or future *voluntary* settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the interest in such property.

The charge under this section shall extend to money received under a policy of assurance effected by any person dying on or after the first day of June, one thousand eight hundred and eighty-nine, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him for such benefit.

When estate duty is payable on settled policy.

It will be noticed that the adoption here of the method of legislating by reference has caused a considerable overlapping of the taxing enactments, and that section 2 (c) of the Act of 1894, by incorporating property previously subject to account duty, brings under taxation indirectly a good deal of what is brought under taxation directly by section 2 (b) and (d), and many of the limitations contained in the provisions of the incorporated sections of the Customs and Inland Revenue Acts, 1881 and 1889, are taken

(c) The expression "executor" means the executor or administrator of a deceased person (Finance Act, 1894, s. 22 (1) (d)).

away by reason of the wider provisions in section 2 (b) and (d). This is particularly noticeable in the case of settled policies. These were chargeable with account and succession duty under the earlier Acts, in so far as the settlor reserved an interest to himself or in so far as he kept up the policy for the benefit of a donee. If the assured settled his policy and reserved no interest to himself and did not keep it up after the date of the settlement, it was not liable to account and succession duty even to the extent of premiums paid by him before the date of the settlement (*d*). Nor was the policy liable to account and succession duty when the settlement was made for valuable consideration and kept up by the settlor in favour of a purchaser (*e*). Section 2 (d) of the Finance Act, 1894, removes these limitations. A policy of insurance is an interest within the meaning of that subsection, and every life policy is chargeable with estate duty to the full amount of the policy moneys if it was purchased or provided by the assured either by himself alone or in concert or by arrangement with any other person, and settled so as to create a beneficial interest accruing on the death of the assured. The fact that the settlement was made for good or valuable consideration, or that the policy has not been kept up by the assured does not affect the liability to pay estate duty.

Attorney-General v. Dobree, [1900] 1 Q. B. 442

A.-G. v. *Dobree.*

In this case the deceased shortly before his marriage effected a policy of insurance on his own life payable on his death to his intended wife. By his marriage settlement the deceased assigned the policy to the trustees of the settlement, and covenanted to pay the premiums during his life. He paid the premiums in accordance with the covenant and on his death the company paid the money to the trustees. The Crown claimed estate duty from the trustees on the ground that the whole policy moneys must by reason of the Finance Act, 1894, section 2 (1) (d) be deemed to be property passing on death. It was held that the policy was an interest purchased or provided by the deceased, within the meaning of the subsection, and that it was not "property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes" within the meaning of the exception in section 3, and that it was therefore chargeable.

Attorney-General v. Hawkins, [1901] 1 Q. B. 285

A.-G. v. *Hawkins.*

The deceased was entitled to three policies of insurance on his own life for £69,500. He was tenant for life, and his son was tenant in tail, of settled

(*d*) *The Lord Advocate* v. *Fleming*, [1897] A. C. 145. This case was on a question of succession and account duty arising in respect of a death in 1890, and involves no decision on the effect of the Finance Act, 1894.

(*e*) *The Lord Advocate* v. *Earl of Fife* (1883), 11 R. 222.

land. By arrangement with his son a disentailing deed was executed and the fee was mortgaged to secure a loan of £70,000 to meet the deceased's debts. The deceased assigned to the trustees of a deed of family arrangement the policies of insurance and his life interest in trust to pay out of the life interest the premiums on the policy and interest on the loan, and after deducting expenses to pay two-thirds of the surplus income to the deceased and one-third to the son, and in trust as to the policy moneys to hold them for the son. The Court of Appeal held that the policies were "an interest purchased or provided by the deceased." There was no assignment of the policies to the son, but an arrangement by virtue of which an interest accrued to the son on the death of the deceased.

Attorney-General v. Robinson, [1901] 2 I. R. 67

A.-G. v. *Robinson.*

By the settlement upon the marriage of the deceased four policies of insurance effected by him upon his life, and certain moneys of his intended wife were assigned to trustees upon trust as to the moneys secured by the policies (when received) to pay the income thereof to the wife for life, and after her death as to the principal moneys for the children of the marriage, and the trusts of the intended wife's moneys were to apply after the marriage so much of the income thereof as might be necessary to pay the premiums on the policies, and to pay the residue thereof to the deceased for life, and after his death to his intended wife for life, and then to the children absolutely. The policies were kept up in accordance with the settlement out of the income of the moneys provided by the wife. The wife predeceased the husband, and upon the death of the latter the children became entitled to the policy moneys in possession. The Crown claimed estate duty. It was held that the moneys were liable to estate duty. The policies were not kept up by the deceased, and were therefore not chargeable under the Finance Act, 1894, section 2 (c), but they were chargeable as an interest provided by the deceased within the meaning of section 2 (d) of the same Act.

Policies assigned to purchaser.

Although section 2 (d) of the Finance Act, 1894, brings under taxation policies which are settled upon good or valuable consideration, it does not bring in policies which are assigned to a purchaser for full consideration in money or money's worth, even although the assignment may form part of what is called a family arrangement.

Lethbridge v. Attorney-General, [1907] A. C. 19

Lethbridge v. *A.-G.*

The deceased effected fifteen policies on his own life, and after maintaining them for some time assigned them to his son under a series of family arrangements necessitated by financial difficulties. The deceased was tenant for life and the son tenant in tail in remainder of the family estates and these were disentailed and re-settled; the fee was mortgaged by the father and son to secure a loan to pay off the father's debts. The policies were assigned to the son, together with a portion of the rents and profits of the estate sufficient to pay the premiums and an annuity during the joint lives of father and son. The House of Lords held that the son had given full value for the policies, and

the annual premiums paid to keep them up. The son was a purchaser of the policies for money's worth, and they were not kept up by the father. The general purpose of the subsection 2 (d) was to prevent a man escaping estate duty by subtracting from his means, during his life, moneys or money's worth which when he dies are to reappear in the form of a beneficial interest accruing or arising on his death; but it is not subtracting from his means if the deceased has received a full equivalent in return for whatever he has laid out. The father neither purchased nor provided anything because he was compensated in full for what he had expended on the policies. There was an absolute assignment to the son at the date of the arrangement, and in this respect the case was quite different from Hawkins' case, in which there was a settlement in the name of trustees under which an interest accrued at the death of the deceased.

Estate duty on policies made without interest.

Estate duty is chargeable on a settled policy even although the policy is illegal for want of interest. If the insurance company have paid the policy moneys the trustees or beneficiaries cannot, as against the Crown, set up the defence that it was an illegal and void policy.

Policy purchased or provided by some one other than deceased.

Estate duty is not chargeable under the Finance Act, 1894, section 2 (1) (d), when the settled policy was wholly purchased or provided by some one other than the deceased.

Attorney-General v. Murray, [1904] 1 K. B. 165

A.-G. v. *Murray.*

The father of the deceased effected a policy of insurance upon the deceased's life. The deceased was then eleven years of age, and the policy was in the father's name as assured. It was payable on the deceased's death at any time after he attained the age of twenty-one, and was granted in consideration of the payment of ten annual premiums. The father paid all the premiums. On the deceased's marriage the policy was settled on the trusts of a marriage settlement to which the deceased and his father were both parties, the deceased bringing into settlement some of his own property. The Crown claimed estate duty on the policy moneys which were paid to the trustees on the death of the deceased. The Court of Appeal held (1) that the fact that the policy was effected by the father without an insurable interest in the life of his son was not material as it could not affect the liability to estate duty if the moneys were in fact paid, (2) that the policy was an interest, but that it was not purchased or provided by the deceased either alone or in concert or by arrangement with another person.

Liability of insurance company to pay estate duty on settled policies.

Under section 9 (1) of the Finance Act, 1894, the commissioners might insist on the insurance companies paying the estate duty on policies which have been settled by the assured, and which do not pass to his executors as such. Under that section the estate duty is a first charge on the property. Apparently the commissioners do not in practice charge the companies on these policies, but charge the trustees under section 8 (4). The liability of the

companies to pay the duty ought, however, to be kept in mind, and it forms an additional reason for the company making payment in every case to the trustee or trustees of a settlement, and not directly to the beneficiaries. If the company paid the beneficiaries the commissioners would probably charge the company with the estate duty.

Settled policies and covenants to insure.

A settlor who has covenanted with trustees to insure his life is liable for breach of the covenant if the insurance companies refuse to insure (*f*). The covenant is *primâ facie* absolute and not conditional on the offices accepting him as a good life (*f*).

Whether life policy falls within covenant to settle *acquirenda*.

A life policy effected by a settlor may fall within the covenant to bring all *acquirenda* into the settlement. Thus where a husband by ante-nuptial settlement covenanted that if at any time during the marriage he should become possessed of or entitled, by devise, payment or otherwise, to any property or estate, whether real or personal, he would convey or assign his interest therein to the trustees, and thereafter during the marriage insured his life, it was held that he was bound to bring the policy into the settlement as property purchased by him (*g*).

Bonus additions to settled policy,

Where a policy is settled the trustees are *primâ facie* entitled to all bonus additions to the amount of the original policy (*h*).

Gilly v. Burley (1856), 22 Beav. 619

Gilly v. *Burley*.

An ante-nuptial marriage settlement contained a recital that the settlor had agreed to effect an insurance for £2500 in the names of the trustees, and that the same had been effected. The settlor covenanted to pay the premiums, and then followed a declaration of the trusts of the sum of £2500 to become due and payable to the said trustees on the death of the settlor. Contrary to the recital in the deed the policy was in fact issued after the marriage, and in the name of the settlor and not of the trustees. By the rules of the company persons holding policies were entitled to elect as to whether a bonus should be applied (i) by payment to holder, (ii) by reduction of premiums, or (iii) by addition to the insured amount. The settlor allowed the bonus

(*f*) *Arthur, In re* (1880), 14 Ch. D. 603.

(*g*) *Turcan, In re* (1888), 40 Ch. D. 5; *Holland, In re*, [1902] 2 Ch. 360.

(*h*) It is not uncommon for the settlor to reserve bonus additions, and then the question may arise whether, if the settlor has thus reserved part of the chose in action, the trustees acquire any legal chose in action in respect of the remainder (*vide supra*, p. 431).

additions to be added to the insured amount, and on his death it was held that such additions fell to the trustees of the settlement, and not to his personal representatives. The case was to be considered on the footing that the settlor had fulfilled his obligation, and insured in the name of the trustees. The question was whether the intention was to settle the whole policy moneys or to settle only £2500, and assign the policy in security. The Court held the intention was to settle the policy. The settlor might have applied the bonus additions towards payment of his premuims, but he had not done so, and they became part of the policy moneys to which the trustees were entitled.

Courtney v. Ferrers (1827), 1 Sim. 137

Courtney v. *Ferrers.*

A settlor having insured his life in the sum of £3000 assigned to the trustees of his marriage settlement "the policy of assurance, and all sums of money, benefits and advantages to arise, accrue or become due or payable upon or by virtue of it in any manner howsoever." In the events which happened the settlor's daughter became absolutely entitled to the policy, subject only to her father's life interest. On her marriage she assigned to her trustees "all that the sum of £3000 assured by" the policy, and in the event which happened the trust was to assign the trust property to such persons as she might by her will appoint. In her will she bequeathed "£1000 part of the sum of £3000, which, by the settlement made on my marriage my father covenants to keep insured on his life, and which is subject to the trusts of the said settlement" to one legatee and the "remaining £2000" to another legatee. On the death of the father £6000 bonus additions were due upon the policy. The Court held that the daughter's intention was to settle her whole interest in the policy, and by her will to divide the whole proceeds of the policy between the two legatees in the proportion of one-third and two-thirds. The legatees were therefore entitled to the whole £9000 in that proportion.

Parkes v. Bott (1838), 9 Sim. 388

Parkes v. *Bott.*

An ante-nuptial settlement recited that it had been agreed that the intended husband should insure his life in the Rock Insurance Office in the names of the trustees in the sum of £3000, that the dividends of certain shares should be applied in keeping the policy on foot, and that the said sum of £3000 should be settled in manner thereinafter mentioned, and it was declared that the trustees should stand possessed of the policy in trust for the intended husband until the marriage, and that upon the solemnisation thereof they should stand possessed of the said sum of £3000 when received under the policy upon certain trusts for the benefit of the intended wife and children of the marriage. The husband became bankrupt and died. At the time of his death a bonus of £885 had accrued upon the policy. It was held that it belonged to the trustees of the settlement, and not to the assignee in bankruptcy. The intention was to settle the whole policy, and not merely a sum of £3000 secured by it.

Roberts v. Edwards (1863), 9 Jur. N. S. 1219

Roberts v. *Edwards.*

A testator bequeathed "the £2000 insured on my life." There were at the date of the will two policies, £1000 each. Subsequently the testator surrendered one and a bonus of £112 10*s.* was declared on the other. It was held that the bonus passed to the legatee.

A case arising in practice is mentioned by Mr. Barrand (*h*). The settlement provided that any bonus might be applied in reduction of future premiums. The settlor with the concurrence of the trustees asked the company to apply any bonus as it became payable to the payment of the premiums in full until the bonus should be exhausted. The directors were of opinion that they could not safely make such an arrangement because the power to apply a bonus "in reduction of future premiums" meant that it should be applied in reduction of all future premiums *pro ratâ*, and that the company could not be a party to an arrangement not sanctioned by the terms of the settlement. This decision was probably correct. On a liberal construction "reduction of future premiums" might be held to include extinction; but the expression as used in the settlement was apparently a reference to one of the usual options given by practically all offices, that is to say the method of permanent reduction of premiums (*k*).

Application of bonus in reduction of premiums.

Where the settlor is the sole surviving beneficiary in the trust, he may refuse to keep up the policy or to allow the trustee to keep it up, or he may call upon the trustee to assign it according to his direction.

Settlor sole beneficiary.

Godsal v. Webb (1838), 2 Keen 99

A woman on her marriage settled her interest in certain property which was limited to her for her separate use for life. The settlement provided that the trustees should out of the income insure the wife's life, and that they should hold the proceeds of the policy in trust to pay the income to her husband for life, and after his decease to pay them to such person or persons as she should by her will appoint, and in default of such will to her next of kin. The wife survived her husband, and had no issue, and being unwilling to continue the payment of the annual premium she joined with the trustees in a voluntary assignment of the policy to her cousin. The cousin paid the premiums from that date until the wife's death, when the wife's next of kin claimed the policy moneys. It was held that there was no intention to settle the policy for the benefit of the next of kin as against the wife, and on becoming sole beneficiary she was entitled to dispose of it absolutely, and her cousin as assignee was accordingly entitled to the whole proceeds of the policy.

Godsal v. *Webb.*

A settlor may reserve the right to withdraw the policy from the settlement and if he has the right to withdraw it altogether, he

Settlor's right of revocation.

(*h*) Journal of the Institute of Actuaries, vol. xxxiii. p. 220.

(*k*) If the trustees had express power to borrow for the purpose of paying premiums, or had implied power through absence of funds, the difficulty might have been got over by permitting the trustees each year to borrow the annual premium on the security of the bonus (*vide infra*, p. 532).

may incumber it so that it remains in the settlement, but subject to the debts charged upon it. Where a settlor reserved the right to cease payment of the premiums and to sell the policy, and afterwards purported to assign the policy to his bankers in security for advances, and covenanted with them to pay the premiums, it was held that the beneficiaries took subject to the charge in favour of the bank (*l*).

Revocation by will.

Where a settlor reserves the right of revocation in general terms the right may be exercised by a properly executed will, and a disposition of the property to some person other than the beneficiary under the settlement is a sufficient revocation. Where a revocation of the settlement is made by an instrument which is intended to operate on the settlor's death it must be made in the form of a will as provided by the Wills Act, 1837, because it is an appointment by a " writing in the nature of a will in the exercise of a power " within the meaning of section 1 of the Wills Act, and therefore void under section 10 of the same Act unless properly executed as a will (*m*). If the appointment is testamentary in its nature it is not sufficient that it is made with all the formalities indicated by the settlement, it must also comply with the provisions of the Wills Act (*m*).

Settlor's covenant to pay premiums.

Where the settlor covenants to pay the premiums and fails to do so, the trustees may sue him for the premiums paid by them, or if he is insolvent they may prove in his bankruptcy for the value of the covenant to pay future premiums, that value being the amount necessary to purchase a paid-up policy. But where a settlor became bankrupt and the trustees proved for that amount and the proof was allowed, but before payment of a dividend the settlor died and the trustees became entitled to the whole policy moneys, it was held that the proof must be expunged except as to the premiums which the trustees had actually paid (*mm*).

(*l*) *Pedder* v. *Mosely* (1862), 31 Beav. 159. In Scotland a gift from husband to wife is revocable *stante matrimonio* (*Dunlop* v. *Johnston* (1867), L. R. 1 Sc. App. 109). A post-nuptial provision for the wife is irrevocable (*Hay's Trustees* v. *Hay* (1904), 6 F. 978). A voluntary post-nuptial settlement by the husband is therefore revocable in so far as it secures a benefit to the wife during coverture, but irrevocable in so far as it secures a provision for her after the husband's death.

(*m*) *Barnett, In re*, [1908] 1 Ch. 402.

(*mm*) *Miller, In re* (1877), 6 Ch. D. 790.

Where insurance company is wound up.

Where a policy was settled and the settlor covenanted to pay the premiums, but before the settlor's death the insurance company was wound up, it was held that the settlor was under no further obligation to the settlement. The trustees could prove in the winding up for the value of the policy, and the settlor was relieved from payment of further premiums (*n*).

Settlor's liability to keep policy on foot secured by bond.

The settlor's liability to bring a certain sum into the settlement may be secured by the assignment of a policy on his life, and a covenant bond or warrant of attorney to enter judgment against him for the amount but subject to the condition in defeasance that the trustees shall not sue or enter up judgment so long as the settlor punctually pays the premiums and does nothing to invalidate the policy. If the settlor upon such a settlement fails to pay the premiums so that the policy lapses even for one day, the trustees may proceed on the covenant bond or warrant of attorney, and at the same time may themselves pay the overdue premiums and revive the policy as security for satisfaction of their judgment against the settlor.

Winthrop v. Murray (1850), 14 Jur. 302

Winthrop v. *Murray.*

A debtor gave to his creditor a warrant of attorney to enter up judgment for the debt on condition that the creditor should not act upon it so long as the premiums on a policy on the debtor's life were punctually paid, and the debtor allowed the policy to lapse for four days, and the creditor entered up judgment for the debt, the Court refused to stay proceedings on the judgment on the ground that the creditor had afterwards paid the overdue premium, and revived the policy.

Settlor's covenant not to invalidate the policy.

Besides a covenant to pay the premiums a settlement of a policy on the life of the settlor should contain a covenant by him not to do any act or thing by which the policy should be forfeited. The damages for breach of this covenant, as where a settlor went beyond the limits of a life policy without consent of the directors and the policy became void, is not the total amount insured, but the then value of the policy forfeited, and the value of the settlor's covenant to pay future premiums on the policy (*o*).

(*n*) *Garniss* v. *Heinke* (1871), 40 L. J. Ch. 306.

(*o*) *Hawkins* v. *Coulthurst* (1864), 5 B & S. 343.

Vyse v. Wakefield (1840), 6 M. & W. 442

Vyse v. *Wakefield.*

A settlor covenanted to present himself for insurance when required and that thereafter he would not do or permit to be done any act or deed whereby the insurance might be avoided or prejudiced. He was required to undergo examination for insurance, but received no notice that an insurance was effected. In fact a policy was effected on his life subject to the condition that it should be void if he went beyond the limits of Europe. He went beyond the limits of Europe, and this action was brought against him for breach of his covenant. It was held that no action lay in the absence of notice to the settlor that an insurance had been effected, and of the terms and conditions upon which it had been effected.

Dormay v. Borrodaile (1847), 10 Beav. 335

Dormay v. *Borrodaile.*

A life policy was granted on the usual condition that it should be void if the assured "should die by his own hands." The policy was settled and the assured covenanted "to do and perform all such acts, matters and things that should be requisite for continuing and keeping on foot the policy." The assured committed suicide. It was held that there was no breach of the covenant. The positive covenant to do all things necessary to keep the policy on foot, did not include the negative covenant not to do any act which might invalidate the policy. Although the policy was void the estate of the settlor was not liable to the trustees of the settlement.

Trustee's obligation to keep policy on foot.

Trustees are not bound to pay the premiums on a policy unless they have trust funds available for that purpose. If they have such funds they must use them to pay the premiums. If they have no such funds they may pay the premiums from their own pockets or borrow money to pay them, and may charge the money so paid or borrowed on the policy (*s*). A company may therefore on the security of a settled policy advance money to the trustee or trustees to pay the premiums provided the company is satisfied by a statutory declaration or other sufficient evidence that there is an absence of funds and consequent danger of the policy lapsing. Trustees cannot renew the policy for their own benefit. Even although they have renewed entirely at their own expense the policy remains subject to the trust (*t*).

Obligation to enforce settlor's covenants.

The trustees of a settlement are *primâ facie* bound to enforce the covenant of the trust against the settlors, but the beneficiaries cannot hold them liable for failure to do so unless they can show that proceedings against the settlor would have been productive.

(*s*) *Clack* v. *Holland* (1854), 19 Beav. 262, 273, 277; *Todd* v. *Moorhouse* (1874), L. R. 19 Eq. 69; *Leslie, In re* (1883), 23 Ch. D. 552.

(*t*) *Fitzgibbon* v. *Scanlan* (1813), 1 Dow. 261.

Ball v. Ball (1847), 11 Ir. Eq. R. 370

Ball v. *Ball.*

A settlor entered into a covenant to pay £1200 to the settlement, and in security to insure his life for that amount. The settlor did not pay the £1200, or insure his life to that amount, but he did insure his life for £800, and the trustees advanced him £800 from the trust funds, and took an assignment of the policy in security for that advance. On the settlor's death it was held that the trustees might apply the £800 policy to reimburse the trust funds in respect of the advance, and that they were not personally liable for their failure to take proceedings in respect of the £1200 unless it could be shown that the trust would have benefited by such proceedings being taken.

Application to Court to sell policy.

Where the settlor has become unable to pay the premiums, and the trustees have no available funds, they may go to the Court for an order to sell or surrender the policy and to apply the proceeds to the trust purposes after deducting any sums already expended by them in keeping up the policy (*u*). And in a proper case the Court would sanction the surrender of the policy in exchange for a paid-up policy of the amount which the surrender value would then purchase (*x*).

Sale or surrender for maintenance of or advancement to infant beneficiaries.

Where an infant is entitled under a settlement of a life policy to a contingent reversionary interest, and the trustees have powers of maintenance and advancement, they may, with the consent of the Court, surrender to the company any bonus additions to the policy, receiving in exchange the then surrender value of such additions (*y*). And apparently the Court might sanction the surrender or sale of any part of the original sum insured as might be necessary to provide the sum required for maintenance.

Refusal of trustees to keep policy on foot.

Where trustees have declined to undertake the duty of keeping a life policy on foot out of the income of the trust property, the Court may appoint some other person to receive and apply a sufficient portion of the income for this purpose on giving security for the amount of the principal sum insured (*z*).

Apportionment of policy moneys between tenant for life and remaindermen.

Where a policy is settled upon trust for a person for life with remainders over, and the policy moneys do not become payable until some time after the trust has become operative, they must be apportioned as between capital and income by ascertaining the sum which, put out at interest at 3 per cent. per annum on the day when the trust became operative and accumulating at compound

(*u*) *Hill* v. *Trenery* (1857), 23 Beav. 16; *Beresford* v. *Beresford* (1857), 23 Beav. 292; *Vickers* v. *Scott* (1837), 1 Jur. 402; *Steen* v. *Peebles* (1890), 25 L. R. Ir. 544.

(*x*) Bunyon on Life Insurance (2nd edition, p. 205).

(*y*) *Hays, Ex parte* (1849), 3 De G. & Sm. 485.

(*z*) *Vickers* v. *Scott* (1837), 1 Jur. 402; *Wells, In re,* [1903] 1 Ch. 848, 853.

interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced at the day of receipt of the policy moneys the amount actually received, and the sum so ascertained should be treated as capital and the residue as income (*a*). Where the premiums on such a policy have been paid by the trustees out of income the premiums ought to be recouped to the tenant for life with interest at 3 per cent. out of the policy moneys, and the balance should then be divided between capital and income in the manner already indicated (*b*). If the policy was subject to a mortgage and the trustees kept down the interest thereon out of income, such payments must also be recouped to the tenant for life with interest at 3 per cent. before division of the balance (*b*).

Assignment by trustees in breach of trust.

If trustees assign a policy in breach of trust the assignee acquires no title if he knew of the breach. If he did not, the question of priority between a purchaser and the beneficiaries depends on the usual rules of priority of notice to the company. That is to say, if the company had knowledge of the trust the title of the beneficiary must prevail against a subsequent assignment in breach of trust even although made to a *bonâ fide* purchaser for value (*c*).

Where trustees assigned a policy in alleged breach of trust and then assigned the rest of the trust funds to new trustees, it was held that the new trustees had no right to recover the proceeds from the purchaser. If there was any breach of trust the old trustees and the purchaser, unless he took for value and without notice, was liable to account to the beneficiaries but not to the new trustees who had acquired no interest in the policy (*d*).

Life policy as device for accumulation of income beyond period permitted by Thellusson Act.

By means of a settled life policy money may be accumulated beyond the period defined by the Thellusson Act (*e*).

(*a*) *Earl of Chesterfield's Trusts, In re* (1883), 24 Ch. D. 643.
Having regard to the present rate of interest which may be obtained by trustees, 3 per cent. is now the current rule for calculation of interest in all questions relating to trust funds where no statute or rule of Court interferes to prevent it (*Rowlls* v. *Bebb*, [1900] 2 Ch. 107, 117; *Woods, In re*, [1904] 2 Ch. 4).

(*b*) *Morley, In re*, [1895] 2 Ch. 738.

(*c*) *Capell* v. *Winter*, [1907] 2 Ch. 376.

(*d*) *Johnson* v. *Swire* (1861), 3 Giff. 194.

(*e*) 39 & 40 Geo. 3, c. 98.

Thellusson Act, 1800, sec. 1

1. . . . No person or persons shall, after the passing of this Act by any Deed or Deeds, Surrender or Surrenders, Will, Codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such Grantor or Grantors, Settlor or Settlors; or the Term of 21 years from the death of any such Grantor, Settlor, Devisor, or Testator; or during the Minority or respective Minorities of any Person or Persons who shall be living or in *Ventre sa Mère* at the Time of the Death of such Grantor, Devisor, or Testator; or during the Minority or respective Minorities only of any such Person or Persons, who under the user or trusts of the Deed, Surrender, Will, or other Assurances directing such Accumulations, would for the Time being, if of full Age, be entitled unto the Rents, Issues, and Profits or the Interest, Dividends, or Annual Produce so directed to be accumulated; and in every Case where any Accumulation shall be directed otherwise than as aforesaid such Direction shall be null and void, and the Rents, Issues, Profits, and Produce of such Property so directed to be accumulated shall so long as the same shall be directed to be accumulated contrary to the provisions of this Act go to and be received by such Person or Persons as would have been entitled thereto if such Accumulation had not been directed. 39 & 40 Geo. 3, c. 98.

Where a testator having effected policies on the lives of his two sons directed that his trustees should pay the premium during their lives out of the income of his property, it was held that this was not a direction to accumulate income within the meaning of the Thellusson Act (*f*).

Section IX.—Married Women and Settlement Policies

At common law all personal property possessed by a woman at marriage, or coming into her possession during coverture, passed to her husband absolutely as his property; but choses in action belonging to a married woman remained her property subject to the right of her husband (1) to reduce them into possession during coverture by receiving payment or suing in their joint names for their recovery; and (2) to have them as his absolute property in the event of his surviving his wife (*g*). Common law vests wife's property in husband.

This right of the husband to his wife's property was modified by two rules established by the Court of Chancery. Equitable exceptions.

The first equitable rule was that where property was expressly Separate estate.

(*f*) *Bassil* v. *Lister* (1851), 9 Hare, 177.

(*g*) *Purdew* v. *Jackson* (1824), 1 Russ. 1, 43.

granted to a woman for her separate use, the husband could not claim the beneficial enjoyment (*h*). If the legal title was vested in trustees the husband took nothing, and if it was granted to the woman without the intervention of trustees, the husband took the legal title, but held it in trust for his wife's benefit. In either case the wife might freely dispose of the beneficial interest without the concurrence of her husband (*i*). Property purchased by the wife out of her separate estate was deemed to be property limited to her separate use. But property might be settled upon a woman for her separate use without power of anticipation, in which case neither she nor her husband could, during the coverture, dispose of the property or of the prospective income arising from it.

Equity to a settlement.

The second equitable rule which invaded the husband's marital right was that in the case of any equitable chose in action belonging to the wife, that is, where the right was one which had to be enforced in a Court of Equity, such Court would not permit the husband to reduce the wife's chose in action into possession for his own benefit, unless he undertook to make a reasonable provision for his wife out of the property received by him. This was known as the wife's equity to a settlement.

Wife's choses in action at common law.

A policy of insurance being a chose in action of a reversionary nature, the rights of husband and wife at common law over property of this kind belonging to the wife may be briefly stated thus: Unless limited to the wife's separate use, the husband had the right to reduce it into possession and the right of survivorship. A chose in action could not be reduced into possession until it became payable (*k*), and when it did become payable it was not reduced into possession by the husband unless during his lifetime he or his assigns actually received the moneys or brought an action to recover them (*l*). Where during the coverture the husband purported to assign his wife's reversionary chose in action, and the husband survived the person upon whose life the reversion depended, and could have reduced it into possession but died

(*h*) The trust for separate use only operated during coverture, but unless limited to one particular marriage, might revive upon each successive marriage if a woman married more than once (*Hawkes* v. *Hubback* (1870), L. R. 11 Eq. 5).

(*i*) She might so dispose of it by deed *inter vivos* or by will (*Fettiplace* v. *Gorges* (1789), 1 Ves. 48): but if she died without disposing of it, the trust for separate use ceased to operate, and the husband's marital right attached (*Cooper* v. *Macdonald* (1877), 7 Ch. D. 288, 296; *Surman* v. *Wharton*, [1891] 1 Q. B. 491).

(*k*) *Purdew* v. *Jackson* (1824), 1 Russ. 1, 43; *Aitchison* v. *Dixon* (1870), L. R. 10 Eq. 589; *Watson, In re* (1890), 7 Mor. 65.

(*l*) *Ashby* v. *Ashby* (1844), 1 Coll. C. C. 549, 553.

without doing so, his wife, who survived, was entitled absolutely, and the assignment was void against her (*l*). But where during the husband's lifetime the reversion fell in and the moneys were paid to the husband's assignees, that was held to be a sufficient reduction into possession to bind the wife (*m*). The fact that a husband received a bonus or other payment due in respect of a policy belonging to his wife was not a reduction into possession of the whole policy, but only of that part actually received (*n*). If a husband survived his wife, her choses in action passed to him absolutely, although not reduced into possession during the coverture (*o*). If a husband predeceased his wife without having reduced her choses in action into possession, the wife became absolutely entitled to them.

Capacity of husband or wife to dispose of wife's policy.

The result of the law as stated in the preceding paragraph was that at common law a husband could not dispose at all of his wife's policy if granted to her for her separate use or purchased by payment of premiums out of her separate property. In the case of a policy belonging to his wife, but not so granted or purchased, he could dispose of it by sale, mortgage, or settlement; and where the wife was entitled to the policy at law, the disposition would be effective in the event of the husband subsequently reducing the policy into possession during coverture, or surviving his wife, but ineffective in the event of his predeceasing his wife without having reduced the policy into possession. Where the wife was only entitled to the policy in equity, the husband's power of effective disposition was further limited by the wife's equity to a settlement. The wife could by sale, mortgage, or settlement dispose of a policy limited to her separate use but she could not during coverture, either with or without her husband's consent, dispose of or release her right of survivorship or her equity to a settlement in a policy not limited to her separate use. It follows that at common law neither the wife nor the husband nor the spouses jointly could effectively sell, charge, or settle the wife's policy not limited to her separate use so as to bind the wife in the event of her surviving the husband, the policy not having been reduced into possession, or in the event of her being entitled in equity to a settlement (*p*).

(*m*) *Hansen* v. *Miller* (1844), 14 Sim. 22.

(*n*) *Nash* v. *Nash* (1817), 2 Madd. 133.

(*o*) *Harding, In the Goods of* (1872), L. R. 2 P. & D. 394.

(*p*) But where husband and wife jointly assigned or settled a policy the Court would not readily hold that the policy was the wife's property not limited to her separate use (*Winn, In re* (1887), 57 L. T. 382; *Winter* v. *Easum* (1864), 10 Jur. N. S. 759).

Neither could the wife, without the consent of her husband, assign, sell, or release her rights under such a policy so as to affect her husband's right to reduce into possession and right of survivorship (*q*).

Woman's capacity to dispose of her property before marriage or after dissolution of marriage.

An unmarried woman could settle her property, including any reversionary chose in action to which she might at the time be entitled, and therefore she could, in anticipation of marriage, by ante-nuptial settlement made with her prospective husband's consent, effectively dispose of any personal property (*r*). If she was an infant at the time the settlement would be voidable, but not void, and she could ratify it on attaining full age, although then under coverture (*s*). And an oral agreement to settle made by the woman before marriage could be completed after marriage, so as to dispose effectively of her property, including any reversionary chose in action (*t*). But where a married woman, in the absence of any ante-nuptial agreement, purported to dispose of her reversionary chose in action not limited to her separate use, the disposition was void, and mere ratification after her husband's death did not make the disposition valid. An actual disposition by her while discovert was essential (*u*).

Act to enable married women to dispose of reversionary interests.

In 1857 Malins' Act was passed to enable a husband and wife to dispose effectively of the wife's reversionary choses in action, if acquired by her under an instrument (other than her own marriage settlement) made after the commencement of the Act, so as to bind not only the husband in respect of his interest, but the wife in respect of her right of survivorship and equity to a settlement.

Malins' Act, 1857

20 & 21 Vict. c. 57.

Married Women may dispose of Reversionary Interests in Personal Estate, and release.

I. After the Thirty-first day of *December* One thousand eight hundred and fifty-seven, it shall be lawful for every Married Woman by Deed to dispose of every future or Reversionary Interest, whether vested or contingent, of such Married Woman, or her Husband in her Right, in any Personal Estate whatsoever to which she shall be entitled under any Instrument made after the said Thirty-first Day of *December* One thousand eight hundred and fifty-seven (except such a Settlement as after mentioned), and also to release or extinguish any Power which may be vested in or limited or reserved to her in

(*q*) *Rogers* v. *Bolton* (1880), 8 L. R. Ir. 69.

(*r*) *Lloyd* v. *Prichard*, [1908] 1 Ch. 265.

(*s*) *Wilder* v. *Pigott* (1882), 22 Ch. D. 263.

(*t*) *Greenhill* v. *North British and Mercantile*, [1893] 3 Ch. 479.

(*u*) *Seaton* v. *Seaton* (1888), 13 A. C. 61.

regard to any such Personal Estate, as fully and effectually as she could do if she were a Feme Sole, and also to release and extinguish her Right or Equity to a Settlement out of any Personal Estate to which she, or her Husband in her Right, may be entitled in possession under any such Instrument as aforesaid, save and except that no such Disposition, Release, or Extinguishment shall be valid unless the Husband concur in the Deed by which the same shall be effected, nor unless the Deed be acknowledged by her as hereinafter directed: Provided always, that nothing herein contained shall extend to any Reversionary Interest to which she shall become entitled by virtue of any Deed, Will, or Instrument by which she shall be restrained from alienating or affecting the same.

Powers over such Estate, and also their Rights to a Settlement out of such Estate in possession.

II. Every Deed to be executed in *England* or *Wales* by a Married Woman for any of the Purposes of this Act shall be acknowledged by her, and be otherwise perfected, in the Manner in and by the Act passed in the Third and Fourth Years of the Reign of His late Majesty King *William* the Fourth, intituled *An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance,* prescribed for the Acknowledgment and perfecting of Deeds disposing of Interests of Married Women in Land (*y*); and every Deed to be executed in *Ireland* by a Married Woman for any of the Purposes of this Act shall be acknowledged by her and be otherwise perfected in the Manner in and by the Act passed in the Fourth and Fifth Years of the Reign of His late Majesty King *William* the Fourth, intituled *An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in* Ireland, prescribed for the Acknowledgment and perfecting of Deeds disposing of Interests of Married Women in Land; and all and singular the Clauses and Provisions in the said Acts concerning the Disposition of Lands by Married Women, including the Provisions for dispensing with the Concurrence of the Husbands of Married Women, in the Cases in the said Acts mentioned, shall extend and be applicable to such Interests in Personal Estate and to such Powers as may be disposed of, released, or extinguished by virtue of this Act, as fully and effectually as if such Interests or Powers were Interests in or Powers over Land.

Deeds to be acknowledged by Married Women in the manner required by 3 & 4 W. 4, c. 74, for disposing of Interests in or Powers over Land in England or Wales;

In Ireland, as by 4 & 5 W. 4, c 92.

(*y*) That is to say, it must have been produced and acknowledged by the wife as her act and deed before a judge of one of the superior Courts at Westminster (or if acknowledged after November 1, 1875, before a judge of the High Court), or before a Master in Chancery, or before two commissioners appointed for the purpose whose duty it was to examine the wife apart from her husband touching her knowledge of the deed, and to ascertain whether she freely and voluntarily consented to it, and unless the judge, master, or commissioners were satisfied that she did so consent and signed a memorandum on the deed to that effect, the deed was void. The judge, master, or commissioners were required to sign a certificate of the fact that the deed had been duly acknowledged, and the certificate and an affidavit verifying the same was required to be filed with an officer of the Court of Common Pleas, and an office copy of the certificate is conclusive evidence of the acknowledgment (3 & 4 Will. 4, c. 74, ss. 79–91). These provisions are amended by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39, s. 7); and in the case of deeds acknowledged after December 21, 1882, the acknowledgment may be before one commissioner, and no certificate need be filed, but the memorandum on the deed purporting to be signed by a person duly authorised shall be conclusive evidence of the acknowledgment. Under the County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 184), an acknowledgment made after December 31, 1888, may be made before a county court judge.

The Powers of Disposition given by this Act not to interfere with any other Powers.

III. Provided always, That the Powers of Disposition given to a Married Woman by this Act shall not interfere with any Power which independently of this Act may be vested in or limited or reserved to her, so as to prevent her from exercising such Power in any Case, except so far as by any Disposition made by her under this Act she may be prevented from so doing, in consequence of such Power having been suspended or extinguished by such Disposition.

Act not to extend to Settlements of Married Women upon Marriage.

IV. Provided always, That the Powers of Disposition hereby given to a Married Woman shall not enable her to dispose of any Interest in Personal Estate settled upon her by any Settlement or Agreement for a Settlement made on the Occasion of her Marriage.

Not to extend to Scotland.

V. This Act shall not extend to *Scotland*.

Married Women's Property Acts.

The Married Women's Property Acts, 1882 to 1908, have now practically extinguished the husband's marital rights over the wife's property, and placed the wife in the position of a *feme sole* with regard to her capacity to contract and to the acquisition, management, and disposal of property (*z*). The Acts, however, are not retrospective, and questions may still arise which may make it necessary to consider the rights of husband and wife at common law or under some of the earlier statutes.

Married Women's Property Act, 1870.

By the Married Women's Property Act, 1870, a married woman was entitled to hold as her separate property, and, therefore to dispose without her husband's concurrence of the following property :—

(1) Wages and earnings gained during marriage ;

(2) Deposits in savings banks and annuities granted by the Commissioners for the Reduction of the National Debt, if standing in her name ;

(3) Money in the public stocks and funds standing in her name and expressed to be for her separate use ;

(4) Money in fully paid up shares or debentures of any joint stock company standing in her name and expressed to be for her separate use ;

(5) Benefits to the holding of which no liability is attached in any industrial and provident society, or in any friendly

(*z*) The wife is not for all purposes in the position of a *feme sole* with regard to her property. She may still be restrained from anticipation ; that is to say, from disposing of the property during the coverture by act or deed *inter vivos* (45 & 46 Vict. c. 75, s. 19). If the wife predeceases her husband without disposing of her property by act or deed *inter vivos* or by will, the husband still takes it by his marital right (*Surman* v. *Wharton*, [1891] 1 Q. B. 491). The contract of a married woman does not bind her personally, but only her separate estate which she has at the time or may afterwards acquire (*Lynes, In re*, [1893] 2 Q. B. 113).

society, benefit building society, or loan society duly registered, certified, or enrolled under the Acts relating to such societies where she is entered in the books as entitled to the benefits for her separate use;

(6) Any personal property to which she shall, during her marriage, become entitled as next-of-kin or one of the next-of-kin of an intestate, or any sum of money not exceeding £200 under any deed or will;

(7) Rents and profits of real estate descending upon her after August 9, 1870.

By section 10 of the Married Women's Property Act, 1870, provision was made for a married woman effecting a policy of insurance on her own life or the life of her husband for her own benefit, and for a married man effecting a policy of insurance on his own life for the benefit of his wife and children.

Married Women's Property Act, 1870, sec. 10

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman. 33 & 34 Vict. c. 93. Married woman may effect policy of insurance.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the County Court of the district, or in Ireland by the Chairman of the Civil Bill Court of the division of the county, in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid. As to insurance of a husband for benefit of his wife.

The Married Women's Property Act, 1870, is repealed by the Married Women's Property Act, 1882, except in so far as it is necessary to give validity to Acts done or rights acquired while it was in force. The Acts now in force are the Married Women's Property Acts, 1882, 1884, 1893, 1907, and 1908. These substantially give a married woman full power to dispose of any property belonging to her as if she were a *feme sole*.

Married Women's Property Act, 1882

45 & 46 Vict. c. 75.

Married woman to be capable of holding property and of contracting as a feme sole.

1.—(1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise (*a*) in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown* (*b*).

(4) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire* (*c*).

(5) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

Property of a woman married after the Act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

(*a*) In *Pontypool Union* v. *Buck*, [1906] 2 K. B. 896, it was held that a married woman having separate estate was not by reason of this section liable under the poor laws to contribute towards the relief of a pauper parent. This was remedied by 8 Edw. 7, c. 27.

(*b*) Repealed 56 & 57 Vict. c. 63, s. 4.

(*c*) Repealed 56 & 57 Vict. c. 63, s. 4.

Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

As to stock, &c. to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient primâ facie evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock, &c. to be transferred, &c. to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

Investments in joint names

8. All the provisions herein-before contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by

of married women and others.

the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock, &c. standing in the joint names of a married woman and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts herein-before contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject

to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein-after contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Wife's antenuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this

Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the

High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be; and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be) by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Married woman to be liable to the parish for

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon

the maintenance of her husband. 31 & 32 Vict. c. 122.

application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

Married Women's Property Act, 1893

56 & 57 Vict. c. 63.

1. Every contract hereafter entered into by a married woman, otherwise than as agent (*d*),

Effect of contracts by

(*d*) When a married woman has in fact the authority of her husband she contracts as his agent, notwithstanding that the other contracting party is ignorant of the fact, and believes that she is contracting as a principal (*Paquin* v. *Beauclerk*, [1906] A. C. 148).

(*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; married women.

(*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just. Costs may be ordered to be paid out of property subject to restraint on anticipation.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband (*e*). Will of married woman.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed. Repeal.

5. This Act may be cited as the Married Women's Property Act, 1893. Short title.

6. This Act shall not apply to Scotland. Extent.

Married Women's Property Act, 1907

7 Edw. 7, c. 18.

1.—(1) A married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a femme sole (*f*). Dispositions of trust estates by married women.

(2) This section operates to render valid and confirm all such dispositions made after the thirty-first day of December one thousand eight hundred and eighty-two, whether before or after the commencement of this Act, but, where any title or right has been acquired through or with the concurrence of the husband before the commencement of this Act, that title or right shall prevail over any title or right which would otherwise be rendered valid by this section.

(*e*) Formerly the will of a married woman made during coverture operated to pass only such separate estate as she then had (*Cuno, In re* (1889), 43 Ch. D. 12). Property acquired subsequently did not pass by such will unless it was re-executed or republished after her husband's death (*Willock* v. *Noble* (1875), L. R. 7 H. L. 580).

(*f*) It was held that the Act of 1882 did not enable a married woman being a trustee to dispose or join in the disposal of any of the trust property without her husband's concurrence except those specific kinds of trust property enumerated in sect. 18 of that Act, and as to which she was given express power of disposal without her husband (*Harkness, In re, and Allsopp*, [1896] 2 Ch. 358).

Settlements of a married woman's separate property. 45 & 46 Vict. c. 75.

2.—(1) Notwithstanding section nineteen of the Married Women's Property Act, 1882, a settlement or agreement for a settlement made after the commencement of this Act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age.

(2) But if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this Act had not been passed.

18 & 19 Vict. c. 43.

(3) Nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infant Settlements Act, 1855.

Married woman entitled to prior estate to be protector of settlement alone.

3.—(1) Where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is by virtue of the Married Women's Property Act, 1882, made her separate property, then she alone shall, in respect of that estate, be the protector of the settlement.

(2) This section applies to disentailing assurances and surrenders made after the thirty-first day of December one thousand eight hundred and eighty-two, and as well before as after the commencement of this Act.

Short title; commencement; construction.

4.—(1) This Act may be cited as the Married Women's Property Act, 1907.

(2) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

(3) This Act shall not extend to Scotland.

45 & 46 Vict. c. 75. 47 Vict. c. 14. 56 & 57 Vict. c. 63.

(4) This Act shall be construed with the Married Women's Property Acts, 1882, 1884, and 1893, and those Acts and this Act may be cited together as the Married Women's Property Acts, 1882 to 1907.

Married Women's Property Act, 1908

8 Edw. 7, c. 27.

Married women having separate property to be liable for the maintenance of parents.

1. A married woman having separate property shall be subject to all such liability for the maintenance of her parent or parents as a feme sole is now by law subject to for the maintenance of such parent or parents.

2. This Act shall apply only to England and Wales.

3. This Act shall come into operation on the first day of January nineteen hundred and nine.

4. This Act may be cited as the Married Women's Property Act, 1908.

Capacity of married woman to dispose of policy.

The result of the Married Women's Property Act, 1882, is that as regards women married before January 1, 1883, the husband still enjoys marital rights as at common law over her policies of insurance except in the following cases :—

(*a*) Policies granted to her for her separate use ;

(*b*) Policies purchased by her out of her separate estate ;

(*c*) Policies effected by her after August 9, 1870, upon her own life or the life of her husband, and expressed on the face of the policy to be for her benefit ;

(*d*) All policies acquired by her on or after January 1, 1883.

Any woman married before January 1, 1883, had and has in respect of the above specified policies, and any woman married after January 1, 1883, had and has in respect of all policies acquired by her, full disposing power without the concurrence of her husband, but subject to the reservation contained in section 19 of the Married Women's Property Act, 1882, to the effect that the Act shall not interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman.

Married Women's Property Act, 1882, s. 19. Husband's capacity to settle without concurrence of wife.

The reservation of settlements by section 19 is of considerable importance. It was held that where by her marriage settlement a woman married before the Act settled all property which might subsequently be acquired by her, except property limited to her separate use, property acquired by her after the passing of the Act, and which by reason only of the Act became her separate property, was not within the exception, and therefore fell into the settlement (*g*). At first it was thought that the section only applied to settlements made or to be made by or with the concurrence of the married woman entitled to the property; but it was held to apply equally to settlements made by a husband without the wife's concurrence (*h*), and in the case of a woman under 21 years of age, married after the Act, having made a joint settlement with her husband of certain stocks to which she was entitled, it was held that although the woman's settlement was voidable by her on the ground of infancy, yet her husband's settlement was sufficient to dispose of the property effectively as against her (*i*). But for the Act he could have so disposed of it, and the Court held that the effect of section 19 was that in the case of any settlement of a married woman's property, whether made with or without her consent, the Act of 1882 must be treated as absolutely inoperative. The result appears to be that before January 1, 1908, the husband of a married woman could, without her consent, make a settlement disposing of any property which belonged, or might afterwards be acquired by her, and which would not be her separate property at common law, or under the

(*g*) *Whitaker, In re* (1887), 34 Ch. D. 227; *Stonor's Trusts, In re* (1883), 24 Ch. D. 195.

(*h*) *Hancock* v. *Hancock* (1888), 38 Ch. D. 78; *Stevens* v. *Trevor Garrick*, [1893] 2 Ch. 309.

(*i*) *Buckland* v. *Buckland*, [1900] 2 Ch. 534. This decision of Buckley, J., has been doubted (Eversley's Domestic Relations, 3rd ed. p. 135, note 4); but it is submitted that it could not be overruled without also overruling the decision of the Court of Appeal in *Hancock* v. *Hancock*, upon the authority of which it was decided.

Act of 1870. The husband could not dispose of a reversionary chose in action, such as a policy of insurance, so as to bar the wife's right of survivorship or equity to a settlement, but otherwise he could make an effective settlement. If a married woman acquired a policy and sold, charged, or settled it before the husband made a settlement, the husband's settlement would to that extent be inoperative because the policy would have ceased to be the property of the married woman at the time the settlement was made, and it would not be a settlement " respecting the property of a married woman " within the meaning of section 19.

Married Women's Property Act, 1907, requires wife's concurrence.

The Married Women's Property Act, 1907, has now deprived the husband of his power under section 19, and no settlement made on or after January 1, 1908, by a husband of his wife's property without her concurrence is effective, except in the case of the wife dying during infancy.

Married woman can give effective discharge.

Where a married woman is entitled to the proceeds of a policy, and the husband has no marital rights in it, she has full capacity to give an effective discharge in her own name without the concurrence of her husband.

Settlement policies.

A policy effected under the Married Women's Property Acts, that is to say, either under section 10 of the Act of 1870, or section 11 of the Act of 1882, for the benefit of spouse and children or any of them, creates a trust of a very peculiar sanctity, inasmuch as the policy forms no part of the assured's estate, and cannot be made available for the benefit of his creditors, except that they may claim out of the insurance money when payable a sum equivalent to the premiums paid, if they can prove that the premiums were paid out of the assured's estate with intent to defraud his or her creditors. The trust cannot be set aside on the ground that it is a voluntary or fraudulent settlement or disposition of property under the Bankruptcy Act or Statute of 13 Elizabeth.

Holt v. Everall (1876), 2 Ch. D. 266

Holt v. *Everall.*

Before 1870 A effected a policy in ordinary form on his own life. On the passing of the Married Women's Property Act of that year he surrendered it in exchange for a policy expressed to be for the benefit of wife and children. The original policy had no surrender value at the time, and the substituted policy was issued at the same premium. On A's death his creditors claimed the proceeds of the policy on the ground that it was void against

them as a voluntary settlement. It was held that the policy was protected by the Act. The substance of the transaction was that the assured simply dropped the original policy and took out a new one. If the original policy had commanded a surrender value at the time of the exchange, that value might properly have been treated as part of the premium paid for the new policy, and would therefore have been added to the amount which creditors would be entitled to receive out of the policy moneys if they could prove that the transaction was effected with intent to defraud them.

Dever, Ex parte (1887), 18 Q. B. D. 660

Dever, Ex parte.

In 1876 a domiciled Englishman effected an insurance in a New York company through their agents in London. The application was made by the husband on behalf of his wife. The policy was a "tontine" policy, whereby the society promised that on the death of the husband they would pay £6000 to the wife "for her sole use, if living, in conformity with the statute," and if not living, to the children of the husband, and, failing them, to the executors, administrators, or assigns of the husband. After a period of ten years the legal holder of the policy had the option of withdrawing the accumulated funds appropriated to the policy. The statute referred to was a New York statute passed in 1870, whereby a policy might be effected for the benefit of a married woman free from the claims of her husband's creditors, provided that if the premium paid by him exceeded $500 in any one year his creditors should be entitled to a sum equivalent to the excess. The premiums were paid by the husband until he became bankrupt, and then by the wife out of her separate estate until the expiration of the ten years, when she exercised the option and withdrew the accumulated funds. Before this time the husband had obtained his discharge. The trustee in his bankruptcy claimed the whole of the policy moneys, or alternatively those of them equivalent to the premiums paid by him in excess of $500. Lord Esher, M.R., held that the contract was a contract solely with the wife, and that if she exercised the option to withdraw the accumulated funds at the end of ten years, it belonged to her for her sole use. He thought the provision of the New York statute in favour of creditors was not made part of the contract, and that "in conformity with the statute" meant nothing more than that the policy was effected for the benefit of the wife. Bowen and Fry, L.JJ., agreed that the statutory provision in favour of creditors was not incorporated into the policy, and also that the wife was the "legal holder" of the policy; but they differed from Lord Esher on the first point, and were of opinion that if the wife exercised her option of withdrawing the accumulated funds during the husband's life, the intention was that it should belong to the husband. They held, however, that as the husband had obtained his discharge before the option had been exercised, the property thus accruing to him did not fall to the trustee in bankruptcy, because during the bankruptcy it was not a contingent interest of any value, but a mere possibility of future benefit, and such a possibility did not pass to the trustee in bankruptcy.

The provisions in the English Acts relating to settlement policies and contained in section 10 of the Act of 1870 and section 11

of the Act of 1882 find their counterpart in Scotland in the Married Women's Policies of Assurance (Scotland) Act, 1880.

Married Women's Policies of Assurance (Scotland) Act, 1880

43 & 44 Vict. c. 26.

Married woman may effect policy of assurance for her separate use.

1. A married woman may effect a policy of assurance on her own life or on the life of her husband for her separate use, and the same and all benefit thereof, if expressed to be for her separate use, shall immediately on being so effected vest in her, and shall be payable to her and her heirs, executors, and assigns, excluding the *jus mariti* and right of administration of her husband, and shall be assignable by her either *inter vivos* or *mortis causa* without consent of her husband; and the contract in such policy shall be as valid and effectual as if made with an unmarried woman.

Policy of assurance may be effected in trust for wife and children.

2. A policy of assurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife for her separate use or for the benefit of his children shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control or form part of his estate or be liable to the diligence of his creditors, or be recoverable as a donation or reducible on any ground of excess or insolvency: And the receipt of such trustee for the sums secured by the policy or for the value thereof in whole or in part shall be a sufficient and effectual discharge to the assurance office: Provided always, that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.

3. This Act shall apply only to Scotland, and may be cited as the Married Women's Policies of Assurance (Scotland) Act, 1880.

Stewart v. Hodge (1901), 8 S. L. T. 436

Stewart v. *Hodge.*

A effected a policy under section 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880. The policy was on his own life, and was expressed to be for the benefit of his wife if she should survive him. A subsequently became bankrupt, and the trustee in bankruptcy came into possession of the policy. A's wife called upon the trustee to deliver the policy to her husband, to be held by him in trust according to its terms. The trustee refused, and A's wife then brought this action in the Court of Session for a declaration that there was a valid trust of the policy moneys in her favour and for delivery of the policy to A as trustee. The trustee pleaded that the policy was effected by A while insolvent and in fraud of his creditors. It was held that A's wife was entitled to the relief asked. There was a valid trust in favour of the wife; even if there was fraud as alleged, the remedy of the trustee in bankruptcy was to be repaid the premiums out of the policy moneys when they became

due, and it afforded no answer to the demand that the policy should be delivered up to A as trustee and proper custodier of the policy.

Whether settlement policies protected against debts of assured due to Crown.

It has been suggested that the provisions of the Married Women's Property Acts protecting settlement policies against the assured's creditors do not bind the Crown, and that a policy effected for the benefit of wife and children might, nevertheless, be made available for the debts of the assured due to the Crown (*k*). In the case of an Act of New South Wales, which provides that the property and interest of any person in a policy of insurance shall be exempt from any law in force relating to bankruptcy or insolvency, or from being seized in execution, the Privy Council have held that the provisions thereof do not bind the Crown, and that where an assured was confined in a lunatic asylum at the public expense, and thereby incurred a debt to the Crown, the Crown was entitled to be paid out of the proceeds of the policy (*l*). This decision, however, is hardly applicable to a case under section 11 of the Married Women's Property Act, 1882. The New South Wales Act protects the estate of the assured against creditors, and it was held that this protection does not bind the Crown. The Married Women's Property Acts, on the other hand, provide that the policy moneys shall not form part of the assured's estate, and as the Crown cannot, any more than any other creditor, take, except by express statutory provision, any property or interest which does not form part of the debtor's estate, it is submitted that the policy moneys payable under a settled policy for the benefit of wife and children are not available to satisfy the debts of the assured even when they are debts due to the Crown.

Whether endowment assurance policies are within the protection of the Acts.

At the time the Married Women's Property Acts were passed, life policies were almost always payable on the death of the life assured. Since then endowment assurance policies whereby the whole moneys, or part thereof, are payable at a certain age or upon death before that age, have become very common, and the question arises whether such policies can be validly effected under section 11 of the Married Women's Property Act, 1882, so as to withdraw the policy from the assured's creditors. An endowment assurance policy might be effected so as to accrue for the benefit of spouse and children whenever payable or so as to accrue for their benefit only in the event of the moneys becoming payable

(*k*) The general rule of law is that the Crown is not bound by the provisions of any statute unless named therein or bound by necessary implication.

(*l*) *A.-G. for New South Wales* v. *Curator of Intestate Estates*, [1907] A. C. 519.

on the death of the assured. In either case it is doubtful whether such a policy comes within the protection of the Act, and until the question has been judicially decided few companies will take the risk of issuing such policies. It should be observed, however, that an endowment assurance policy is a life policy effected by a person on his own life (*m*), and that the operative words of section 11 appear to cover the case of such a policy as well as any other life policy. The real doubt arises upon the clause at the end of the section, which appears to contemplate the policy being payable only in the case of death. As, however, this part of the section is directed solely to the provision of proper machinery for the working of the trust it ought not to have too much weight on the interpretation of the earlier part of the section. The Scottish Act contains no words which are not equally applicable to an endowment assurance policy as to an ordinary life policy. It is submitted that an endowment assurance policy ought to be held to be within the protection of both English and Scottish Acts if the policy is expressed to be for the sole benefit of wife and children. On the other hand, it is submitted that a policy cannot be partly within the Act and partly outside it, and that therefore a policy cannot be effected under the Act so as to accrue for the benefit of the assured if he survives the stated age but for the benefit of wife and children if he dies under that age.

What beneficiaries are protected.

Policies are within the Acts when expressed to be for the benefit of spouse and children or any of them. The Act of 1870 only protects a policy effected by a married man on his own life for the benefit of wife or children. The Act of 1882 extends the protection to a policy effected by any man or woman on his or her own life for the benefit of spouse or children (*n*). The policy under either Act may be for the benefit of a spouse then living, or any future spouse, or for the benefit of children already born or to be born of the assured by his then existing marriage or any other marriage (*o*). Grandchildren or other issue remoter than children are not within the protection of the Acts and therefore cannot take direct benefit under the trust (*oo*).

(*m*) *Prudential Insurance Company* v. *Inland Revenue*, [1904] 2 K. B. 658.

(*n*) The Scottish Act, like the English Act, 1870, protects only the husband's policies in favour of his wife, and does not apply to the wife's policies in favour of her husband.

(*o*) *Parker's Policies, In re*, [1906] 1 Ch. 526.

(*oo*) *Bowen* v. *Lewis* (1884), 9 A. C. 890, 915.

Effect of including stranger in trust.

The effect of introducing into a policy purporting to be made under the Act a beneficiary not included in the class entitled to protection, as, for instance, the inclusion of an illegitimate child, is to deprive the whole trust of the peculiar protection afforded by the Act, and not to deprive the beneficiary of his or her interest in the policy moneys (*p*).

Parker's Policies, In re, [1906] 1 Ch. 526

Parker's Policies, In re.

In 1879 a man having a wife then living effected two policies of assurance on his own life. They recited that they were made in accordance with the provisions of section 10 of the Married Women's Property Act, 1870, and provided that under the provisions of the said Act, his widow or widow and children, or some or one of them in such shares as the assured should appoint, should be entitled to receive the moneys payable on his death. Subsequently the assured's first wife died, leaving three children, and in 1886 he married again. In 1903 he appointed the policy moneys to his second wife absolutely in the event of her surviving him. He died the same year, leaving him surviving his second wife and three children of the first and one child of the second marriage. It was held that the second wife was within the Act, but that even if she had not been she was on the construction of the policy a beneficiary thereunder, and as the moneys had been appointed to her she was entitled to them as against the children.

Settlement policy by unmarried person.

It seems to be reasonably clear that an unmarried man or an unmarried woman or a widower or widow may effect a valid settlement policy under the English Act of 1882 for the benefit of a future spouse, or children then existing or to be born.

Distribution among wife and children.

Where a policy is effected under the provisions of the Married Women's Property Act, the policy alone is to be looked at in order to ascertain as between spouse and children who is to participate and in what shares (*pp*). Frequently the policy is expressed to be merely for the benefit of the assured's wife and children. Under the earlier Act, Malins, V.C., held that the Court had a discretion as to the distribution of the fund if the assured had not made any distribution among the objects named (*q*); but Chitty, J., held that where there was a wife and children the wife took a life interest, and the children as joint tenants in the reversion (*r*). Later, North, J., held that unless there was something in the policy to indicate an intention on the part of the assured to give his wife a

(*p*) *Parker's Policies, In re*, [1906] 1 Ch. 526.

(*pp*) *Seyton, In re* (1887), 34 Ch. D. 511. The policy may, however, reserve to the assured or any other person a power of appointment or distribution, and an appointment made in pursuance of such power will be as effective as if contained in the policy.

(*q*) *Mellor's Policy Trust* (1877), 6 Ch. D. 127; 7 Ch. D. 200.

(*r*) *Adams' Policy Trust* (1883), 23 Ch. D. 525.

life interest, she ought to take as joint tenant with the children, and the fact that the Act of 1870 enacts that the provision in favour of the wife shall be for "her separate use," is not sufficient to entitle her to a life interest in the whole fund (*s*). This decision was afterwards followed by Chitty, J., in a similar case (*t*). There is no doubt that under the Act of 1882, where the policy is simply declared to be for the benefit of wife and children, all those surviving take equal shares as joint tenants, and the representatives of those who die before the policy becomes payable get nothing (*tt*). *Primâ facie* all children take, even although born of a prior or subsequent marriage. If the wife is named in the policy, it does not accrue for the benefit of a second wife. If the policy is simply expressed as being for the benefit of the assured's wife and children, a second wife will take the benefit along with the children of both marriages (*u*). But where the policy was expressed to be "for the benefit of his wife, or, if she be dead, between his children in equal proportions," it was held that a second wife was not entitled to any benefit, as the policy apparently pointed to the wife then living, but the children of both marriages were held entitled to participate as joint tenants (*x*).

When do spouse and children take an absolute vested interest in policy moneys ?

The question has been raised as to how far the spouse or children of the assured may during the currency of the policy take an absolute vested interest therein, so that they may dispose of the beneficial interest by surrender or sale during their lives, or so that after their death such interest may pass to the personal representative of the survivor of them instead of reverting to the estate of the assured.

Assured cannot revoke.

There is no doubt that so long as an object of the trust remains, the assured cannot revoke the provisions in their favour, and even although the settlement be purely voluntary, it must be deemed to be complete and irrevocable the moment the policy is executed and delivered to the assured.

Interest vests when class of beneficiaries is determined.

Where the policy is in favour of a class of beneficiaries which cannot be added to, as, for instance, where it is for the benefit of a named wife only or for the benefit of the children of a deceased

(*s*) *Seyton, In re* (1887), 34 Ch. D. 511.

(*t*) *Davies' Policy Trust,* [1892] 1 Ch. 90.

(*tt*) The *jus accrescendi* incidental to a joint tenancy will apparently continue even after the policy has become payable until such time as the joint tenancy shall have been severed by a distribution of the fund or by any one of the beneficiaries assigning his or her interest in the fund.

(*u*) *Browne's Policy, In re,* [1903] 1 Ch. 188.

(*x*) *Griffiths' Policy, In re,* [1903] 1 Ch. 739.

wife, the beneficiary or beneficiaries will *primâ facie* take a vested beneficial interest which may be sold or surrendered, and unless so expressed is not contingent upon such beneficiary or beneficiaries surviving the assured (*y*).

Vesting may be postponed or anticipation restrained.

By the express terms of the trust vesting may be postponed as when it is expressed to be in favour of such children as attain 21 or marry under that age, or the capacity of the beneficiary to sell or surrender his or her interest may be restricted as where a married woman is restrained from anticipation.

No vesting where class of beneficiaries is not determined.

Where the policy is in favour of a class of beneficiaries which may be added to, as, for instance, where it is in favour of wife and children generally, then *primâ facie* there is no vesting until the moneys have become payable, and when they become payable the interest vests in the members of the class then surviving, and, if none survives the period of payment, the moneys do not form part of the estate of the last survivor, but revert as a resulting trust to the assured's own estate. Where the objects of the trust fail there is a resulting trust in favour of the assured and his representatives, even although not named in the policy (*z*).

Prescott v. Prescott, [1906] 1 Ir. R. 155

Prescott v. *Prescott.*

A married woman effected a policy on her own life. The policy purported to be issued pursuant to the Married Women's Property Act, 1882, and to be in favour of W. P., the husband of the assured. The company promised to pay the said W. P., his executors, administrators, or assigns, £1000 on the death of the assured. W. P. died, and left his wife surviving him. Upon a summons to determine whether the beneficial interest in the policy was vested in the executors of W. P. or in his wife, it was held that the interest vested in W. P. absolutely at the date the policy was issued, and that his interest did not depend upon his surviving his wife. The interest passed to his executors, but they took it *cum onere*, and there was no obligation on the wife to keep the policy alive. If it was to be kept alive, the premiums must be paid out of the estate of W. P. The Court were of opinion that the addition of the words "executors, administrators, or assigns" neither added nor detracted anything. The decision would have been the same if there had been a simple declaration that the policy was for the benefit of W. P.

Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q. B. 147

Cleaver v. *Mutual Reserve Fund.*

A married man effected a policy of insurance on his own life. The policy was not stated to be issued in pursuance of the Married Women's Property

(*y*) *Schumann* v. *Scottish Widows Fund* (1886), 13 R. 678; *Prescott* v. *Prescott*, [1906] 1 Ir. R. 155. See, however, *contra*, *Robb* v. *Watson*, [1910] 1 Ir. R. 243.

(*z*) *Cleaver* v. *Mutual Reserve*, [1892] 1 Q. B. 147.

Act, but it was expressed to be in favour of the assured's wife, F. M., and the company promised to pay the policy moneys to her if living at the time of the death of the assured, otherwise to his legal representatives. The assured died in May, 1889, leaving his wife surviving. In August, 1889, the wife assigned her interest to Cleaver, who was afterwards appointed administrator of the property and effects of F. M. under the Act to abolish Forfeitures for Treason and Felony. The insurance money was claimed by Cleaver and by the executors of the assured, and this action was brought by them as joint plaintiffs, Cleaver claiming alternatively as assignee from F. M. and as her administrator under the last-mentioned Act. In defence the company alleged that the assured died from poison intentionally administered to him by his wife, F. M. The Court held that that was no defence against the claim of the executors. Apart from the Married Women's Property Act, there was a contract with the husband upon which his executors, and they alone, could sue. There was no trust in favour of the wife, and the fact that it was made payable to her was a mere direction which might have been altered by the assured at any time. The crime of the wife did not disentitle the executors from claiming the policy moneys as part of the estate of the assured. The question as to whether the wife was entitled as a beneficiary was not one which arose as between the executors and the company. Further, if the Married Women's Property Act applied there was a trust in favour of the wife, but there was a resulting trust in favour of the assured's estate if the objects of the trust failed. Here the rule of public policy prevented the beneficiary named in the trust or any person claiming through her from taking the money, and therefore the trust had failed, and the executors were entitled to the money on behalf of the assured's estate.

Robb v. Watson, [1910] 1 Ir. R. 243

Robb v. *Watson.*

A policy of insurance dated March 13, 1882, was expressed to be issued on the application of W. for the sole benefit of his wife, E. W., for her separate use under the Married Women's Property Act, 1870. The policy provided that the funds and property of the society should be liable to pay to the executors, administrators, or assigns of W. the sum of £1000 within three calendar months after satisfactory proof of his death. W. paid all the premiums. In October, 1901, W. executed a trust deed for creditors, whereby he assigned all personal estate, "whether in possession, reversion, remainder, or expectancy." The wife, E. W., died in February, 1907, and letters of administration were granted to W. The creditors under the trust deed claimed that the policy was captured thereby as the reversionary property of W., whereas W. claimed that he had no interest in the policy in 1901, but merely a *spes successionis.* The sole beneficial interest was in his wife, and therefore there was no property of W. which could pass under the trust deed. The judge held that the proper inference from the provision in section 10, that the policy should not "so long as any object of the trust remains be subject to the control of the husband or his creditors, or form part of his estate," was that after the objects of the trust were satisfied the policy should be subject to the control of the husband and form part of his estate. There was therefore a reversionary interest in the husband which passed under the trust deed for creditors, and on the death of the wife the creditors were entitled to the policy.

Robb v. *Watson* criticised.

The case just cited is open to criticism. It would seem that if the object of the trust is to give an absolute vested interest to the wife named in the policy, and not merely an interest conditional on survivorship, the object of the trust remains notwithstanding the death of the wife. The meaning of an "object of the trust" is brought out more clearly in the Act of 1882, where the words are "so long as any object of the trust remains unperformed." Clearly if the object of the trust is to give the property to the wife absolutely, it remains unperformed until the policy moneys become payable, and if she has died in the meantime the trust is performed by transferring the moneys to her personal representatives. It is submitted that on the facts stated in *Robb* v. *Watson* there was an absolute vested interest in the wife, and the husband took only through her upon her intestacy. Nothing, therefore, passed to the creditors under the trust deed.

Surrender of settlement policy.

Where a policy effected under the Married Women's Property Act is offered for surrender by the trustee or trustees of the policy during its currency, the company has to consider whether it is within his or their power to surrender and give the company a good discharge.

Trustee's power to surrender.

The trustee may have express power to surrender conferred on him by the terms of the trust. Apart from such express power it is doubtful whether any power can be implied. In the Scottish case of *Schumann* v. *Scottish Widows' Life* the Court held that the terms of the Scottish Act gave the trustee a power to surrender. The words of the Act mostly relied on in support of this opinion also occur in the English Act, but notwithstanding this decision it is submitted that the Act does not confer a power to surrender, but only provides machinery for the exercise of such power if otherwise conferred by the trust. As the law now stands it would not be safe for any company to allow a surrender for cash unless the trustee has express power by the terms of the trust or has obtained the sanction of the Court (*a*). The most convenient course in granting such policies is to give the trustee the right to surrender the policy in exchange for a paid-up policy. If the policy has actually lapsed through non-payment of premiums the company may safely make an *ex gratiâ* payment of the surrender value, but there must be no express or implied agreement to do so before the lapsing of the policy unless the trustee has power to surrender.

(*a*) *Schultze* v. *Schultze* (1887), 56 L. J. Ch. 356.

Surrender for purpose inconsistent with object of trust.

Even where the trustee has power to surrender and give a good discharge, the company will not obtain a good discharge if it pays to him with knowledge that he intends to apply the surrender money in breach of trust. Thus where the policy is settled upon a wife without power of anticipation, or is settled generally upon the assured's wife and children, a company would not be justified in paying the surrender value to the trustee if they knew, or had good reason to believe, that the object of the surrender was to enable the wife to anticipate her benefit, or to give the immediate benefit of the policy to the wife and children of the then subsisting marriage, to the possible exclusion of the wife and children of some future marriage.

Surrender where beneficiary has a vested interest.

Where a sole beneficiary or all the beneficiaries has or have acquired a vested interest in the policy, and there is no restraint on anticipation, or where the objects of the trust have failed and the beneficial interest has reverted to the assured, such beneficiary or beneficiaries or the assured, as the case may be, may with the trustee grant a complete discharge for the surrender value.

Schumann v. Scottish Widows' Life (1886), 13 R. 678

Schumann v. *Scottish Widows' Life.*

A married man effected a policy on his own life under the provisions of the Married Women's Policies of Assurance (Scotland) Act, 1880. The policy was a paid-up policy issued upon a single premium. It was expressed to be for the benefit of the assured's wife, M., for her separate use, and in the event of her predeceasing him for the assured. After the policy had been in force for some time, the spouses intimated their joint desire to surrender the policy. The company doubted whether they could get a sufficient discharge, and a special case was presented to the Court. The Court were of opinion that the Act contemplates the possibility of surrender. It provides that "the receipt of such trustee for the sums secured by the policy or for the value thereof in whole or in part shall be a sufficient and effectual discharge to the assurance office." The assured in default of appointment was the trustee, and could therefore, jointly with the wife, give a good discharge to the company. One member of the Court (Lord Shand) was of opinion that the assured as trustee could alone have given a good discharge. The surrender of the policy was not inconsistent with the trust, as the husband as trustee might invest the money or apply it for the immediate maintenance of the wife.

Schultze v. Schultze (1887), 56 L. J. Ch. 356

Schultze v. *Schultze.*

The assured effected a policy in 1871 under section 10 of the Married Women's Property Act, 1870, expressed to be for the benefit of his wife for her life, for her separate use, and subject thereto for the benefit of the children of the marriage. In 1883 the assured became bankrupt, and subsequently insane, and the policy was in danger of lapsing for want of payment of premiums.

The assurance society's rules permitted the policy to be surrendered or exchanged for a fully paid-up policy of lower value, but in this case they declined to do so without the authority of the Court. Accordingly this action was brought in the name of the wife against her husband, asking for the appointment of a trustee and for power to him to exchange the policy for a fully paid-up policy, and that the costs of the proceedings should be paid by mortgaging the paid-up policy to the society. As there were infant beneficiaries the Court appointed two trustees, and directed the exchange of the policy and payment of the costs as claimed.

Company must deal with properly constituted trustee.

In paying the policy moneys or advancing money to pay premiums or accepting a surrender of a policy effected under the Married Women's Property Act, the company ought to be satisfied that it is dealing with the properly constituted trustee of the policy, and that such trustee has power to bind all parties interested in the trust.

Where policy effected under Act of 1870.

Under the Act of 1870 there is no provision constituting the assured or his personal representatives a trustee or trustees, or giving the assured a power of appointing trustees, and therefore, where the policy has been settled under that Act, it is necessary to apply to the Court for the appointment of a trustee before the company can get a valid discharge for the policy moneys, or make any arrangement for surrendering or charging the policy (*b*). The application may be made either to a judge of the High Court or to the judge of the County Court of the district in which the insurance office is situated. In this instance the jurisdiction of the County Court is apparently not limited to cases where the value of the policy is less than £500.

Where policy effected under Act of 1882.

Under section 11 of the Act of 1882 the assured himself, and after his death his personal representative, is trustee in default of appointment of another trustee. During the life of the assured he may appoint a trustee or trustees, and make provision for the appointment of new trustees either during his lifetime or after his death. The assured may from time to time during his lifetime appoint a new trustee or trustees to act along with those already appointed or in substitution for those who have died. Apparently, however, the assured has no power under the Act of 1882 to remove or discharge a trustee and appoint another in his place. If he has such power at all, it can only be under section 10 of the Trustee Act, 1893. The power of discharging and appointing trustees under that section is vested in the person or persons

(*b*) *Turnbull, In re*, [1897] 2 Ch. 415.

nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there be no such person, then in the surviving or continuing trustees or trustee for the time being, or in the personal representatives of the last surviving or continuing trustee. Although it is open to some doubt, it is submitted that the assured is the person "nominated for the purpose of appointing new trustees by the instrument creating the trust." The policy is the instrument creating the trust, and the assured is thereby nominated as the person who is to have all the statutory powers under section 11, including the power of appointing new trustees. When the policy moneys become payable on the death of the assured, and there has been no appointment of trustees, payment may with safety be made to the assured's personal representatives. If during the life of the assured any arrangement is to be made for surrendering or charging the policy, the assured may in default of appointment be dealt with as trustee. In order, however, to guard against a possible breach of trust it is usual to take the joint receipt of husband and wife.

Where policy effected under Scottish Act.

Under the Scottish Act the assured and his personal representatives are trustees unless some other trustee or trustees are appointed in the policy, or by some other writing made at the time the policy is effected and intimated to the company. It is doubtful whether in default of such appointment the assured has power during the currency of the trust to appoint or assume any other person as trustee (*c*). Such an appointment can, at any time, be made by the Court (*c*). The assured during his lifetime can as trustee make any arrangement for surrendering or charging the policy which is *intra vires* of the trust (*d*).

Appointment of trustees by Court.

A trustee of a policy under either of the English Acts may be appointed on petition (*dd*) or originating summons (*e*) or in an action (*ee*). On a petition to appoint a new trustee, it was held that the Court had no jurisdiction to determine any question relating to the administration of the trust or to give directions to the trustee (*f*). An originating summons is, therefore, the most convenient procedure to adopt when a trustee is to be appointed, as the cost is less and other incidental matters can be determined on the same summons if necessary.

(*c*) 24 & 25 Vict. c. 84, s. 1; 30 & 31 Vict. c. 97, ss. 11, 12, 13.

(*d*) *Schumann* v. *Scottish Widows' Life* (1886), 13 R. 678.

(*dd*) *Atkinson's Policy Trusts, In re* (1895), 13 Rep. 285.

(*e*) *Smith's Policy Trusts, In re* (1898), 33 L. J. (Notes of Cases) 187.

(*ee*) *Schultze* v. *Schultze* (1887), 56 L. J. Ch. 356.

(*f*) *Adams' Policy Trusts, In re* (1883), 23 Ch. D. 525.

Where the beneficiaries are infants and the moneys are to be held for their benefit, two trustees ought to be appointed (*g*). The Act of 1870 provides for the appointment of one trustee only, but it has been held that even where the insurance is under that Act the Court has under its general jurisdiction power to appoint two trustees, where, as in the case of infant beneficiaries, it is necessary or expedient that that should be done (*h*).

Two trustees required for infant beneficiary.

An application to appoint a trustee in the case of a policy effected under the Act of 1870 ought to be intituled in the matter of that Act, and need not also be intituled in the matter of the Act of 1882 (*i*).

Title of application.

As a general rule it is probably unnecessary to demand strict proof that the trust is one protected by the Acts, that is to say, that there is, in fact, a valid marriage, and that the children are legitimate. The trust may still be a valid trust although not protected by the Acts. If, however, the validity of the appointment of the trustee or trustees depends upon the terms of the Act, or if the company has notice that the assured's estate is insolvent, strict proof of marriage and legitimacy ought be required in the form of proper marriage and birth certificates.

Whether strict proof of marriage and legitimacy should be demanded.

Where property is settled on a married woman, and she is restrained from anticipation, she cannot, notwithstanding the Married Women's Property Acts, dispose of it by act or deed during coverture (*k*). She may dispose of it if afterwards she becomes discovert, or she may dispose of it by will so as to defeat her husband's right of survivorship. And under the Conveyancing Act, 1881 (*l*), the Court may, with the consent of a married woman, and provided it is for her benefit, make an order to bind her interest in property as to which she is restrained from anticipation. If a married woman effects a policy for her own benefit, and the policy purports to be unassignable, the effect of the condition against assignment is to restrain the woman from anticipation (*m*).

Married women restrained from anticipation.

(*g*) *Howson's Policy Trusts, In re* (1885), W. N. 213; *Smith's Policy Trusts, In re, supra.*

(*h*) *Schultze* v. *Schultze, supra.*

(*i*) *Kuypers' Policy Trusts, In re*, [1899] 1 Ch. 38.

(*k*) Married Women's Property Act, 1882 (45 & 46 Viet. c. 75), s. 19. In Scotland, if either before or after marriage a policy is settled in trust for her as a provision, she cannot discharge the obligation *stante matrimonio*, and she is therefore in the same position as a woman in England restrained from anticipation (*Barras* v. *Scottish Widows' Fund* (1900), 2 F. 1094; *Scottish Life* v. *Donald* (1901), 9 S. L. T. 200).

(*l*) 44 & 45 Viet. c. 41, s. 39.

(*m*) *Lavender's Policy, In re*, [1898] 1 Ir. R. 175.

44 & 45 Vict. c. 41 s. 39.

Conveyancing Act, 1881, sec. 39

Power for Court to bind interest of married woman.

39.—(1) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, behind her interest in any property.

(2) This section applies only to judgments or orders made after the commencement of this Act.

Lavender's Policy, In re, [1898] 1 Ir. R. 175

Lavender's Policy, In re.

A married woman effected in 1885 an insurance on the life of her husband. The policy was headed "Wife's Policy—Endowment," and the company thereby promised to pay to her for her sole use the sum assured if she and her husband both survived a period of ten years. The policy was expressed to be subject to the conditions contained therein, and one of these was, "This policy is not assignable." The Court held that the wife was thereby restrained from anticipation, and that a charge on the policy purported to be made by her before the money became payable was void.

Married woman can give power of attorney.

By the Conveyancing Act, 1881, a married woman may by power of attorney authorise any other person to do any act which she herself has power to do.

44 & 45 Vict. c. 41, s. 40.

Conveyancing Act, 1881, sec. 40

Power of attorney of married woman.

40.—(1) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2) This section applies only to deeds executed after the commencement of this Act.

Effect of divorce.

Divorce by dissolving the marriage releases the woman from her husband's marital rights, and therefore, except in so far as her property has already vested in possession and become the husband's, or been settled by him *jure mariti*, the decree of divorce terminates every marital right, and she may contract or deal with her property as a *feme sole*, and on her death intestate it would pass to her next of kin.

Judicial separation.

Whilst the separation continues a judicial separation has the same effect as divorce, that is to say, the woman is in all respects in the same position as a *feme sole* with regard to her capacity to contract and her power of disposing of her property coming into

her possession after the date of the decree (*m*). As in the case of divorce, the marital right is completely extinguished, and even in the event of her dying intestate the husband would have no claim to her property (*n*).

Protection order.

A wife deserted by her husband may obtain a protection order with regard to all property coming into her possession after the date of the desertion, and such property belongs to her as a *feme sole* in the same way as if there was a judicial separation (*o*).

Separation order.

A separation order under the Summary Jurisdiction (Married Women) Act, 1895, has the same effect as a judicial separation (*p*).

Where separation terminates or order is discharged.

A decree for judicial separation, a protection order, or a separation order may be reversed or discharged (*q*), or may become inoperative by reason of the parties having resumed cohabitation. The marital right of the husband is thereby revived, but all dealings with the woman in the meantime, and until the parties dealing with her have notice that the separation is at end, remain valid and effectual (*r*).

Where wife is trustee.

The above provisions respecting the property of a wife separated from or deserted by her husband extend to property which she becomes entitled to as executrix, administratrix, or trustee (*s*).

Power of Court to order guilty wife to make a settlement.

In any case in which the Court pronounces a sentence of divorce or judicial separation for adultery of the wife (*t*), or makes a decree for restitution of conjugal rights against the wife (*u*), and it appears to the Court that the wife is entitled to any property either in possession or reversion, the Court may order such settlement as it thinks reasonable to be made of such property for the benefit of

(*m*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 25, 26. Property previously vested in reversion but coming into possession after the decree, and choses in action payable but not reduced into possession, are released from the husband's marital right (*Insole, In re* (1865), L. R. 1 Eq. 470; *Johnson* v. *Lander* (1869), 7 Eq. 228). Property vested in possession before the decree is not released from the husband's marital right (*Waite* v. *Morland* (1888), 38 Ch. D. 135).

(*n*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491. See *Cuenod* v. *Leslie*, [1909] 1 K. B. 880; *Burdett* v. *Horne* (1911), 27 T. L. R. 402.

(*o*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21. The order is retrospective to the date of desertion (*Cooke* v. *Fuller* (1858), 26 Beav. 99; *In the Goods of Elliott* (1871), L. R. 2 P. & D. 274). Choses in action payable but not reduced into possession at the time of the desertion are released from the husband's marital right (*In re Coward* v. *Adams* (1875), L. R. 20 Eq. 179). Property vested in possession before the desertion is not released from the husband's marital right (*Hill* v. *Cooper*, [1893] 2 Q. B. 85).

(*p*) 58 & 59 Vict. c. 39.

(*q*) An order improperly obtained may be discharged after the wife's death so as to revest the husband's marital right (*Mahoney* v. *M'Carthy*, [1892] P. 21).

(*r*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), ss. 8, 10.

(*s*) 21 & 22 Vict. c. 108, s. 7.

(*t*) 20 & 21 Vict. c. 85, s. 45.

(*u*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3.

the innocent husband, or the children of the marriage, or both. A settlement so ordered by the Court is valid and effectual, notwithstanding any disability arising from coverture (*x*).

Power of Court to vary settlements.

After a final decree of nullity or dissolution of marriage the Court may inquire into marriage settlements and order any property comprised in the settlement to be applied as it may think fit (*y*).

Stedall v. Stedall (1902), 86 L. T. 124

Stedall v. *Stedall.*

A policy effected by a husband on his own life in an American company was expressed to be payable to his wife if she survived him. On the wife being divorced on the ground of adultery, it was held that the wife's interest was property of the wife within the meaning of section 45 of the Matrimonial Causes Act, 1857, and could be ordered to be settled by her for the benefit of the children of the marriage. Sir Francis Jeune was also of opinion that the policy was a post-nuptial settlement within the meaning of section 5 of the Matrimonial Causes Act, 1859, and that he could have ordered the policy moneys to be applied under that section.

Section X.—Infants

Infants' contracts at common law.

At common law the contract of an infant, that is, a person under twenty-one years of age, is, according to the nature of the contract, (1) void, (2) enforceable by either party, or (3) voidable by the infant.

Contracts of an infant which on the face of them are prejudicial to the infant's interest are void (*a*).

Certain classes of contract which are necessary for the infant's maintenance and well-being, such as contracts for a reasonable supply of food and clothing and contracts of apprenticeship, are enforceable by either party (*b*).

Other contracts of an infant are voidable by the infant. If the contract is one of continuing obligation, that is to say, out of which rights and liabilities may arise from time to time, the infant is bound, unless he repudiates the contract within a reasonable time after he attains full age (*c*). If there is no continuing obligation, the infant is not bound unless he expressly ratifies the contract after he comes of age. If an infant has received no benefit from a contract which he is entitled to avoid, or can and

(*x*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 6.

(*y*) Matrimonial Causes Act, 1859 22 & 23 Vict. c. 61), s. 5; Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3.

(*a*) *Meakin* v. *Morris* (1884), 12 Q. B. D. 352.

(*b*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; *Clements* v. *L. & N. W. Ry.*, [1894] 2 Q. B. 482.

(c) *Edwards* v. *Carter*, [1893] A.C. 360.

does restore what he has received, he may recover from the other contracting party anything which he has given or paid under the contract (*d*).

Practically all contracts and deeds of an infant relating to insurance, such as the contract of insurance, the assignment, mortgage, or settlement of the policy, are contracts within the last category, and are, therefore, voidable by the infant at common law (*e*).

The status of an infant in relation to his contracts has been considerably altered by statute.

Infants' Marriage Settlement Act, 1855.

The disability of an infant to bind himself or herself by an ante-nuptial marriage settlement was extremely inconvenient, and the Infants' Marriage Settlement Act, 1855, was passed to remedy this inconvenience. It provides as follows :—

Infants' Marriage Settlement Act, 1855

18 & 19 Vict. c. 43.

Infants may, with the Approbation of the Court of Chancery, make valid Settlements or Contracts for Settlements of their Real and Personal Estate upon Marriage.

I. From and after the passing of this Act it shall be lawful for every Infant upon or in contemplation of his or her Marriage, with the Sanction of the Court of Chancery, to make a valid and binding Settlement or Contract for a Settlement of all or any Part of his or her Property, or Property over which he or she has any power of Appointment, whether Real or Personal, and whether in Possession, Reversion, Remainder, or Expectancy; and every Conveyance, Appointment, and Assignment of such Real or Personal Estate, or Contract to make a Conveyance, Appointment, or Assignment thereof, executed by such Infant, with the Approbation of the said Court, for the Purpose of giving Effect to such Settlement, shall be as valid and effectual as if the Person executing the same were of the full Age of Twenty-one Years: Provided always, that this Enactment shall not extend to Powers of which it is expressly declared that they shall not be exercised by an Infant.

In case Infant die under Age, Appointment, &c., to be void.

II. Provided always, That in case any Appointment under a Power of Appointment, or any disentailing Assurance, shall have been executed by any Infant Tenant in Tail under the Provisions of this Act, and such Infant shall afterwards die under Age, such Appointment or disentailing Assurance shall thereupon become absolutely void.

The Sanction of the Court of Chancery to be given upon Petition.

III. The Sanction of the Court of Chancery to any such Settlement or Contract for a Settlement may be given, upon Petition presented by the Infant or his or her Guardian, in a summary Way, without the Institution of a Suit; and if there be no Guardian, the Court may require a Guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any Persons interested or appearing to be interested in the Property should be served with Notice of such Petition.

(*d*) *Hamilton* v. *Vaughan-Sherrin, etc.* [1894] 3 Ch. 589.

(*e*) An agreement, however, by an infant workman to become a member of an assurance society was held to be enforceable against him as part of his contract of service (*Clements* v. *L. & N. W. Ry.*, [1894] 2 Q. B. 482).

Not to apply to Males under 20, or Females under 17 Years of Age.

IV. Provided always, That nothing in this Act contained shall apply to any Male Infant under the Age of Twenty Years, or to any Female Infant under the Age of Seventeen Years.

It will be observed that the sanction of the Court of Chancery (since 1875 of the Chancery Division of the High Court of Justice) is necessary to the validity of an infant's marriage settlement. Ante-nuptial settlements made without such sanction, and all other settlements, are still voidable by the infant settlor.

Infants' Relief Act, 1874.

The next statutory interference with the common law relating to infants' contracts is the Infants' Relief Act, 1874 (*a*). That Act provides as follows :—

37 & 38 Vict. c. 62.

Infants' Relief Act, 1874

Contracts by infants, except for necessaries, to be void.

1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries (*b*)), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

No action to be brought on ratification of infant's contract.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

The precise meaning of this Act has been the subject of much discussion. Briefly the effect of the two sections appears to be as follows: The first section applies only to the two classes of contracts there specified, that is (1) contracts for the repayment of money lent or to be lent; (2) contracts for goods supplied or to be supplied, and to accounts stated with infants. These transactions are absolutely void, instead of being only as theretofore voidable at the instance of the infant. Neither the infant nor the other contracting party can under any circumstances sue upon them (*c*). The second section applies to all contracts (*d*), and

(*a*) 37 & 38 Vict. c. 62.

(*b*) And see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

(*c*) It is impossible to agree with the suggestion made in Simpson's Law of Infants (3rd edition), p. 4 (d), to the effect that the Act makes these transactions void only as against the infant.

(*d*) *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439.

operates to prevent parties contracting with an infant from taking proceedings against him on the ground that he has ratified the contract after attaining his majority. Thus voidable contracts, which formerly could not be enforced against the infant unless ratified, are now, so far as the right of the other party to enforce them is concerned, in the same position as contracts absolutely void. But it must be remembered that the section only defeats the right of the other contracting party to sue, and that the contract remains valid and subsisting. The infant may sue upon it, or the other contracting party may derive benefit from it if he can do so without having to bring an action against the infant or persons representing his estate, as, for instance, where money belonging to the infant comes into his hands, and he retains it to satisfy his debt. Where the contract is one of continuing obligation, so that at common law it would have been binding upon the infant unless repudiated within a reasonable time after attaining majority, it is not affected by this section. The other contracting party does not require to rely on ratification as part of his cause of action. He relies on the absence of repudiation, and is in the same position after as before the Act.

Applying the above general statements of the law relating to infants' contracts to contracts made by infants with reference to an insurance policy, the following observations may be made.

Infant's right to repudiate a policy and recover premiums.

Where a policy is issued to an infant it is clearly enforceable by the infant, and the only question of practical importance appears to be whether he can, on attaining full age, repudiate the contract within a reasonable time thereafter and claim a return of the premiums paid. The point is a nice one, and does not appear to have been judicially decided in this country. Mr. Bunyon stated that an infant could not recover premiums paid (*e*); but the authorities cited by him hardly support the proposition (*f*). The question as to whether an infant can recover money paid upon his contract depends upon whether he has derived any intermediate advantage from it which he cannot restore. If he has he cannot get back what he has paid, but otherwise he can. Thus where an infant took a lease of premises, and on attaining full age repudiated it and claimed a return of a premium which

(*e*) Bunyon on Life Insurance (2nd edition), p. 346.

(*f*) *Holmes* v. *Blogg* (1818), 2 Moo. J. B. 552; *Wilson* v. *Kearse* (1800), Peak. Ad. Cas. 196. The latter, a decision of Lord Kenyon at Nisi Prius, is practically overruled by *Corpe* v. *Overton* (1833), 10 Bing. 252.

he had paid, it was held he could not recover because he had had the benefit of the occupation of the premises in the meantime (*g*). And where an infant made an agreement to enter into partnership and paid a deposit by way of guaranteeing his fulfilment of the contract, and during his minority carried on the business and received a weekly allowance under the agreement, it was held he could not recover the deposit upon repudiating the agreement when he attained majority (*h*). But where there was a similar agreement for partnership, and the infant had paid a deposit, but the agreement had not been acted upon, the infant was held entitled to recover his deposit on the ground that he had derived no intermediate advantage (*i*). And where a company had issued shares to an infant, and his name was placed on the register and he received certificates, but had neither received any dividend nor attended any meetings, it was held that on attaining full age he could repudiate his shares and recover the money paid (*k*). The fact that his name was on the register was not an advantage within the meaning of the rule. Thus it may be questioned whether the fact that an insurance company has issued a policy and been on the risk is an advantage to the infant in this sense. The point is very much the same as arises when the assured seeks to cancel the policy and recover premiums on the ground of innocent misrepresentation by the company or its agent. In *Kettlewell* v. *Refuge* (*l*) the majority of the Court of Appeal was of opinion that a contract of insurance could be cancelled *ab initio*, notwithstanding that the company had been on the risk. It has already been submitted that this case was rightly decided, and if so, it seems to follow on principle that an infant who repudiates his policy could cancel the contract *ab initio* and recover his premiums.

Policy mortgaged by an infant.

If an infant borrowed money upon the security of a policy the whole transaction would be void under section 1 of the Infants' Relief Act as a contract for the repayment of money lent or to be lent. The lender could neither sue the infant nor enforce his charge upon the policy (*m*). The severity of this enactment may sometimes be mitigated by the equitable rule that where money borrowed by an infant has been applied by him in payment of a

(*g*) *Holmes* v. *Blogg* (1818), 2 Moo. J. B. 552; *Valentini* v. *Canali* (1889), 24 Q. B. D. 166.

(*h*) *Taylor, Ex parte* (1856), 8 De G. M. & G. 254.

(*i*) *Corpe* v. *Overton* (1833), 10 Bing. 252.

(*k*) *Hamilton* v. *Vaughan-Sherrin Co.*, [1894] 3 Ch. 589.

(*l*) [1907] 2 K. B. 242.

(*m*) *Nottingham Building Society* v. *Thurstan*, [1903] A. C. 6.

debt which could have been enforced against the infant, the lender may stand in the shoes of the person whose debt has been paid off. Therefore if the money borrowed was expended in paying for necessaries, the lender could recover from the infant (*n*). And where an infant purchased land and borrowed money on mortgage to pay the vendor, it was held that, although the mortgagee could not recover on the covenants in the mortgage which was void, he was entitled to be subrogated to the vendor's lien for unpaid purchase money, and therefore had a charge upon the land for the money advanced (*o*). This doctrine of subrogation will seldom affect the right to any policy moneys; but where an infant requires money for necessaries a valid security upon a life policy might be effected by assigning the policy in security to the person supplying the necessaries, so that the person advancing the money to pay him off would be subrogated to his right to the policy moneys.

Policy sold or purchased by an infant.

An assignment of a policy by an infant by way of sale is not void, but is voidable and within section 2 of the Infants' Relief Act. If there is an intention to assign *de præsenti*, there is a complete assignment in equity, however informal the expression of the intention may be. The contract is one of continuing obligation and will be valid and binding on the infant if not repudiated within a reasonable time after he attains majority. If there is merely a promise or covenant to assign at a future time, then there is merely an executory promise and no contract of continuing obligation, and the infant is not liable even although he purports to ratify the promise after he has attained his majority. On the other hand, the infant may enforce the contract, and upon tendering an assignment sue for the purchase price. Similarly if an infant agrees to purchase a policy and there is an assignment *de præsenti*, the property passes to him subject to his right of repudiation on attaining majority. If there is merely a promise to assign to him, the contract is executory and cannot be enforced against him, although he may enforce it upon attaining majority. No action for specific performance can be brought by an infant, because until he has attained majority he cannot forgo his right to repudiate the bargain (*p*).

Policy settled by an infant.

A settlement of a policy by an infant, if made upon marriage

(*n*) *Marlow* v. *Pitfield* (1719), 1 P. Wms. 558.

(*o*) *Thurstan* v. *Nottingham Building Society*, [1902] 1 Ch. 1.

(*p*) *Hargrave* v. *Hargrave* (1850), 12 Beav. 408; *Flight* v. *Bolland* (1828), 4 Russ. 298.

with the sanction of the Court, is as binding as if made by a settlor of full age. Otherwise a settlement by an infant cannot be enforced against him if incomplete; that is to say, a mere promise to settle is not binding, and cannot be ratified. But a complete settlement is binding subject to the infant's right of repudiation on attaining full age (*q*). The repudiation must be made within a reasonable time (*r*). In deciding what is reasonable, regard must be had to all the circumstances of the case (*s*); but the infant settlor is held to have full knowledge of the contents of the settlement, and cannot excuse his delay on the ground of ignorance (*t*); nor does the fact that the interest settled is a reversionary interest justify the settlor waiting until the interest comes into possession before making up his mind (*t*). Where an infant had settled all property to which he might become entitled under the will of his father, and his father died nearly four years after the settlor attained his majority, and the settlor did not purport to repudiate until more than a year after his father's death, it was held that the lapse of time was unreasonable and that the settlor was bound by the settlement (*t*).

Charge on contingent reversion for future maintenance of infant.

Although a trustee may, with the consent of the Court, raise money for the maintenance of an infant beneficiary by charging his contingent reversion and insuring against the failure of the contingency (*u*), an infant entitled to a contingent reversion not being part of a trust estate cannot effectively charge his reversion so as to secure repayment of a loan for future maintenance and the premiums on a policy to provide against the failure of the contingency.

Howarth, In re (1872), L. R. 8 Ch. 415

Howarth, In re.

An infant entitled to a freehold estate in possession applied to the Court by his next friend, and obtained an order charging the property in favour of his mother, who had maintained him, with the cost of past maintenance and the costs of the proceedings. The Court held that as judgment could have been recovered against the infant for past maintenance and execution levied on his property, they had jurisdiction to make an order charging his property.

(*q*) *Duncan* v. *Dixon* (1890), 44 Ch. D. 211; *Smith's Trust, In re* (1890), 25 L. R. Ir. 439.

(*r*) *Cooper* v. *Cooper* (1888), 13 A. C. 88.

(*s*) *Jones, In re*, [1893] 2 Ch. 461.

(*t*) *Edwards* v. *Carter*, [1893] A. C. 360. This case was decided in the House of Lords a few months after the decision of North, J., in *In re Jones*, and the dicta in the House of Lords go far to overrule that decision, which was to the effect that a settlement made by an infant in contemplation of marriage could be repudiated by her forty years later, when the property settled had at length come into possession.

(*u*) *Ante*, p. 533.

Hamilton, In re (1885), 31 Ch. D. 291

Hamilton, In re.

Two infants were entitled to successive estates tail in remainder after the life estate of their father. The father had become bankrupt and his life estate had been sold, and there was no fund applicable to the maintenance of the infants. A case was submitted to an actuary to calculate what sum should be paid at the death of the tenant for life in consideration of £200 a year until the first of the children attained twenty-one, provided that at least one of the children should be living at the death of the father and attain twenty-one; if neither child survived the father and attained twenty-one, or if the son died under twenty-one leaving issue, the lender to lose his money, the calculations to be made on the understanding that the infants' lives were insured. An actuary advised that an insurance company might be found to undertake the risk for £13,500 payable on the father's death subject to the above contingencies, the sum to carry interest at 5 per cent. from the death of the father until one of the children attained majority, in the event of the father's dying before either attained twenty-one. A summons was taken out on behalf of the infants by their grandfather as next friend, asking that £200 a year might be allowed for their maintenance, and that it might be raised by charging their reversionary interest with the sum necessary to purchase that allowance and pay the premiums on a policy providing against the failure of the contingency. The Court of Appeal held that they had no jurisdiction to make such an order. The principle of *In re Howarth* was not applicable because, firstly, though an action would lie against the infants for necessaries supplied, no action could ever be brought against them for the sum of £13,500 or for premiums on the policy, and that was what was sought to be charged; and, secondly, no execution could be obtained against an estate in remainder. The Court could not make an order charging the estate which would have a wider effect than a judgment at law against the infant.

Cadman v. Cadman (1886), 33 Ch. D. 397

Cadman v. Cadman.

There were five infants entitled to successive estates tail after the death of their grandmother, who was tenant for life. There was no fund applicable for their maintenance, and they desired to raise it on their reversionary interests. In order to meet the difficulty arising from the judgment in *In re Hamilton*, the grandmother proposed to release her life interest so that the first infant should have an estate in possession, the proposal for insurance was dropped, and the Court was asked to make an order charging the estate with £1000 for past maintenance of the five children and £800 per annum for their future maintenance. The Court of Appeal refused to make the order on the ground that no judgment could ever be obtained against an infant for a sum advanced for future maintenance, nor could judgment be obtained against the first infant in possession for necessaries supplied not only for himself, but for his brothers and sisters. They doubted whether the order made in *In re Howarth* was within the jurisdiction of the Court, but the order now asked for was far beyond that, and could not be made.

Infant may exercise

An infant may by deed exercise a power of appointment, provided the exercise of the power does not diminish or extinguish

power of appointment.

some interest of his own in the property (*y*). In so far as the exercise of the power affects his own interests, it is voidable by him in the same way as if it had been a disposition of his own property.

Infant's will invalid.

No will made by any person under the age of twenty-one years is valid (*z*), except that a will of personalty made by any soldier on active service, or by any mariner or seaman at sea, is valid if the testator was over the age of fourteen (*a*).

Infant's capacity to give a valid discharge for policy moneys.

Where moneys such as policy moneys become payable to an infant who is beneficially entitled to it, caution must be observed in making the payment. In so far as the infant's right in equity to receive the money is concerned, payment to him, upon his own receipt, of the whole claim is a sufficient answer to any further claim by him or his representatives (*b*). But an infant cannot give a legal discharge (*c*). If he is the person legally entitled to sue, the company should not pay to him until he is of full age, because if they were to pay on his sole receipt as an infant, that receipt would be no answer to some other claimant who had an equitable charge on the policy moneys, of which the company had no notice, and who afterwards instituted proceedings in the infant's name against the company. Where the infant is only entitled in equity and has not the legal title to sue in his own name, the company are probably safe if they pay to him on his own receipt and obtain a discharge from the person legally entitled to sue in his own name. But the company cannot safely settle a claim made by an infant for less than the full amount of the claim, because his settlement would, like any other contract made by him, be voidable. Where as indicated the company cannot get a good discharge from an infant, they should pay into Court.

Infant beneficiary under a trust.

Where an infant is entitled as beneficiary under a trust, the company may safely pay the claim to the trustees on their receipt alone, or they may settle the claim with the trustees if the settlement is apparently a *bonâ fide* and reasonable settlement.

Infant trustee.

Where an infant is entitled as trustee or executor, payment cannot safely be made to him on his sole receipt, but if there are other trustees or executors acting with him, payment may be made on the receipt of those who are *sui juris*.

(*y*) *D'Angibau, In rè* (1880), 15 Ch. D. 228, 235.

(*z*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7.

(*a*) 7 Will. 4 & 1 Vict. c. 26, s. 11; *In the Goods of Hiscock*, [1901] P. 78.

(*b*) *Lee* v. *Brown* (1798), 4 Ves. 362.

(*c*) *Dobbs* v. *Brain*, [1892] 2 Q. B. 207, 209; *Ledward* v. *Hassells* (1856), 2 V. & J. 370; *Cory* v. *Gertcken* (1816), 2 Madd. 40.

Action by infant.

If an action is commenced or other proceedings are instituted by an infant, they ought to be in the name of the infant by his "next friend" (*d*). If proceedings are commenced in the infant's name without a next friend, the defendant may apply to have the proceedings dismissed or the process amended by adding a next friend (*e*), and the infant's solicitor may be ordered to pay the costs of the application or of the action if dismissed (*f*). The object of insisting on a next friend being joined is to have a responsible person who will be liable for costs in the event of the defendant being successful. If the defendant appears and defends an action brought by an infant in his own name, and takes no objection that a next friend has not been joined, he waives the irregularity and cannot afterwards object (*g*). No action brought by an infant plaintiff, whether in his own name or by a next friend, can be compromised without the consent of the Court (*h*).

Section XI.—Lunatics

Lunatics so found by inquisition, and lunatics not so found.

In considering the acts of persons of unsound mind it is important to note the distinction between lunatics as to whose property an order has been made by the Judge in Lunacy, and lunatics in respect of whose property no judicial order has been made.

Lunatics not so found.

Where no order has been made by the Judge in Lunacy, the management and control of his property and affairs still remains with the lunatic. His legal position is as follows. His voluntary acts purporting to dispose of his property are void (*i*). Thus a voluntary settlement could not be enforced against a lunatic or his estate if it was proved that at the time he made it he was so insane as to be unable to manage his affairs. Contracts and dispositions of property for value are voidable by the lunatic or those responsible for his estate, if it can be shown that he was so insane as to be unable to manage his affairs, and that the other party knew of his condition (*k*). A contract made by a person

Voluntary settlements.

Contracts or dispositions for value.

(*d*) R. S. C., Order XVI. r. 16.
(*e*) *Flight* v. *Bolland* (1828), 4 Russ. 298.
(*f*) *Geilinger* v. *Gibbs* (1897), 1 Ch. 479.
(*g*) *Brocklebank, Ex parte* (1877), 6 Ch. D. 358.
(*h*) *Brooke* v. *Lord Mostyn* (1864), 2 De G. J. & S. 373, 415; R. S. C., Order XVI. r. 21.
(*i*) *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475.
(*k*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599.

of unsound mind is not voidable on the ground of insanity, if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind (*k*). The acts of a sane person are not affected by his subsequent insanity, and the acts of a person generally insane are binding if done during a lucid interval (*l*). There is a presumption in favour of sanity; but if general insanity be proved, the onus of proving a lucid interval rests on the person alleging it (*l*).

Lucid intervals.

Presumption of sanity.

Return of premiums to lunatic insurer.

It may be observed as a deduction from the law stated above that a lunatic having insured his life or effected any other insurance such as fire or accident could not afterwards claim a return of premiums unless the company knew of his insanity when they received the premiums. If they or their agent did know of the insanity, it is submitted that the lunatic or those representing his estate could elect to avoid the policy and recover the premiums.

Discharge for policy moneys payable to lunatic.

The receipt of a lunatic for policy moneys due to him would be a sufficient discharge if the company did not know of his condition; but if they did, his receipt would not bind him, and the company could not safely make payment to him, but should wait until a committee or other person legally entitled to receive the money is appointed, or else pay the money into Court.

Drunkenness.

If a man is too drunk to know what he is about, he is legally in a position similar to that of a lunatic; his voluntary dispositions are probably void, but his contracts and dispositions for value are not void, but voidable if the other contracting party knew his condition (*m*). His contracts may be ratified so as to bind him if when sober he confirms them by word or deed (*m*).

Lunatics so found.

A lunatic as to whose property an order has been made by a Judge in Lunacy is in a different position. Under the Lunacy Act, 1890 (*n*), when a person is believed to be insane a near relative may apply to the Judge in Lunacy for an order directing an inquisition whether such person is of unsound mind and incapable of managing himself and his affairs (*o*). The alleged lunatic is then examined before a jury in the High Court or before a Master in Lunacy, and upon being found a lunatic the Judge in Lunacy makes an order for the custody of his estate, and if necessary of his person (*p*). The order for the custody of the lunatic's estate

(*k*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599.
(*l*) *Hall* v. *Warren* (1804), 9 Ves. 605.
(*m*) *Matthews* v. *Baxter* (1873), L. R. 8 Ex. 132.
(*n*) 53 & 54 Vict. c. 5.
(*o*) 53 & 54 Vict. c. 5, s. 90.
(*p*) 53 & 54 Vict. c. 5, s. 108.

has the effect of taking all property of the lunatic, whether real or personal, and whether in possession, reversion, remainder, contingency, or expectancy, out of the lunatic's control, and placing it under the control and protection of the Crown (*q*). The Court appoints a committee, who represents the Crown and manages the property subject to the direction of the Court. In certain cases also the Judge in Lunacy may, without ordering an inquisition, but on being satisfied, by affidavit or otherwise, that a person is a lunatic and unable to manage his affairs, make an order appointing some person to manage his affairs for him, or generally to exercise all power which might be exercised by a committee (*r*).

Control of property passes to Crown represented by committee.

Where a committee has been appointed, or where any order has been made as to the management of a lunatic's property, the whole property of the lunatic, or the property affected by the order, having been taken away from the lunatic's control, cannot be dealt with by him. In the case of *In re Walker* (*s*) it was held by the Court of Appeal that a lunatic so found by inquisition, and whose property was in the hands of a committee, could not make a valid voluntary disposition of his property, even although made during a lucid interval. The absolute control of the property was for his protection vested in the Crown, and the lunatic had absolutely no disposing power over it. Although this was a voluntary disposition, the principle of the case seems to apply equally to a disposition for value, and it is submitted that a lunatic so found cannot, until the inquisition has been superseded and the order for the protection of his property rescinded, do any act, whether voluntary or for good consideration, which will bind the estate in the hands of the committee, and that the ignorance of the party contracting with the lunatic is immaterial.

Lunatic cannot dispose of his property.

It is submitted that the committee of a lunatic has power by his sole receipt to give a good discharge for any money which is payable to the lunatic, and is paid in full to him. This has been doubted, and as there is no actual decision to the effect that it is so, it would probably be wiser for an insurance company to decline to pay without an order from the Judge in Lunacy authorising the committee to give a discharge for the money. Certainly the company could not safely make a compromise with the committee without the sanction of the judge. The judge has power

Power of committee to give a good discharge for moneys payable to the lunatic.

(*q*) *Walker, In re*, [1905] 1 Ch. 160.
(*r*) 53 & 54 Vict. c. 5, s. 116.
(*s*) [1905] 1 Ch. 160.

to authorise the committee to sell any property belonging to the lunatic, and to deal with his property in other ways specified in the Act (*t*), and there can be little doubt that the general powers of management given to the Court are sufficient to unable the judge to authorise a compromise for the lunatic's benefit.

Section XII.—Bankruptcy (*u*)

Petition.

The property of a debtor, whether legal or equitable, including his choses in action, passes on his bankruptcy to the trustee in bankruptcy. When a petition in bankruptcy is presented, the

Receiving order.

Court first makes a receiving order, which places the Official Receiver in the possession and control of the debtor's property so as to protect it pending the meetings of creditors, and their decision as to whether they will accept some scheme of arrangement

Adjudication.

or make the debtor bankrupt (*w*). If no scheme of arrangement is accepted, the debtor is adjudged bankrupt, and then the debtor's property vests in the Official Receiver as trustee in bankruptcy until a trustee is appointed by the creditors, when the property

Official Receiver.

passes to him (*x*). The position of the Official Receiver before adjudication, and that of the Official Receiver or trustee after adjudication are totally distinct. The receiving order does not divest the debtor of his property, and he may continue to bring actions in his own name (*y*). The Official Receiver cannot take any proceedings in his own name to recover the estate (*z*), nor need he be joined as plaintiff in an action brought by the debtor (*a*). The Official Receiver's duty is confined to management and protection (*a*). He is entitled to take possession of all the debtor's property for this purpose, and if the debtor recovers anything by action he must hand over the proceeds to the Official Receiver(*z*). But although the Official Receiver cannot sue, he can apparently give a good discharge to any debtor of the debtor who thinks fit to pay directly to him instead of to the debtor (*z*). The Official Receiver before adjudication could not, however, settle any claim so as to bind himself or the trustee after adjudication.

(*t*) 53 & 54 Vict. c. 5, s. 120.

(*u*) Williams on Bankruptcy (9th edition), 1908; Wace on Bankruptcy, 1904; Chalmers and Hough on Bankruptcy (6th edition), 1906; Ringwood on Bankruptcy (10th edition); May on Fraudulent and Voluntary Conveyances (3rd edition), 1908.

(*w*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 5, 9.

(*x*) B. A. ss. 20, 54.

(*y*) *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548.

(*z*) *Sartoris, In re*, [1892] 1 Ch. 11.

(*a*) *Berry, In re*, [1896] 1 Ch. 939.

Upon adjudication the whole property, including all choses in action, passes to the Official Receiver, and, upon the appointment of a trustee, to the trustee, without any conveyance, assignment, or transfer whatever (*b*). All property passes to trustee.

The Official Receiver takes his title as trustee from the date of adjudication (*c*), the trustee appointed by creditors takes his title from the date when his appointment is certified by the Board of Trade (*d*). Trustee's title.

Bankruptcy Act, 1883, secs. 44, 50 (5), 54

44. The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars :— 46 & 47 Vict. c. 52, ss. 44, 50 (5), and 54.

(1) Property held by the bankrupt on trust for any other person ;

(2) The tools, if any, of his trade and the necessary wearing apparel and bedding of himself, his wife, and children to a value inclusive of tools and apparel and bedding not exceeding £20 in the whole.

But it shall comprise the following particulars :—

(i) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before the discharge ; and

(ii) The capacity to exercise and take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice ; and

(iii) All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business by the consent or permission of the true owner under such circumstances that he is the reputed owner thereof : Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

50.—(5) Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee.

54.—(1) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee.

(2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

(3) The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee,

(*b*) B. A. 1883, ss. 44, 54, 50 (5).
(*c*) B. A. 1883, s. 54 (1).
(*d*) B. A. 1883, s. 21 (4). The trustee's title is proved by production of an office copy of the adjudication order and a copy of the Board of Trade certificate under the seal of the Board : ss. 138, 140.

and shall vest in the trustee for the time being during his continuance in office without any conveyance, assignment, or transfer whatever.

(4) The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British Dominions requiring registration, enrolment, or recording of conveyances or assignment of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly.

Every interest in policy passes.

Practically every beneficial right or interest which a man may have in or in relation to a policy of insurance passes to his trustee in bankruptcy for the benefit of his creditors.

Powers of appointment.

Where the bankrupt has a general power of appointment, the trustee in bankruptcy may exercise the power for the benefit of creditors.

Powers of revocation.

And so where a settlor has reserved absolute power to revoke a settlement, the trustee in bankruptcy may equally revoke it (*e*).

Powers exercisable only with consent.

But where the power of appointment or revocation is only exercisable jointly by the bankrupt and another, or where it requires the consent of some other person, the trustee in bankruptcy cannot claim the benefit of the power or interfere with the bankrupt's exercising it jointly or with the necessary consent(*f*).

Contingent interests,

but not a mere possibility of interest.

If a bankrupt has any contingent interest in a policy which is of any realisable value, that interest passes to the trustee, and may be realised by him. But where there is a mere possibility of an interest accruing, and the possibility is of no realisable value whatever, the prospective interest does not pass to the trustee.

Dever, Ex parte (1887), 18 Q. B. D. 660

Dever, Ex parte.

A policy in an American insurance company had been issued on the application of a married woman on the life of her husband for the benefit of her and her children, and failing them, for the benefit of the husband's representatives. The policy was subject to a condition that after the premiums had been paid for ten years the owner might elect to take the surrender value. The husband paid the premiums until he became bankrupt, and then the wife paid them out of her separate property. Some time after the husband had obtained his discharge the wife elected to take the surrender value of the policy. The amount was claimed by the husband's trustee in bankruptcy, but the Court held that even although the husband might be entitled to the surrender value, as to which there was a difference of opinion, yet it was only available in the event of the wife, to whom the policy belonged, exercising her option as owner, and therefore as the interest of the husband in the policy, if

(*e*) *Dunlop* v. *Johnston* (1867), L. R. 1 Sc. App. 109.

(*f*) *Jones* v. *Winwood* (1841), 10 Sim. 150; *Lane Fox, In re*, [1900] 2 Q. B. 508.

any, was that of a mere possibility depending on the exercise of a power by another person, that was not an interest which passed to the trustee in bankruptcy.

Watson, In re (1890), 7 Mor. 65

Watson, In re.

A policy on the life of a married woman was effected by the husband in her name before the Married Women's Property Acts. The policy, being a chose in action, was therefore the property of the wife, but her husband was entitled to it if he survived her. The husband paid all the premiums until he became bankrupt. His trustee in bankruptcy claimed the benefit of his contingent interest in the policy. The Court directed that the policy should remain in the possession of the trustee on his undertaking to pay the premiums during the joint lives of the spouses. If the wife died first the trustee would then be entitled to the policy moneys, and if the husband died first the wife would be entitled to the policy without having to repay the premiums to the trustee.

Property held by bankrupt in trust.

Property held by a bankrupt in trust for any other person does not pass to his trustee in bankruptcy, and the legal title, if vested in the bankrupt, remains in him notwithstanding the bankruptcy (*g*). Property in trust within the meaning of this provision includes all property as to which the beneficial ownership is not in him, but in another. Thus where a chose in action, such as a policy of insurance, has been assigned by the bankrupt so as to pass the equitable title, not merely by way of charge or mortgage, but absolutely, the trustee in bankruptcy takes nothing, notwithstanding that the legal right to sue in law remains with the bankrupt (*h*).

Trustee takes subject to all equitable claims.

Notice to office by trustee in bankruptcy.

And where the assignment is not absolute, but by way of charge or mortgage, the trustee takes the same rights only as the bankrupt had, that is, subject to all equitable mortgages and charges. Even since the Policies of Assurance Act, 1867, the trustee cannot defeat equitable assignees or incumbrancers by giving notice of his title to the office before they have given notice of their assignment or incumbrance (*i*). If such assignments or incumbrances are impeachable by the trustee as having been made before adjudication, but after the first act of bankruptcy, or as being voluntary or fraudulent assignments, his title to impeach them does not depend on giving notice to the office (*k*). But the trustee in bankruptcy ought to give notice to the office

(*g*) B. A. 1883, s. 44.
(*h*) *Irving, In re* (1877), 7 Ch. D. 419.
(*i*) *Wallis, In re*, [1902] 1 K. B. 719; *Ibbetson, Ex parte* (1878), 8 Ch. D. 519.
(*k*) *Caldwell, Ex parte* (1871), L. R. 13 Eq. 188.

in order to protect himself against assignments and incumbrances made subsequent to the adjudication, for if the company has no notice of the bankruptcy, any *bonâ fide* purchaser for value may acquire priority by giving prior notice (*l*).

Trustee disclaiming policy or failing to keep it on foot.

The trustee in bankruptcy becoming entitled to the bankrupt's policy of insurance may realise it by sale or surrender for the benefit of the creditors, or he may keep it up for the benefit of the estate in the event of the bankrupt's death. But where the trustee refused to pay the premiums on the bankrupt's policies and disclaimed all interest in them, and the bankrupt died, his representatives were held entitled to the policy moneys as against the trustee (*m*). Apparently, however, the trustee in bankruptcy is neither bound to pay the premiums nor disclaim the policy; but if a third person has kept the policy on foot during the bankrupt's insolvency, and the trustee afterwards claims the benefit of the policy moneys, the Court may compel the trustee to repay out of the policy moneys the sums expended in so keeping the policy on foot (*n*).

Where third person has paid the premiums.

Where a third person has kept the policy on foot by payment of premiums before the bankruptcy, and at the request of the bankrupt, such person will have a lien on the policy as against the bankrupt, and the trustee will take subject to the equity. Where with the knowledge of the trustee in bankruptcy a third person has voluntarily paid premiums after the date of the bankruptcy, the trustee, although not bound in law or equity to repay the premiums, may be directed as an officer of the Court to do so, on the principle that the Court will not allow its officer, the trustee in bankruptcy, to retain moneys for distribution amongst creditors where it would be contrary to fair dealing to do so (*n*).

Tyler, In re, [1907] 1 K. B. 865

Tyler, In re.

A debtor was adjudicated bankrupt on August 27, 1896. A trustee was appointed, but was subsequently released, and the Official Receiver became *ex officio* trustee. At the commencement of the bankruptcy the bankrupt was entitled to two policies of insurance for £300 and £500. In 1893 he mortgaged the policies to his bankers to secure an overdraft of £400, and covenanted to pay the premiums. In 1895 the bankrupt was financially embarrassed, and requested his wife to pay the interest on the overdraft and

(*l*) *Russell's Policy Trusts, In re* (1872), L. R. 15 Eq. 26; *Lloyd* v. *Banks* (1868), L. R. 3 Ch. 488; *Palmer* v. *Locke* (1881), 18 Ch. D. 381; *Stone, In re*, [1893] W. N. 50.

(*m*) *Learmouth, In re* (1866), 14 W. R. 628.

(*n*) *Tyler, In re*, [1907] 1 K. B. 865; *Hall, In re*, [1907] 1 K. B. 875.

the premiums in order to save the policies, and promised to repay her. The wife accordingly made these payments from December, 1895, until the bankrupt's death in March, 1906, a total of £481 14*s.* 2*d.* The insurance company paid the policy moneys to the bank, and they, after paying off the overdraft, had a balance in their hands of £514 16*s.* 8*d.* The Official Receiver claimed the whole of this sum as the property of the bankrupt. The widow claimed a return of the moneys expended by her. Bigham, J., held that although the widow had no legal right, and probably also no equitable right, to recover the money, the trustee, as officer of the Court, must do what was just and right, and as it would be a great injustice to retain the whole fund without refunding to the widow the moneys she had paid to keep the policies on foot, he ordered that she should be paid £481 14*s.* 2*d.* It appeared that neither the trustee nor the Official Receiver had any knowledge that the payments were being made, but the bankrupt had stated in his preliminary examination, taken in 1901 by a clerk of the Official Receiver's predecessor in office, that his wife had always paid the premiums and interest. On appeal the Court of Appeal affirmed the judgment of Bigham, J. They indorsed the principle that the trustee in bankruptcy as an officer of the Court must act as a high-minded man, and not always strictly on his legal rights, and having regard to the circumstances of the case, and especially to the fact that it came to the knowledge of the trustee for the time being that the wife was paying the premiums and that she was allowed to go on paying the premiums, the Court would be allowing its officer to do, from a moral point of view, a dishonest thing if it allowed the trustee to keep the moneys without refunding what the wife had paid. The Court also thought that in this case there was a sufficient promise by the husband before the bankruptcy to make the premiums and interest paid by the wife, on the faith of that promise, a charge upon the policy enforceable in equity against the bankrupt and his trustee quite apart from the other ground of their decision.

Where bankrupt did not disclose policy.

If a bankrupt does not disclose the fact that he has a policy on his life, and continues to pay the premiums thereon after he has obtained his discharge, the trustee in bankruptcy may claim the policy or its proceeds whenever he becomes aware of its existence, and is not bound to allow the bankrupt or his representatives anything in respect of premiums paid.

Tapster v. Ward (1909), 101 L. T. 503

Tapster v. *Ward.*

In 1879 A effected a policy on his own life. He paid one premium upon it, and then, during the currency of the first year, proceedings for the liquidation of his affairs were commenced by him under the Bankruptcy Act, 1869. A trustee was appointed, and he made an arrangement with his creditors, and the liquidation was closed in 1880. The existence of the policy was never disclosed to the trustee. A continued to pay premiums until his death in 1907. The Official Receiver then claimed the policy moneys as trustee in the liquidation, and it was held that he was entitled to the whole proceeds.

Property acquired by bankrupt

Rights which the bankrupt acquires during bankruptcy do not pass to the trustee unless and until they are claimed by him;

after adjudication.

and as regards personal property and choses in action so acquired, any transactions with any person dealing with the bankrupt *bonâ fide* and for value, whether with or without knowledge of the bankruptcy, are valid against the trustee (*o*). But the assignee for value of a chose in action must perfect his title against the trustee by giving notice to the debtor or holder of the fund before the trustee has given notice to such debtor or holder that he claims the money on behalf of the estate (*p*). As between the trustee in bankruptcy and an assignee for value of an after-acquired chose in action, priority depends on priority of notice (*p*). Persons taking from the bankrupt as personal representatives, legatees, or voluntary assignees acquire no better title than the bankrupt, and the trustee can follow the after-acquired property and recover it from them, so long as it remains in their possession and can be identified (*q*). Until the trustee intervenes the bankrupt or his voluntary assignee may sue in his own name in respect of after-acquired choses in action, but if the trustee has given notice that he claims the right no further proceedings can be taken except in his name, and the trustee is entitled to be joined as a party in any proceedings then pending (*r*).

Bennett, In re, [1907] 1 K. B. 149

Bennett, In re.

A debtor was adjudicated bankrupt in 1896. There were then no assets of any value, and the liabilities were £300. In 1904 the bankrupt effected two policies of life insurance on his own life. He died in 1905 intestate, and his brother, without knowledge of the bankruptcy, took out letters of administration and swore the estate at £304 15*s.*, being the amount due on the two policies. The brother received the policy moneys, and after deducting the costs of the administration distributed it among himself and six others as next of kin, retaining in his own hands his own share and the shares of the infants. It was held that the trustee in bankruptcy was entitled to recover from the brother as administrator the shares which he retained, and was entitled to recover from each of the next of kin the share which they had received.

Title to policy after bankruptcy closed.

When a bankrupt receives his discharge, the property which has vested in the trustee does not *ipso facto* revest in the bankrupt. In so far as it has not been realised, it is still available for

(*o*) *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262; *New Land Development, In re*, [1892] 2 Ch. 138; *Clayton and Barclay's Contract, In re*, [1895] 2 Ch. 212; *Hunt* v. *Fripp*, [1898] 1 Ch. 675.

(*p*) *Beall, In re*, [1899] 1 Q. B. 688; *Mercer* v. *Vans Colina*, [1900] 1 Q. B. 130 *n.*

(*q*) *Bennett, In re*, [1907] 1 K. B. 149; *Ball, In re*, [1899] 2 Ir. R. 313.

(*r*) *Carter, Ex parte* (1876), 2 Ch. D. 806; *Emden* v. *Carte* (1881), 17 Ch. D. 768.

the benefit of creditors until they have been paid in full. Where a bankruptcy is closed and the trustee has been discharged, the property which has not been realised and distributed vests in the Official Receiver, and it is his duty to get in and distribute it when he can (*s*).

Property once vested in the trustee does not revest in the bankrupt until either the bankruptcy is annulled and the property is revested in the bankrupt by order of the Court (*t*), or until the trustee or Official Receiver reassigns the property to the bankrupt, which he may do either because the property is of no value to the estate, as in the case of a policy with no surrender value, or because the creditors have been satisfied either by a composition or by payment in full.

Sometimes difficulty arises from the fact that a policy was of no value at the time of the bankruptcy, and was therefore disregarded and the bankruptcy wound up without any order of the Court or assignment revesting the title in the bankrupt. It is clear from the decision in *Tapster* v. *Ward* that the policy, although of no value at the time, vests in the trustee in bankruptcy. No doubt the conduct of a trustee who was aware of the existence of a policy might be such as to amount to an abandonment of it to the bankrupt (*u*), but an abandonment would only revest the purely equitable right to the policy. It is submitted that the right to sue at law can only be revested in the bankrupt by an order of the Court, or a written assignment from the trustee or Official Receiver.

Reputed ownership.

By the reputed ownership clause in the Bankruptcy Act, all goods which at the date of the bankruptcy are in the possession, order, and disposition of a bankrupt in his trade or business with the consent of the true owner, pass to his trustee on the ground that the true owner must suffer for having allowed him to have false credit. Choses in action, including policies of insurance, originally came within the reputed ownership clause, but since 1869 are expressly excepted from its operation (*w*). In Ireland, however, choses in action are not excepted from the order and disposition clause in the Irish Bankruptcy statutes, and the law on this point is still the same as it was in England before 1869. In view

(*s*) B. A. 1883, s. 160.
(*t*) B. A. 1883, s. 35.
(*u*) *Whyte* v. *Northern Heritable Securities Co.*, [1891] A. C. 608; *Learmonth, In re* (1866), 14 W. R. 628.
(*w*) *Ibbetson, Ex parte* (1878), 8 Ch. D. 519.

of this fact, the English decisions before 1869 may be discussed. These decisions are still useful even in England, because (1) the notice of an assignment required to be received by the holder of a fund in order to take the chose in action out of the order and disposition of the assignor is probably just the same kind of notice as is required to fix the holder with the liability which follows from having notice of an equity, and to prevent any subsequent assignee from obtaining priority by giving an earlier notice, and (2) where circumstances formerly warranted a finding that a chose in action was in the order and disposition of a bankrupt with the consent of the true owner, there will now be at least *primâ facie* evidence of fraud to support an application by the trustee in bankruptcy to have it set aside under the 47th section of the Bankruptcy Act or under 13 Eliz. c. 5.

What is reputed ownership.

In order to take a chose in action out of the order and disposition of a bankrupt, notice to the holder of the fund was absolutely necessary, notwithstanding that the assignment was by formal deed (*x*) and that the documents of title had been deposited with the assignee (*y*). The notice of the assignment had to be definite, and a mere vague or ambiguous statement to the holder of the fund which might put him on inquiry was not sufficient (*z*). The notice was not required to be in writing (*a*), nor to be given with the intention of perfecting the assignment (*b*). Primarily the holder of the fund would receive notice from the assignee, but if he had obtained elsewhere definite information that the chose in action had been assigned, that was sufficient (*c*). It was not necessary that he should have notice of the precise nature of the assignment, as, for instance, whether it was a sale or a mortgage (*d*). Notice to an agent of the holder was sufficient if he received it under circumstances which made it his apparent duty as agent to communicate it to his principal (*e*);

(*x*) *Webb, In re* (1867), 36 L. J. Ch. 341; *Tennyson, Ex parte* (1832), Mont. & Bli. 67.

(*y*) *Williams* v. *Thorp* (1828), 2 Sim. 257; *Thompson* v. *Tomkins* (1862), 2 Dr. & Sm. 8; *Gibson* v. *Overbury* (1841), 7 M. & W. 555.

(*z*) *West* v. *Reid* (1843), 2 Hare, 249; *Carbis, Ex parte* (1834), 4 Dea. & Ch. 354; *Edwards* v. *Martin* (1865), L. R. 1 Eq. 121.

(*a*) *Alletson* v. *Chichester* (1875), L. R. 10 C. P. 319; *North British* v. *Hallett* (1861), 7 Jur. N. S. 1263; *Agra Bank, Ex parte* (1868), L. R. 3 Ch. 555; *Edwards* v. *Scott* (1840), 2 Scott N. R. 266.

(*b*) *Smith* v. *Smith* (1833), 2 Cro. & M. 231.

(*c*) *Stewart, Ex parte* (1865), 11 Jur. N. S. 25; *Tibbits* v. *George* (1836), 5 A. & E. 107.

(*d*) *Alletson* v. *Chichester* (1875), L. R. 10 C. P. 319; *Stright, Ex parte* (1832), 2 Dea. & Ch. 314; *Barnett, Ex parte* (1845), De G., Bcy. Cas. 194.

(*e*) *North British* v. *Hallett* (1861), 7 Jur. N. S. 1263; *Tibbits* v. *George* (1836), 5 A. & E. 107.

except where the agent receiving notice was himself a party to the assignment, or where it was to his interest not to communicate the matter (*f*). Where an insurance company's agent acted as solicitor for both assignor and assignee of a policy in their office, it was held that they had notice of the assignment (*g*); and where a director of an insurance company held a policy in the company, and deposited it with a bank to secure advances, and one of the bankers was the company's auditor, it was held that the company had sufficient notice of the assignment to take the policy out of the order and disposition of the director (*h*). This, however, seems a doubtful decision, because, in so far as the knowledge of the director was concerned, it was in his interest as assignor to conceal the assignment, and as to the knowledge of the banker, he had as auditor no apparent duty to communicate the matter to the insurance company. Where a director or other servant or agent of a company is the assignor of a policy, or acts as solicitor for an assignor, his interest on his own or his client's behalf is to conceal the assignment, and therefore some further notice to the company is necessary in order to take the policy out of the order and disposition of the assignor (*i*). Where such director, servant, or agent is himself an assignee of the policy, he cannot be heard to say that notice to himself is notice to the company, because, although it was his duty as agent to communicate it, he cannot so completely sever his identity as to say that as assignee he is in no way answerable for his breach of duty as agent. Where such director, servant, or agent is a solicitor for an assignee, his knowledge is probably sufficient notice to the company.

In the case of a mortgagee or assignee becoming bankrupt after having sub-mortgaged or sub-assigned his chose in action, notice of such sub-mortgage or sub-assignment must have been given to the holders of the fund in order to take the chose in action out of the order and disposition of the bankrupt. For this purpose notice to the mortgagor or assignor is not necessary (*k*).

Reputed ownership in Ireland.

In Ireland it has been held that since the Policies of Assurance Act, 1867, notice of an assignment must be in writing, and that

(*f*) *Thompson* v. *Speirs* (1845), 13 Sim. 469; *Russell's Policy Trusts, In re* (1872), L. R. 15 Eq. 26.

(*g*) *Gale* v. *Lewis* (1846), 9 Q. B. 742.

(*h*) *Waithman, Ex parte* (1835), 4 Dea. & Ch. 412.

(*i*) *Boulton, Ex parte* (1857), 1 De G. & J. 163; *Thompson* v. *Speirs* (1845), 13 Sim. 469; *Russell's Policy Trusts, In re* (1872), L. R. 15 Eq. 26; *Henessy, Ex parte* (1842), 5 Ir. Eq. 259.

(*k*) *Barnett, Ex parte* (1845), De G., Bcy. Cas. 194; *Jones* v. *Gibbons* (1804), 9 Ves. 407.

an oral notice is ineffective to take the policy out of the order and disposition of the assignor (*l*), and as a logical extension of this principle it might also be held that unless the notice is a formal notice addressed to the principal office named in the policy, it would be equally ineffective. The correctness of this decision is, however, extremely doubtful. It has also been held in Ireland that where a notice addressed to the secretary of the insurance company at the principal office is posted, that is sufficient to protect the assignee, although the notice may never have been received by the company (*m*). And this, it is conceived, is right, because the assignee having done everything he could be expected to do, the policy, if it remains in the order and disposition of the bankrupt, does not do so with the consent of the true owner.

Reputed ownership of goods and fire insurance.

Where goods belonging to A were in the order and disposition of B, and so passed to B's trustee in bankruptcy, it was held that the benefit of a fire insurance policy effected by A did not pass to the trustee, and on the goods being destroyed by fire and the company paying the loss to A, the trustee had no right to the policy moneys (*n*).

Right of trustee in bankruptcy to sell policies and to sue upon or settle claims.

After adjudication the trustee (or Official Receiver acting as trustee (*o*)) may sell any of the bankrupt's property (*p*), including policies of assurance, and claims then in existence and in respect of which actions are pending (*q*), and his receipt is a good discharge for any debt due to the bankrupt (*r*). With the consent of the committee of inspection the trustee may bring an action or make a binding compromise in respect of any claim (*s*), and with the same consent he may mortgage or pledge any of the bankrupt's property (*t*). The bankrupt himself cannot during bankruptcy sue in respect of any property or chose in action which has passed to the trustee (*u*). If before adjudication an action in respect of such property has been commenced by the

(*l*) *Young, In re* (1890), 25 L. R. Ir. 372.
(*m*) *Hickey, In re* (1875), Ir. R. 10 Eq. 117.
(*n*) *Smith, Ex parte* (1818), 3 Madd. 63.
(*o*) *Turquand* v. *Board of Trade* (1886), 11 A. C. 286.
(*p*) B. A. 1883, s. 56 (1).
(*q*) *Scear* v. *Lawson* (1880), 15 Ch. D. 426; *Guy* v. *Churchill* (1888), 40 Ch. D. 481.
(*r*) B. A. 1883, s. 56 (2).
(*s*) B. A. 1883, s. 57 (2) (6).
(*t*) B. A. 1883, s. 57 (5).
(*u*) *Motion* v. *Moojen* (1872), 14 Eq. 202.

bankrupt, and is pending at the date of the adjudication, the bankrupt cannot continue the proceedings (*x*). The defendant must give notice to the trustee, who may elect to continue the action, and apply to be made a party (*y*), and if the trustee declines to proceed with the action it may be stayed, and if stayed, the stay cannot afterwards be removed at the instance of the bankrupt when he has obtained his discharge (*z*). The trustee, although he has declined to proceed with the action commenced by the bankrupt, may bring a fresh action in his own name in respect of the same matter (*a*).

Bankruptcy Act, 1883, secs. 56 (1) (2), 57

Powers of trustee to deal with property.

56. Subject to the provisions of this Act the trustee may do all or any of the following things :—

(1) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.

(2) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof.

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Powers exercisable by trustee with permission of the committee of inspection.

57. The trustee may, with the permission of the committee of inspection, do all or any of the following things :—

(1) Carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same.

(2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt.

(3) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection.

(4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the committee think fit.

(5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts.

(6) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums payable at such times and generally on such terms as may be agreed on.

(7) Make such compromise or other arrangement as may be thought

(*x*) *Jackson* v. *North Eastern* (1877), 5 Ch. D. 844.

(*y*) Rules of Supreme Court, Order XVII. r. 4.

(*z*) *Selig* v. *Lion*, [1891] 1 Q. B. 513.

(*a*) *Bennett* v. *Gamgee* (1876), 2 Ex. D. 11.

expedient with creditors or persons claiming to be creditors in respect of any debts provable under the bankruptcy.

(8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person.

(9) Divide in its existing form amongst the creditors according to its estimated value any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do a particular thing or things for which permission is sought in the specified case or cases.

Trustee's title relates back to first act of bankruptcy.

The trustee in bankruptcy succeeds to the rights of the bankrupt subject to equities; that is to say, with certain exceptions he takes no better title than the bankrupt himself, and he takes it subject to the same charges. The title of the trustee, however, relates back to the first act of bankruptcy committed by the debtor within the three months immediately preceding the presentation of the petition (*b*), and consequently the act constituting such first act of bankruptcy, if a conveyance of or charge upon the bankrupt's property, and all transactions with the property after that date, are, subject to certain exceptions, void as against the trustee in bankruptcy (*c*). The principal exceptions are executions and attachments completed before the date of the receiving order (*d*), and payments made to the bankrupt or by the bankrupt to his creditors, and all transactions by or with the bankrupt for valuable consideration made before the date of the receiving order and in good faith, without notice of an act of bankruptcy (*e*).

Bankruptcy Act, 1883, secs. 43, 45, and 49

Relation back of trustee's title.

43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall

(*b*) B. A. 1883, s. 43.
(*c*) *Carl Hirth, In re*, [1899] 1 Q. B. 612.
(*d*) B. A. 1883, s. 45.
(*e*) B. A. 1883, s. 49.

be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Restriction of rights of creditor under execution or attachment.

45.—(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this Act an execution against goods is completed by seizure and sale ; and an attachment of a debt is completed by receipt of the debt, and an execution against land is completed by seizure, or in the case of an equitable interest by the appointment of a receiver.

Protection of *bonâ fide* transaction without notice.

49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy—

(A) Any payment by the bankrupt to any of his creditors ;

(B) Any payment or delivery to the bankrupt ;

(C) Any conveyance or assignment by the bankrupt for valuable consideration ;

(D) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration.

Provided that both the following conditions are complied with, namely—

(1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order ; and

(2) The person other than the debtor to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into has not at the time of the payment, delivery, or conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

Even an act of bankruptcy may be protected if *bonâ fide*.

Transactions with the debtor, such as receiving payment of a debt (*f*), or taking security for an unpaid debt (*g*), or purchasing the debtor's property (*h*), are protected under section 49 if the party dealing with the debtor acts in good faith, and the fact that the transaction is in itself an act of bankruptcy or in fraud of creditors does not affect the right of the party dealing with the debtor (*h*). If, however, the party dealing with the debtor acts in bad faith, that is to say, with knowledge of the debtor's intention to defraud his creditors, he cannot claim protection under this section, even although the transaction was before the receiving order and without notice of an act of bankruptcy (*i*).

(*f*) *Badham, In re* (1893), 10 Mor. 252.

(*g*) *Dunkley and Son, In re*, [1905] 2 K. B. 683.

(*h*) *Shears* v. *Goddard*, [1896] 1 Q. B. 406.

(*i*) *Jukes, In re*, [1902] 2 K. B. 58.

What constitutes notice of an act of bankruptcy.

Notice of an act of bankruptcy must be notice that an act of bankruptcy has in fact been committed. Notice that the debtor intends to commit an act of bankruptcy is not sufficient, as where the party dealing with the debtor had notice that the debtor had signed a declaration of insolvency and intended to file it (*k*), or where he had notice that the debtor had instructed his solicitors to prepare a notice to creditors that he was about to suspend payment (*l*) or to prepare a bankruptcy petition (*m*). Notice of facts which do not amount to an act of bankruptcy, but which might suggest the possibility and put the party on further inquiry from which he would have ascertained that an act of bankruptcy had been committed, is not sufficient notice if the party does not make any inquiry (*n*). On the other hand, parties dealing with the debtor must be presumed to know the bankruptcy law, and knowledge of facts which do in law amount to an act of bankruptcy is sufficient notice; and where a party has notice of facts from which a Court or jury would naturally and properly infer that an act of bankruptcy has been committed, he will be held to have notice, and the Court will not inquire whether he did in his own mind draw the inference (*o*). Again, the notice need not be notice of the specific facts which constitute the act of bankruptcy. Notice in general terms that an act of bankruptcy has been committed is sufficient. Thus notice that a bankruptcy petition has been presented by a creditor is notice of an act of bankruptcy, because such petition would naturally contain a statement of some act of bankruptcy (*p*). But notice that a petition has been dismissed is not notice of an act of bankruptcy, because it might have been dismissed on the ground that no such act had been committed (*q*).

Position of company which has notice of an act of bankruptcy committed by claimant.

During the period between the commission of an act of bankruptcy and an adjudication upon a petition presented within three months, the position of parties owing money to the debtor is very anomalous. The debtor still retains the legal and beneficial interest in all his property, but this interest is contingent on no bankruptcy petition being presented within three months. If the debtor brings an action to enforce his claims against others,

(*k*) *Conway* v. *Nall* (1845), 1 C. B. 643.
(*l*) *Morgan, In re* (1895), 2 Mans. 508.
(*m*) *Wright, In re* (1876), 3 Ch. D. 70.
(*n*) *Evans* v. *Hallam* (1871), L. R. 6 Q. B. 713.
(*o*) *Snowball, Ex parte* (1872), 7 Ch. 534; *Slobodinsky, In re*, [1903] 2 K. B. 517.
(*p*) *Lucas* v. *Dicker* (1880), 6 Q. B. D. 84.
(*q*) *O'Shea's Settlement, In re*, [1895] 1 Ch. 325.

it is no defence to that action for the party owing the money to say that the debtor has committed an act of bankruptcy, and at the same time the party owing the money and having knowledge of the act of bankruptcy, dare not pay the debtor except under legal process, because a voluntary payment and a discharge from the debtor would not be a defence against the subsequent demand of the trustee in bankruptcy (*r*). Where a claim is made upon a company by a claimant who to its knowledge has committed an act of bankruptcy, its only course is to pay into Court or await proceedings being taken against it. If the claimant sues the company and it makes no defence except its inability to obtain a discharge, it will probably be entitled to its costs. The Court will direct the money which has been recovered under the judgment to be paid into Court and kept there until it shall be seen whether the debtor is made bankrupt or not (*s*). Where a debtor has executed a deed of assignment of all his property for the benefit of his creditors, that is an act of bankruptcy, and after notice of such assignment payment cannot be safely made to him or his assignee, or on their joint receipt, until three months after the date of the assignment (*t*). The trustee in bankruptcy would not be bound by any payment made to or discharge given by the trustee under the deed, and even where the trustee in bankruptcy has called upon the trustee under the deed to hand over all the property collected by him, that is not an adoption of his acts, and payment made to the trustee under the deed can only be deemed a payment in discharge of the debt if the money does in fact come into the hands of the trustee in bankruptcy (*u*).

Transactions with a debtor after notice of an act of bankruptcy will not be protected merely on the ground that they are done in pursuance of an existing contract which is valid as against the debtor. Thus the completion of a contract of sale (*x*), or the redemption of a security given by the debtor (*y*), would be void against the trustee unless carried out under the order of the Court. If the debtor sought to enforce his rights by legal process, the Court would make such order as might be necessary in the best interest of the estate.

(*r*) *Ponsford Baker* v. *Union of London and Smith's Bank*, [1906] 2 Ch. 444.

(*s*) *Ponsford and Baker* v. *Union of London and Smith's Bank*, [1906] 2 Ch. 444.

(*t*) *Davis* v. *Petrie*, [1906] 2 K. B. 786.

(*u*) *Davis* v. *Petrie*, [1906] 2 K. B. 786.

(*x*) *Powell* v. *Marshall Parkes and Co.*, [1899] 1 Q. B. 710.

(*y*) *Ponsford and Baker* v. *Union of London and Smith's Bank*, [1906] 2 Ch. 444.

Payments made to a bankrupt after the date of the receiving order but in ignorance of the bankruptcy.

Payments made to a bankrupt up to the date of the receiving order are protected by section 49 of the Bankruptcy Act if the person making the payment has at the time no notice of an available act of bankruptcy. Payments made after the date of the receiving order are not protected by any specific provision in the Act; but in the present state of the authorities it may be assumed that a person making payment to a bankrupt, or to the personal representatives of a bankrupt, after the date of the receiving order, but without notice of any act of bankruptcy, is protected under the equitable doctrine of notice which regulates the liability of a debtor in dealing with equitable assignees of the chose in action. There is, curiously enough, no decision directly in point, but in several cases it has been decided that the trustee in bankruptcy takes no better title to an equitable chose in action than any other assignee under a deed of assignment, and that his title against subsequent assignees depends on priority of notice to the debtor (*z*). In the case of *Russell's Policy Trusts* (*a*) Malins, V.C., applied the same doctrine of notice to the case of a life policy which was mortgaged by the holder after he had become bankrupt, and he held that priority of notice by the mortgagees gave them priority over the trustee in bankruptcy. The authority of this decision no doubt justifies the assumption that the principle would be extended to the case of an insurance company making a payment to a bankrupt or his representatives without notice of a bankruptcy. The case of *Russell's Policy Trusts* (*a*) is, however, open to criticism on the ground that what passed to the trustee in bankruptcy was not an equitable chose in action, but apparently the right to sue in law upon the policy; and if so, the trustee's priority might not depend on notice in the same way as if he had acquired only an equitable chose in action. It is certainly open to argument that a trustee in bankruptcy being entitled by operation of law to the legal right of action on any policy belonging to the bankrupt cannot be defeated by any dealing with the policy after the date of the receiving order, and is not bound, as he would be in the case of an equitable chose in action, to perfect his title by notice to the company. At present, however, the law must be accepted as laid down in the case of *Russell's Policy Trusts* (*a*), and it follows from this that a trustee in bankruptcy must be

(*z*) *Palmer* v. *Locke* (1881), 18 Ch. D. 381; *Stone, In re,* [1893] W. N. 50.

(*a*) (1872), L. R. 15 Eq. 26.

regarded in the same light as any other assignee of the policy, and that if the company has no notice of the bankruptcy, payment to the bankrupt as apparent holder of the policy will discharge it (*b*).

Settlements made with a bankrupt.

A *bonâ fide* settlement made by an insurance company with an assured or his representatives without notice of any act of bankruptcy would probably bind the trustee to the same extent as payment of the claim in full. But if the company makes what purports to be an *ex gratiâ* payment without obtaining a discharge from all further claims, the trustee in bankruptcy would still be entitled to proceed against the company for the full amount of the claim (*c*).

What constitutes an act of bankruptcy.

Knowledge of what is or is not an act of bankruptcy is of considerable importance to insurance companies. An act of bankruptcy committed by the debtor is the necessary foundation of a bankruptcy petition. The title of the trustee relates back to the first act of bankruptcy within the three months before the presentation of the petition, and no transaction with the debtor after knowledge of an act of bankruptcy is protected under section 49. The various acts of bankruptcy are defined in the Act.

Bankruptcy Act, 1883, sec. 4, amended by Bankruptcy Act, 1890, sec. 1

Acts of bankruptcy.

(1) A debtor commits an act of bankruptcy in each of the following cases :—

(A) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (*cc*) ;

(B) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof ;

(C) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged a bankrupt ;

(*b*) See also *Sowerby* v. *Brooks* (1821) 4 B. & Ald. 523 ; *Atkinson, In re* (1852) 2 De G. M. & G. 140 ; *Barr's Trusts, In re* (1858), 4 K. & J. 219 ; *Bright's Trusts, In re* (1880), 13 Ch. D. 413 ; in Ireland under the Irish Act of 1857 and in Scotland under the Scottish Bankruptcy Act, 1856, the law is apparently otherwise and the title of the trustee in bankruptcy s absolute notwithstanding the absence of notice. It is incumbent, therefore, upon companies to search for bankruptcies in Ireland and Scotland.

(*c*) *Wills* v. *Wells* (1818), 8 Taunt. 264.

(*cc*) No creditor who has acquiesced in the execution of such a deed can avail himself of it as an act of bankruptcy (*Stray, Ex p.* (1867), L. R. 2 Ch. 374).

(D) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house or otherwise absents himself or begins to keep house

(E) If execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days;

(F) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself;

(G) If a creditor has obtained a final judgment against him for any amount, and execution thereof not having been stayed has served on him a bankruptcy notice requiring him to pay the judgment debt in accordance with the terms of the judgment or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained;

(H) If the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.

Voluntary and fraudulent dispositions.

The relation back of the title of the trustee to the first act of bankruptcy within three months of the petition avoids, with certain exceptions, transactions completed after that date. But in addition to the transactions so avoided, certain other transactions which are or are deemed to be in fraud of creditors are voidable by the trustee in bankruptcy. These are—

(1) Voluntary or fraudulent settlements under the Bankruptcy Act, 1883, section 47.

(2) Fraudulent conveyances under the statute of Elizabeth, 13 Eliz. c. 5.

(3) Fraudulent preferences under the Bankruptcy Act, 1883, section 48.

Bankruptcy Act, 1883, sec. 47

Avoidance of voluntary settlements.

47.—(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void

against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

(3) Settlement shall for the purposes of this section include any conveyance or transfer of property.

Meaning of "settlement."

For the purpose of section 47 "settlement" includes any conveyance or transfer of property by the donor which contemplates the retention of the property by the donee, either in its original form or in such form that it can be traced (*d*). It does not extend to a gift of money or property where it is intended that the money or proceeds of the property shall not be retained (*d*), but shall be expended at once.

What settlements are struck at.

Section 47 avoids voluntary settlements and settlements which although not voluntary are fraudulent, as being designed to defeat the application of the bankruptcy laws. It strikes at all settlements which are not made for good consideration and *bonâ fide*. The settlement is not absolutely void *ab initio*, but voidable by the trustee in bankruptcy as from the time his title accrues, that is, from the first act of bankruptcy within three months prior to the presentation of the petition. If before that time the property or any interest therein passes to a *bonâ fide* purchaser for value, such purchaser acquires a good title which is unimpeachable by the trustee in bankruptcy, and which a vendor can compel a purchaser to accept (*e*). The purchaser is a purchaser in good faith if he is ignorant of any probability of the settlor's insolvency, and knowledge that the settlement was voluntary does not affect his title (*f*). The trustees of a settlement who have properly incurred costs, charges, and expenses in connexion with property the subject of a voluntary settlement which is afterwards declared void against the trustee in bankruptcy are purchasers for value in respect of

Bonâ fide purchaser for value may acquire good title from donee.

(*d*) *Plummer, In re*, [1900] 2 Q. B. 790.

(*e*) *Vansittart, In re*, [1893] 2 Q. B. 377; *Carter, In re*, [1897] 1 Ch. 776.

(*f*) *Brall, In re*, [1893] 2 Q. B. 381.

Settlement only voidable as against trustee.

their claim for such costs, and are entitled to a lien on the property (*g*). A voluntary settlement which has been declared void against the trustee in bankruptcy is only void as against him, and therefore, except in so far as the property is necessary to satisfy the creditors of the bankrupt, it stands good and any surplus belongs to the settlee (*h*). The trustee in bankruptcy is only entitled to treat the settlement as void, and cannot claim to stand in the place of the settlee so as to acquire any priority on behalf of the general creditors over mortgagees and incumbrancers on the property subsequent to the date of the settlement (*i*).

Who are purchasers for value.

In order to take a transfer or conveyance of property out of the operation of the section, it must be made to a purchaser who takes for value and in good faith. A purchaser means any one who acquires the property or an interest therein for a valuable consideration. Any person who for advances or other valuable consideration acquires a charge or lien on the property is a purchaser for value (*l*).

Hance v. Harding (1888), 20 Q. B. D. 732

Hance v. *Harding.*

A having effected a policy of insurance on his own life made a post-nuptial settlement for the benefit of his children, to which settlement his father, B, was a party. A assigned his life policy to the trustees, and B assigned certain leasehold interests all on similar trusts for the children. A became bankrupt within two years from the date of the settlement. The Court came to the conclusion that the settlement was made without regard to any contemplated probability that A would become insolvent or bankrupt, but with regard to the fact that the son had become involved in an unfortunate connexion, and had contracted intemperate habits. They therefore held that the settlement was *bonâ fide* and not in fraud of creditors, and they further held that B was a purchaser for valuable consideration, having given something, that is to say, his leasehold interests, to get something, that is, the policy, for the benefit of his son's children. "Purchaser" is not to be limited to a purchaser in the mercantile sense of the term, that is, a person who has bought something by contract of purchase and sale.

Pope, In re, [1908] 2 K. B. 169

Pope, In re.

A wife, having *bonâ fide* threatened divorce proceedings against her husband, agreed not to take proceedings upon the husband consenting to make a post-nuptial settlement in favour of her and her children. The settlement made in pursuance of this agreement purported to be made "in consideration of natural

(*g*) *Holden, In re* (1887), 20 Q. B. D. 43.
(*h*) *Parry, In re*, [1904] 1 K. B. 129.
(*i*) *Sanguinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176.
(*l*) *Naylor, In re* (1893), 62 L. J. Q. B. 460.

love and affection," and no other consideration was expressed in the deed. Upon the husband becoming bankrupt within two years of the date of the settlement, it was held by the Court of Appeal that the settlement was made in favour of a purchaser in good faith and for valuable consideration, and could not be set aside by the trustee. It was not necessary that there should be either money or physical property given by the purchaser in order to bring the case within the exception. A release of a right or a compromise of a claim, not being a merely colourable right or claim, was sufficient to constitute a person a purchaser within the meaning of section 47. Buckley, L.J., dissented from the majority of the Court, being of opinion that the word " purchaser " imported something more than one who gave " valuable consideration," and meant a person who would be properly described as a purchaser or buyer, that is, one who has given valuable consideration in the form of money or property, or something capable of being measured by money.

Parry, In re, [1904] 1 K. B. 129

Parry, In re.

A settlor made a voluntary settlement which, being made more than two years before his bankruptcy, was unimpeachable. This settlement was revocable by the settlor with the consent of the trustees of the settlement. Within two years of becoming bankrupt the settlor, with consent of the trustees, withdrew £1600 from the settlement, and settled as an equivalent a reversionary interest in certain property. The Court held that the second settlement was void against the trustee in bankruptcy. The trustees of the settlement were not purchasers for value. Although a sum of money was withdrawn from the settlement, the settlement was revocable by the settlor, and the trustees had given nothing but their consent to the transaction.

Instrument itself not conclusive of its voluntary or onerous nature.

The document conveying or charging the property is not conclusive of the question as to whether the settlement is voluntary or for value. A deed of settlement in form voluntary, but appearing from extrinsic evidence to have been made for valuable consideration, is good against the trustee (*m*). On the other hand, a conveyance purporting to be made for a valuable consideration is void if in fact voluntary. The consideration must be substantial and not merely illusory; and where, for instance, the settlor settled a life policy upon his sister in consideration of five shillings, the Court held that the settlement was voluntary even although the nominal consideration had in fact passed (*n*).

Who are *bonâ fide* purchasers.

In order to escape the operation of the section, the transfer or conveyance must be taken in good faith on the part of the purchaser. Good faith means absence of notice of the settlor's insolvency or of any intention on his part to defeat the bankruptcy laws by withdrawing the settlor's property from the reach of

(*m*) *Pott* v. *Todhunter* (1845), 2 Coll. C. C. 76; *Pope, In re*, [1908] 2 K. B. 169.

(*n*) *Naylor, In re* (1893), 62 L. J. Q. B. 460.

creditors, or by giving any creditor or creditors an undue preference. Bad faith on the part of the settlor is immaterial if the purchaser acted in good faith (*o*).

Period measured from first act of bankruptcy.

Settlements are voidable against the trustee in bankruptcy if made within ten years of the settlor becoming bankrupt, unconditionally if within two years, and otherwise conditionally on the party claiming under the settlement being unable to prove that the settlor was at the time able to pay all his debts without the aid of the property settled. These periods of two years and ten years respectively are to be calculated from the date of the first act of bankruptcy within three months of the petition, that being for the purposes of the trustee's title the time of the debtor becoming bankrupt (*p*).

Each premium paid on policy is not a new settlement.

In the case of *Harrison and Ingram* (*q*) the question arose on the settlement of a life policy as to whether the payment of each premium by the settlor was to be deemed a new settlement of the amount of the premium or of a proportionate part of the policy moneys, or whether the original settlement of the policy was to be deemed to be the settlement of the whole policy moneys. If the payment of each premium was a new settlement the trustee in bankruptcy would be entitled to avoid the settlement to an extent proportionate to the amount of premiums paid within the impeachable periods, but if there was no new settlement the whole policy moneys would be beyond the reach of the trustee, provided that the original settlement of the policy was unimpeachable. The Court of Appeal, reversing Wright, J., held that the payment of each premium was not a new settlement capable of being impeached by the trustee in bankruptcy.

No right to set off amount of settlement against debt due by settlor.

In *Lister* v. *Hooson* (*r*) it was held that where a voluntary settlement is set aside by the trustee in bankruptcy the person claiming under the settlement cannot set off the amount of the settlement against any debt due by the bankrupt to him, but must account for the whole of the property voluntarily settled, and prove in the bankruptcy in respect of his claim against the bankrupt. The reason is that the settlement is not void against the bankrupt, but only against his trustee in bankruptcy, and there was therefore never any debt due from the donee to the bankrupt which could be set off against a debt due from the bankrupt to

(*o*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505.
(*p*) *Reis, In re*, [1904] 1 K. B. 451.
(*q*) [1900] 2 Q. B. 710.
(*r*) [1908] 1 K. B. 174.

the donee. *A fortiori* the donee under a voluntary settlement which has been set aside by the trustee in bankruptcy cannot claim to retain the property as security for any debt due by the bankrupt to him.

Fraudulent dispositions within 13 Eliz. c. 5.

A disposition of property which cannot be set aside by the trustee in bankruptcy as a fraudulent settlement under section 49 of the Bankruptcy Act may, nevertheless, be set aside in favour of creditors as a fraudulent disposition of property under the statute 13 Eliz. c. 5. This statute provides in effect that any alienation of property to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions shall be void as against them, except in respect of any estate or interest upon good consideration and *bonâ fide* lawfully conveyed or assured to persons taking without knowledge of the fraud.

Statute of Elizabeth, 1570, secs. 1, 2, and 6

Fraudulent deeds made to avoid the debts of others shall be void.

For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore. Which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been and are derived and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and divisance between man and man, without the which no commonwealth or civil society can be maintained or continued.

All fraudulent conveyances made to avoid the debt or duty of others shall be void.

2. Be it therefore declared, ordained, and enacted by the authority of this present parliament, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution at any time had or made sithence the beginning of the Queen's Majesty's Reign that now is or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs by such guileful, covinous, or fraudulent devices and practices as is aforesaid are, shall, or might be in any ways disturbed, hindered,

delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or other matter or thing to the contrary notwithstanding.

* * * * * *

Estates made upon good consideration and *bonâ fide*.

6. Provided also, and be it enacted by the authority aforesaid, that this Act or anything therein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons or bodies politick or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

13 Eliz. c. 5 compared with Bankruptcy Act, 1883, s. 47 (2).

The distinguishing features of the statute 13 Eliz. c. 5, as compared with the provisions of section 47 of the Bankruptcy Act are—

(1) It is available for the benefit of creditors at all times, and not only on bankruptcy.

(2) It is available against all fraudulent transactions, however remote in point of time.

(3) It strikes at transactions which are fraudulent against the creditors as a body, but not at transactions which merely give an undue preference to one creditor over another.

(4) It does not avoid transactions on the ground that they are voluntary, unless they are also fraudulent against creditors.

When available for the benefit of creditors.

The statute 13 Eliz. c. 5 is available for the benefit of all creditors, and a fraudulent disposition may be set aside although the debtor has not been made bankrupt. If the debtor has become bankrupt the trustee in bankruptcy may take proceedings to have the disposition declared void as against him, and if there is no bankruptcy any creditor may obtain a declaration that the disposition is void against creditors; but unless the creditor taking the proceedings has a lien or charge on the property he cannot have it applied for his sole benefit (*s*). It must be applied for the benefit of all the creditors, and therefore the creditor suing ought to sue on behalf of himself and all other creditors (*s*). If the debtor has died the assignee holding the property under a fraudulent disposition is apparently in the position of an executor *de son tort*, and a creditor's administration action may be brought

(*s*) *Reese River Co.* v. *Atwell* (1869), 7 Eq. 347.

against him by any creditor suing on behalf of himself and all other creditors.

How far the property may be followed.

The property may be followed by the creditors so long as it remains *in specie* in the hands of the assignee or any one taking it from him except a purchaser for value without notice of the infirmity, and where a voluntary assignee of a policy of insurance had obtained the policy moneys and invested them in mortgage security, it was held in a creditor's administration action, brought to try the question as to whether the assignment was void against creditors, that although the property had changed its form it did remain *in specie* in the hands of the assignee, and the Court exacted an undertaking from the assignee not to deal with the money *pendente lite* (*t*).

What dispositions are struck at.

The statute of Elizabeth is aimed at every kind of disposition, whether a conveyance, exercise of a power of appointment, or any other act whereby the debtor places beyond the reach of creditors property which would otherwise be available to satisfy their debts.

Includes dispositions of choses in action.

The statute applies to all property which would but for the fraudulent disposition be available to satisfy the debt of the creditors at the time the application is made. At common law no chose in action could be taken in execution, and therefore during the lifetime of a debtor who had not become bankrupt a voluntary or fraudulent disposition of his choses in action could not be assailed. But by the Judgment Act, 1838, money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialities, or other securities for money may be taken in execution, and since the Common Law Procedure Act, 1854, all debts owing or accruing due to the debtor may be attached by the creditor to satisfy his judgment. Those provisions seem to bring policies of insurance, which are securities for money, and claims due thereunder, which are choses in action, within the statute 13 Eliz. c. 5, so as to make fraudulent dispositions impeachable by creditors at any time and not only on death or bankruptcy (*u*).

Intent to defraud.

No disposition of property is void under 13 Eliz. c. 5 unless it is fraudulent within the meaning of the statute. The aim of the statute is to prevent a debtor removing his property from the reach of creditors, but it has nothing to do with the theory of

(*t*) *Mouat, In re*, [1899] 1 Ch. 831.

(*u*) *Stokoe* v. *Cowan* (1861), 29 Beav. 637; *Mouat, In re*, [1899] 1 Ch. 831; *Barrack* v. *M'Culloch* (1857), 3 Jur. N. S. 180.

equal distribution of assets among creditors, which came later with the sequestration and bankruptcy Acts, and therefore a disposition may be fraudulent within the meaning of section 49 of the Bankruptcy Act, in that it seeks to give an undue preference to a creditor, and yet not fraudulent under the statute of Elizabeth, in that no property is withdrawn from the reach of creditors (*x*).

Intent to prefer is not fraudulent.

A deed, therefore, transferring a man's whole property for the benefit of his creditors is not void under 13 Eliz. c. 5, even although he is hopelessly insolvent and the deed is for the benefit of some creditors only to the exclusion of the others (*y*). Such a deed is only void under the statute if it is a cloak whereby in reality the debtor reserves some benefit to himself (*a*).

Voluntary disposition by person indebted conclusive evidence of fraud,

A disposition which is designed to withdraw property from the reach of creditors is fraudulent and void whether made voluntarily or for valuable consideration, but where the disposition is voluntary and the debtor is "indebted" at the date of the transaction, the Court assumes that the disposition was fraudulent, and mere innocence of intention to defraud on the part of the debtor will not save the transaction.

Freeman v. Pope (1870), L. R. 5 Ch. 538

Freeman v. *Pope.*

A clergyman had a life policy of £1000 and livings worth some £800 a year, and had incurred debts of some £500. He assigned the life policy voluntarily to a stranger in blood. On his death some time afterwards the assignment was declared void as against his creditors, because, although the Court were satisfied that the assignment was made purely out of benevolence towards the assignee and without any thought that his creditors might ultimately be defeated, yet the deceased was in fact substantially indebted at the time, and they were of opinion that a person who has incurred serious liabilities has no right to be generous before he is just, and the creditors were entitled to come before a voluntary assignee.

if any creditor existing at the date of the settlement is still unpaid when the settlement is challenged.

The rule that a voluntary conveyance by a person "indebted" is conclusive evidence of fraud is probably applicable only when some creditor or creditors existing at the date of the settlement are still unpaid. It has been decided that if there are such creditors the settlement may be set aside at the instance of any future creditor (*b*). It has never been definitely decided that the presumption does not arise in favour of future creditors unless

(*x*) *Middleton* v. *Pollock* (1876), 2 Ch. D. 104; *Alton* v. *Harrison* (1869), L. R. 4 Ch. 622.

(*y*) *Maskelyne and Cook* v. *Smith*, [1903] 1 K. B. 671; *Games, Ex parte* (1879), 12 Ch. D. 314; *Gillo, In re* (1891), 8 Mor. 157.

(*a*) *Middleton* v. *Pollock* (1876), 2 Ch. D. 104.

(*b*) *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419.

some existing creditors are still unpaid, but the better opinion appears to be that it does not (*c*).

What dispositions are voluntary so as to let in the presumption of fraud.

A disposition is voluntary unless made for valuable consideration, in the sense of some actual benefit accruing to the grantor. The fact that the consideration is inadequate does not make it voluntary so as to let in the presumption of fraud when the grantor was indebted (*e*), although inadequacy of consideration may, together with other circumstances, be evidence of actual fraud. Neither natural affection nor moral obligation is a valuable consideration (*f*), and therefore a post-nuptial settlement upon wife and children is a voluntary settlement, if there is no other consideration. But where a relative of the settlor's wife agreed to advance him the interest due upon a mortgage if he would settle the property on his wife and children, the advance was held to be a good consideration and the settlement was not voluntary (*g*). Marriage is always a valuable consideration (*h*), and therefore an ante-nuptial settlement can never be set aside under the statute of Elizabeth as a voluntary settlement merely on the ground that the grantor was insolvent at the time he made it. But where a marriage settlement goes beyond the immediate objects of the marriage and there are provisions for collateral relatives from whom no valuable consideration moves then *quoad* these objects, the settlement has nothing to do with the marriage, but is to be considered as a voluntary settlement purely for the purpose of providing for those relatives (*i*). A disposition is not voluntary if made to satisfy a subsisting legal obligation under a previous contract for value. Thus where on marriage a man promised orally to settle certain property on his prospective wife and some time after marriage executed a deed of settlement in which he recited the oral promise, it was held that the post-nuptial settlement was not voluntary (*k*). The recital of the oral promise in the deed was a sufficient memorandum of the agreement to satisfy the Statute of Frauds, and so the agreement was admissible in evidence (*k*). But for the recital it would not have been admissible and the settlement would have stood as a voluntary settlement. Where, again, in an ante-nuptial contract, the husband

(*c*) May's Fraudulent and Voluntary Conveyances (3rd edition), p. 42.

(*e*) *Bayspoole* v. *Collins* (1871), L. R. 6 Ch. 228.

(*f*) *Penhall* v. *Elwin* (1853), 1 Sm. & G. 258.

(*g*) *Bayspoole* v. *Collins* (1871), L. R. 6 Ch. 228.

(*h*) *Kevan* v. *Crawfurd* (1877), 6 Ch. D. 29; *Reis, In re*, [1904] 2 K. B. 769.

(*i*) *Smith* v. *Cherrill* (1867), L. R. 4 Eq. 390, 395.

(*k*) *Holland, In re*, [1902] 2 Ch. 360.

covenanted to assign all his after-acquired property except business assets to the trustees of the settlement, and after marriage having purchased a house with his savings conveyed it to his trustees, the conveyance was held not to be voluntary (*l*).

A disposition made by way of further security for an existing debt is voluntary unless there is some fresh consideration moving from the creditor at the time the disposition is made. An agreement to give time or to forbear from taking proceedings to enforce the debt is sufficient consideration, and such an agreement may be implied from the circumstances without any express promise on the part of the creditor; but where an assignment was made under seal in favour of a creditor and was never communicated to the creditor, it was held that the assignment was voluntary and void under the statute (*m*).

Unless the grantor receives some actual benefit it is not a disposition for value within the meaning of the statute, even although there may be consideration sufficient to support a contract. For instance, a conveyance of property which is subject to an onerous obligation is not a conveyance for value merely because the grantee promises to perform the obligation attached, as where the assignee of a lease promises to pay the rent or the assignee of a policy promises to pay the premiums (*n*).

When the settlor is deemed to be indebted.

It is apparently not necessary to prove actual insolvency of the grantor of a voluntary settlement in order to raise the presumption of intent to defraud (*o*). Comparatively small debts with an apparently ample margin of funds will not justify any such presumption (*p*), but if, on a reasonable estimate of contingencies, the debtor's immediately available assets, exclusive of the amount settled, are not sufficient to meet his debts which are due or which may become due within a short period of time, the debtor is not justified in making a voluntary disposition of property, and such a disposition will be held void against creditors, whatever his actual intention may have been (*q*). And if shortly after having made a voluntary disposition a debtor does in fact become insolvent, the onus is on the party claiming under the

(*l*) *Reis, In re*, [1904] 2 K. B. 769.

(*m*) *Barker's Estate, In re* (1875), 44 L. J. Ch. 487; and see *Wigan* v. *English and Scottish Law Life*, [1909] 1 Ch. 291.

(*n*) *Riddler, In re* (1882), 22 Ch. D. 74.

(*o*) *Townsend* v. *Westacott* (1840), 2 Beav. 340.

(*p*) *Scarf* v. *Soulby* (1849), 1 Mac. & G. 364.

(*q*) *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Ridler, In re* (1882), 22 Ch. D. 74.

disposition to show that the debtor was not at the time of the disposition " indebted " in the sense just indicated (*r*).

If not indebted settlor's fraudulent intention must be proved.

Where the grantor of a voluntary disposition is not proved to have been " indebted " at the date of the disposition, a fraudulent intention to defeat his creditors must be proved (*s*). If it is proved that the debtor in fact intended to defeat his creditors, the *bona fides* of the grantee is immaterial.

Evidence of fraudulent intention.

The existence of a fraudulent intention is a question of fact which the Court must, in each particular case, decide upon all the circumstances (*t*). The fact that a man makes a voluntary settlement of practically all his property is suspicious, and if he is a trader or a man engaged or about to engage in hazardous transactions, a voluntary settlement of all his means is conclusive of fraudulent intention, unless explained by other circumstances which disclose an innocent intention (*u*). The fact that heavy and perhaps unknown liabilities are likely to fall upon a man in the immediate future, as where legal proceedings are being taken against him, raises a suspicion that any voluntary disposition of property is made for the purpose of defeating or delaying the creditors. Thus a voluntary settlement by a man on his daughter (*x*), and in another case a settlement for the benefit of the settlor, his wife and children (*y*), were set aside when the settlements were made after legal proceedings had been taken against the settlor and there was a probability of heavy liability. But a voluntary settlement made while legal proceedings are pending against the settlor is not necessarily void, unless there was a serious prospect of insolvency. It is only a suspicious circumstance which may be explained.

Large disposition by trader.

Pending liabilities.

Mercer, Ex parte (1886), 17 Q. B. D. 290

Mercer, Ex parte.

The settlor was a master mariner. He had become engaged to be married in England, but afterwards went to Hong Kong, and there married another woman. After his marriage, and while still in Hong Kong, he received intimation that an action for breach of promise had been commenced against him, and at the same time the information that he had become entitled to a legacy of £500. He made a voluntary settlement of the legacy for the benefit of his wife, self, and children. He had no other means except some £50 which

(*r*) *Crossley* v. *Elworthy* (1871), L. R. 12 Eq. 158.

(*s*) *Holloway* v. *Millard* (1816), 1 Mad. 414.

(*t*) *Edmunds* v. *Edmunds*, [1904] P. 362; *Lane Fox, In re*, [1900] 2 Q. B. 508.

(*u*) *Russell, Ex parte* (1882), 19 Ch. D. 588; *Ware* v. *Gardner* (1869), L. R. 7 Eq. 317.

(*x*) *Barling* v. *Bishopp* (1860), 29 Beav. 417.

(*y*) *Reese River* v. *Atwell* (1869), L. R. 7 Eq. 347.

would become due to him as wages on returning to England. Judgment for £500 was recovered against him in the breach of promise action, and the judgment creditor sought to set aside the settlement. The Court held that the settlement was *bonâ fide*, and not in fraud of creditors. The settlor was not a trader likely to incur large liabilities, and there was no reason for him to suppose that such heavy damages would have been awarded against him in the action; the damages recovered might have been no more than he could have met out of his wages which were accruing due.

Disposition of debtor's whole property.

If circumstances justify it, a voluntary settlement of a debtor's whole property is not in fraud of creditors.

Lane Fox, In re, [1900] 2 Q. B. 508

Lane Fox, In re.

A young woman of twenty-one came into considerable property free from any trust, and was advised by her relatives to make a settlement. She accordingly conveyed her whole property to trustees in trust to apply the income absolutely at their discretion, either by paying it to her, paying her debts, or accumulating it and adding it to capital. She retained power to revoke the settlement with consent of her trustees. She afterwards incurred large liabilities by extravagant living, and her trustees having refused to pay certain debts, the creditors sought to set aside the settlement. It was held that the settlement was not in fraud of creditors, but was a most prudent and proper settlement for a young woman to make.

Reservation of benefits for settlor and family.

In the case of voluntary settlements, the more the settlor reserves for the benefit of himself and near relations, the greater the suspicion that the settlement is not honest. But, as may be seen by cases already cited, the reservation of life interests for self and large interests for wife or children is not in itself proof of fraud (*z*). And even a provision that the settlor's interest shall terminate on bankruptcy is not conclusive of fraud (*a*). The power of revocation by the settlor has been dubbed a badge of fraud (*b*), and where the power is absolute in the settlor, the power must be exercised for the benefit of creditors, if necessary; but a power of revocation with consent of trustees is, as appears from the case just cited, by no means conclusive evidence of fraud.

Power of revocation.

Inadequacy of consideration.

Inadequacy of consideration may be an important factor in determining whether or not a disposition of property is *bonâ fide* or fraudulent, but it is not sufficient to stamp a transaction as fraudulent which otherwise appears to be *bonâ fide* and honest (*c*).

(*z*) *Holloway* v. *Millard* (1816), 1 Mad. 414.

(*a*) *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Holland, In re*, [1902] 2 Ch. 360.

(*b*) *Peacock* v. *Monk* (1748), 1 Ves. Sen. 126; *Acraman* v. *Corbett* (1861), 1 J. & H. 410; *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419.

(*c*) *Johnson, In re* (1881), 20 Ch. D. 389; *Smith* v. *Tatton* (1879), 6 L. R. Ir. 32; *Copis* v. *Middleton* (1817), 2 Mad, 410.

In *Stokoe* v. *Cowan* (*d*) a man, having deposited a policy of insurance on his life for £800 with his mother to secure an advance of £174, within a month of his death and with the knowledge that he was *in extremis*, assigned the policy to his mother absolutely in consideration of the debt. The Court set aside the assignment except as a security for the debt.

Intent to defeat execution.

A sale or mortgage of property for adequate consideration is not voidable even although the avowed object is to defeat execution at the instance of a particular creditor (*e*), but if a sale or mortgage is made for the purpose of withdrawing the property or its proceeds from the reach of creditors in general, it will be set aside (*f*).

Reputed ownership as evidence of fraud.

The fact that the vendor of chattels remained in possession and enjoyment of them has always been considered *primâ facie*, but by no means conclusive, proof of fraud (*g*). The same principle will apply to assignments of choses in action made secretly without notice to the holder of the fund (*h*).

Onerous dispositions cannot be set aside unless grantee was privy to the fraud.

In the case of dispositions for good consideration, the disposition cannot be set aside under 13 Eliz. c. 5, unless it is shown that the grantor intended to defeat his creditors and that the grantee was party or privy to the fraudulent scheme (*l*). Antenuptial settlements can seldom be successfully attacked, because, even although the husband may have settled far more property than he was justified in doing, having regard to his circumstances, it is very difficult to prove that the wife was privy to any fraudulent intention (*m*). In the case of *In re Reis* (*n*) the husband being engaged in business settled his whole property and covenanted to convey all property subsequently acquired, and yet it was held that the settlement was not fraudulent on the face of it, and even although the intention of the husband was to defeat his creditors, the wife was not necessarily privy to any such intention. Even the fact that the husband's life interest is to cease on his becoming insolvent does not make the settlement *ipso facto* a settlement in fraud of creditors (*o*). But where a marriage is not a *bonâ fide*

(*d*) (1861), 29 Beav. 637.
(*e*) *Wood* v. *Dixie* (1845), 7 Q. B. 892; *Darvill* v. *Terry* (1861), 6 H. & N. 807.
(*f*) *Edmunds* v. *Edmunds*, [1904] P. 362.
(*g*) *Arundell* v. *Phipps* (1804), 10 Ves. 139; *Latimer* v. *Batson* (1852), 4 B. & C. 652.
(*h*) *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419.
(*l*) *Johnson, In re* (1881), 20 Ch. D. 389, 394.
(*m*) *Keevan* v. *Crawford* (1877), 6 Ch. D. 29.
(*n*) [1904] 2 K. B. 769.
(*o*) *Holland, In re*, [1902] 2 Ch. 360.

marriage, but is merely part of a fraudulent scheme to defeat creditors, the settlement may be set aside, as where a man having lived many years with a mistress became involved in legal proceedings, and thereupon married the woman and settled all his property upon her by ante-nuptial contract and the Court was satisfied that the woman was privy to the scheme (*p*).

Formerly, where a policy was claimed by the trustee in bankruptcy under the reputed ownership clause against a purchaser for value who had not given notice to the office, such purchaser was held entitled to a refund of premiums paid by him (*q*), and although the reputed ownership clause no longer applies to choses in action in the case of an English bankruptcy, the principle may be applied so as to entitle any innocent party, such as a grantee under a voluntary settlement, to a refund of premiums paid by him to keep alive a policy afterwards claimed by the trustee in bankruptcy.

Fraudulent preferences.

Section 47 of the Bankruptcy Act, 1883, and the statute of Elizabeth, both strike at dispositions which are designed to place the debtor's property beyond the reach of any of the creditors. As, however, the policy of the bankruptcy law is to provide a distribution of the debtor's property among the creditors, a further provision is made avoiding as against the trustee in bankruptcy dispositions of property to one creditor whereby he would obtain an unfair advantage over the others.

Bankruptcy Act, 1883, sec. 48

Avoidance of preferences in certain cases.

48.—(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months of the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

(*p*) *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46.

(*q*) *Schondler* v. *Wace* (1808), 1 Camp. 487; *Webb's Policy, In re* (1867), 36 L. J. Ch. 341.

What is a preferential payment?

The word "preference" as used in the Act, imports a voluntary act on the part of the debtor to prefer one creditor to another (*r*). Payments made in the ordinary course of business (*s*), payments made under threat of proceedings (*t*) or for any other reason made for the benefit of the debtor himself, are not fraudulent preferences because, although in fact they give an undue preference, they are not made with that intention, but for the purpose of putting the debtor himself in a better position than he would be in if they had not been made. Unless the dominant view of the debtor in making the payment is to prefer one creditor to another, there is no fraudulent preference (*u*). If the debtor does make the payment with the dominant intention to prefer the creditor, the state of mind of the creditor is immaterial, and a *bonâ fide* acceptance of the payment by him does not save the transaction (*x*). Only the trustee in bankruptcy is entitled to set aside an assignment on the ground of fraudulent preference, and where the result of doing so would be solely for the benefit of an individual creditor who claims a security on the property assigned and not for the benefit of creditors generally, the trustee ought not to take proceedings (*y*).

Bona fides of creditor is immaterial.

When it may be set aside.

Right of secured creditors.

Where a policy is subject to a mortgage or charge valid against the trustee in bankruptcy the creditor is a secured creditor. If the security is adequate the creditor may rest upon it and need not prove in the bankruptcy, the trustee being entitled only to the equity of redemption (*yy*). If the security is inadequate the creditor may either surrender the policy to the trustee and prove in the bankruptcy for his whole debt, or realise it and prove for the balance, or value it and prove for the balance (*z*). If he values it, the trustee may redeem it by paying him the assessed value; but if the trustee is dissatisfied with the valuation he may require it to be realised as may be agreed or as the Court may direct; and the creditor may, by notice in writing,

(*r*) *Sharp* v. *Jackson*, [1899] A. C. 419.

(*s*) *Clay, In re* (1895), 3 Man. 31.

(*t*) *Sharp* v. *Jackson*, [1899] A. C. 419.

(*u*) *Vautin, In re*, [1900] 2 Q. B. 325; *Blackburn, In re*, [1899] 2 Ch. 725.

(*x*) The Act of 1883 in this respect restored the law to what it was before 1869. See *Butcher* v. *Stead* (1875), L. R. 7 H. L. 839, 846.

(*y*) *Cooper, Ex parte* (1875), L. R. 10 Ch. 510.

(*yy*) *Le Feuvre* v. *Sullivan* (1855), 10 Moore, P. C. 1; *Elder* v. *Beamont* (1857), 8 El. & Bl. 353.

(*z*) B. A. 1883, Sch. II. (12).

require the trustee to elect whether he will redeem or require a realisation, and if he does not within six months signify in writing his election, the equity of redemption or other interest in the policy vested in the trustee by reason of the bankruptcy passes to the creditor and his debt is diminished by the amount of the assessed value.

Right of mortgagee who has valued policy and proved for balance.

It will sometimes happen that after a mortgagee of a policy has valued his security at the then surrender value of the policy and proved for the balance of his debt, the policy falls in or is otherwise largely increased in value shortly afterwards, and the question arises whether the estate of the bankrupt mortgagor is entitled to benefit from the sudden increase of value or whether it is the sole property of the mortgagee. Before the Act of 1883, the bankruptcy rules provided that if the creditor assessed the value of his security and proved for the balance of his debt, he "shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled at any time before realisation of such security to redeem the same on payment of such assessed value." Under that rule it was held that a mortgagee having valued and proved for the balance of his debt could never retain out of the proceeds of the policy more than the assessed value and the amount of any premiums which he had paid since the bankruptcy, with interest at 4 per cent., and any excess had to be handed over to the bankrupt's estate, even although the trustee never objected to the valuation nor offered to redeem (*a*). This was no doubt a hardship on the mortgagee who continued to pay the premiums and might have been a loser by keeping up the policy on a long life, although he would derive no compensating benefit if the life fell prematurely. The present rules provide a remedy in this respect, because the mortgagee who has valued can call upon the trustee to elect whether he will redeem or require a realisation, and if he does neither within six months the trustee's equity of redemption is foreclosed and all future benefit of the policy falls to the mortgagee. If the mortgagee neglects to exercise his right of calling upon the trustee to elect, the position is practically the same as under the old rules, because the trustee can elect to redeem at any time after the policy moneys have become payable.

Separate securities

Where separate securities are held by one creditor in respect of

(*a*) *King, Ex parte* (1875), L. R. 20 Eq. 273.

separate debts, the creditor, unless he has the right of consolidation, should value the securities separately and prove for the total unsecured balance. A trustee in bankruptcy has no right to give a secured creditor the benefit of consolidation to which he is not entitled by allowing him to value the securities in a single lump sum and to prove in respect of the difference between their aggregate value and the total debt. to be valued separately.

Pearce, In re, [1909] 2 Ch. 492

Pearce, In re.

B. and Co. were creditors of P. for £6497, and for different portions of that total debt they held two securities, (1) a vendor's lien in respect of certain shares, (2) a mortgage on a freehold property, a debt, and certain policies of insurance. P. was adjudicated bankrupt in August, 1899, and B. and Co. sent in a proof valuing their security at a lump sum of £3806, and claiming to prove for the balance. At the request of the trustee they afterwards gave details of their valuation as follows :—

Vendor's lien on shares,			£1325
Mortgage	policies	£205	
	freehold	£2276	2481
	debt		
			3806

In February, 1901, a composition of 12*s.* in the pound was agreed to. Shortly afterwards the trustee, having received a larger amount than was expected on the debt, paid B. and Co. £2276 and the 12*s.* dividend on the balance of the aggregate debt for which they had proved. In March, 1901, the bankruptcy was annulled, and an order made revesting his property in P. In 1903 the policies were sold, and B. and Co. received some money on them. In 1904 P. created further charges on the freehold property. The subsequent mortgagees now claimed against B. and Co. an account of what was due on their mortgage and redemption. B. and Co. claimed to hold both their securities as a consolidated mortgage for the whole balance of the £3806, at which the securities had been valued. At first they claimed to have the right to consolidate apart from the bankruptcy proceedings, but during the argument abandoned this claim, and relied solely on the bankruptcy proceedings as having in effect consolidated the two securities. They maintained that a trustee in bankruptcy might allow a creditor, who had a small debt charged on a property of large value and a large debt charged on a property of small value, and had no right to consolidate, to prove for one aggregate sum and value the securities as one aggregate security, and thus in effect to get the benefit of consolidation. The Court of Appeal held that a trustee had no power to allow a secured creditor to obtain in this way a greater advantage over unsecured creditors than he was entitled to. In this case, after the bankruptcy had been annulled, the securities must be treated as if there had been no bankruptcy, except that the debt must be taken to be reduced by the amount for which B. and Co. had proved and received a dividend. The securities must stand separately, and a subsequent mortgagee of the freehold was entitled to redeem the mortgage upon payment of what was due upon that deed only. B and Co. were held

entitled to charge in account against the mortgage the total debt of £2481, with interest and premiums paid on the policies after the date of the receiving order. On the other side of the account they must credit the £2276 on the date when received and the money received on the sale of the policies.

Debts provable in bankruptcy.

Generally all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, are deemed to be debts provable in bankruptcy, and the trustee is bound to estimate the value of future or contingent liabilities, subject to the review of the Court, if the creditor is dissatisfied with his valuation (*c*).

Covenant to pay future premiums.

Under the Bankruptcy Act, 1849, covenants by a debtor or other person to pay the annual premiums on a life policy were held not to be contingent liabilities within the meaning of that Act, and therefore not debts provable in bankruptcy (*d*). Under the Bankruptcy Act, 1861, express provision was made for liabilities of this kind, and the person entitled to the benefit of the covenant might, if he thought fit, apply to the trustee for a valuation and prove in the bankruptcy (*e*). Under the Act now in force liability to pay an annual premium comes within the general definition above cited of debts provable in bankruptcy, and therefore the party entitled to the benefit of the covenant must prove in the bankruptcy, because the liability will be extinguished on the discharge of the bankrupt (*f*). A surety for the principal debtor on a covenant to pay premiums cannot, after the bankruptcy and discharge of the debtor, recover from him premiums which the creditor has after the discharge compelled the surety to pay to him. The debtor's liability to creditor and surety are both debts provable in bankruptcy, and are therefore discharged on the debtor obtaining his certificate (*g*). On the bankruptcy of a surety his contingent liability to the creditor is also a debt provable in bankruptcy, even although the principal creditor is absolutely solvent, and therefore if the surety has become bankrupt and has obtained his discharge the creditor can no longer resort to him.

(*c*) B. A. 1883, s. 37.
(*d*) *Warburg* v. *Tucker* (1858), 1 E. B. & E. 914; *Mitcalfe* v. *Hanson* (1866), L. R. 1 H. L. 242; *Amott* v. *Holder* (1852), 17 Jur. 318.
(*e*) B. A. 1861, s. 154.
(*f*) B. A. 1883, ss. 37, 30.
(*g*) *Saunders* v. *Best* (1864), 17 C. B. N. S. 731.

Value of such covenant.

On a life policy the value of a covenant to pay future premiums has been held for the purpose of proof in bankruptcy to be the sum which the Insurance Company would take as a single payment in commutation of the remaining premiums (*h*).

Miller, In re (1877), 6 Ch. D. 790

Miller, In re.

A settlor covenanted to pay £5000 to his marriage settlement trustees on his death and to insure and keep insured his life for that sum. He paid the premiums on such a policy for some years and became bankrupt, and the marriage settlement trustees paid the premiums for some years. The trustee in bankruptcy admitted a proof on behalf of the trustees for £2052 as the value of the covenant based upon an estimate of the amount required to purchase a paid-up policy. After a dividend of 10 per cent. had been declared, but before it had been paid, the bankrupt died, and the trustees of the settlement received the policy moneys. The Court held that they were not entitled to receive the dividend on the proof as admitted, but, on the other hand, the Court refused to expunge the proof, and ordered the trustee in bankruptcy to pay the full loss actually sustained by the trustees owing to the breach of covenant, that is the premium in fact paid by them amounting to £766.

Proof by mortgagee.

But where a mortgagee holds a policy as security for a debt and the debtor has covenanted to pay the premiums, the mortgagee having valued the policy and proved for the balance of the debt cannot also prove for the value of the covenant to pay the premiums because the debt is treated as extinguished *pro tanto* by the value of the security and as to the balance by the proof in bankruptcy (*i*).

Composition or scheme of arrangement

At any time after a receiving order is made, the debtor may submit a scheme of arrangement for payment of a composition, and if at a meeting of creditors a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept the proposal, the scheme becomes binding subject to the approval of the Court (*j*). A scheme so accepted and approved binds all the creditors so far as relates to any debts due to them and provable in bankruptcy (*j*). A certificate of the official receiver that a composition or scheme has been duly accepted and approved is, in the absence of fraud, conclusive as to its validity (*j*). If the debtor makes default in complying with the provisions of

(*h*) *Bank of Ireland, Ex parte* (1886), 17 L. R. Ir. 507.

(*i*) *Deering* v. *Bank of England* (1886), 12 A. C. 20.

(*j*) B. A. 1890, s. 3.

the composition or scheme it may be annulled and the debtor adjudged bankrupt without prejudice to anything already done under the scheme (*k*). Sometimes a composition or scheme is accepted after the debtor has been adjudged bankrupt, and where that is the case the bankruptcy continues until the debtor has fully satisfied his obligations under the scheme and then the bankruptcy is annulled by order of the Court.

Primâ facie does not include after-acquired property.

Primâ facie a scheme of arrangement only vests in the trustee such property as the debtor is entitled to at the date when the scheme was sanctioned by the creditors. After-acquired property is not included in the scheme unless there is an express stipulation to that effect (*l*). The approval of the scheme by the Court is equivalent to an order of discharge of the debtor (*l*).

Property distributed as in bankruptcy.

The provisions of the Bankruptcy Act relating to the proof of debts and the realisation and distribution of property apply to the administration of a scheme of arrangement except in so far as the scheme provides otherwise (*m*). Thus the rights of secured creditors are *primâ facie* the same as if they were proving in bankruptcy, but the express terms of the scheme may enlarge or restrict their rights (*n*).

Small bankruptcies under £300.

In the case of small bankruptcies where the property of the debtor is not likely to exceed in value £300, the Court may order the estate to be administered in a summary manner. In such cases the official receiver acts as trustee (*o*).

Administration order in County Court.

Where judgment has been obtained in a county court and the debtor is unable to pay the amount forthwith and alleges that his whole indebtedness amounts to a sum not exceeding £50, inclusive of the debt for which the judgment is obtained, the judge may make an administration order under which the registrar of the County Court administers the estate of the debtor in favour of such creditors as are scheduled by the debtor or have come in and proved their debt before the registrar. An administration of the debtor's estate in a County Court is different from a bankruptcy.

(*k*) B. A. 1890, s. 3.
(*l*) *Croom, In re*, [1891] 1 Ch. 695.
(*m*) B. A. 1890, s. 3 (17).
(*n*) *Bolton* v. *Ferro* (1880), 14 Ch. D. 171; *Pearce, In re*, [1909] 2 Ch. 492.
(*o*) B. A. 1883, s. 121.

Although the registrar may, for the purpose of administration, issue execution against the debtor's goods, the whole property of the debtor does not vest in the registrar as in the trustee in bankruptcy, and the debtor is not discharged from all debts provable in bankruptcy, but only from the debts of the scheduled debtors (*p*).

Administration of estate of deceased insolvent.

When in the administration of the estate of a deceased person the estate proves insufficient for the payment in full of all debts the rules of bankruptcy as to the rights of secured creditors and as to the debts and liabilities provable will be observed (*pp*). The estate of a deceased insolvent may be administered according to the law of bankruptcy upon the petition of a creditor. No such petition may be presented after any proceedings have been commenced for the administration of the estate, but a judge of the Chancery Division may, on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Bankruptcy Court, and that Court may make an order for administration according to the law of bankruptcy, and thereupon the whole estate shall vest in the official receiver who shall realise and distribute the estate (*q*). The estate to which the official receiver is entitled under an order for administration includes only the estate which belonged to the deceased at his death. The rules of bankruptcy which entitle the trustee in bankruptcy to take in certain cases the property of persons other than the bankrupt do not apply, and therefore the 47th section does not apply, and the official receiver cannot procure the setting aside of voluntary settlements under the provisions of that section (*r*). If a settlement is void or voidable at common law or under the Statute of 13 Elizabeth, he may have it set aside but not otherwise.

Bankruptcy Act, sec. 47, does not apply.

Section XIII.—Succession on Death (*s*)

Succession to personal property

The right of succession to the personal property of a deceased person depends upon the law of his domicile at the date of death.

(*p*) B. A. 1883, s. 122.
(*pp*) Judicature Act 1875, s. 10.
(*q*) B. A. 1883, s. 125.
(*r*) *Gould, In re* (1887), 19 Q. B. D. 92.
(*s*) See Williams on Executors, 10th edition (1905); Ingpen on Executors (1908); Theobald's Law of Wills, 7th edition (1908); Underhill and Strahan on the Interpretation of Wills and Settlements, 2nd edition (1906).

depends on deceased's domicile.

If he leaves a will its validity is, subject to the exceptions contained in Lord Kingsdown's Act (*t*), to be determined by that law, and if he dies intestate his personal property will be distributed according to that law. A will disposing of personal property is construed primarily according to the law of the testator's domicile at the date of death, but if the testator expresses an intention that it shall be construed otherwise, that intention must prevail and the fact that a will is framed in the form and language of a foreign country may be a sufficient indication of the testator's intention to have it construed according to the law of that country.

Wills Act, 1837.

The law of England relating to the validity of a will is contained in the Wills Act, 1837 (*u*), and amending Acts of 1852 (*x*) and 1861 (*y*).

Infant's will.

No will made by any person under the age of twenty-one years is valid (*a*).

Married woman's will.

A married woman can dispose of her separate property by will in the same manner as if she were a *feme sole*. The concurrence of her husband is not necessary, and the will does not require to be re-executed or republished after his death. It speaks from the death of the testatrix and passes all property of which she was then capable of disposing (*b*).

Lunatic's will.

A will made by a person of unsound mind or procured by undue influence, is invalid.

Formalities essential to valid execution of a will.

By the Wills Act, 1837 (*c*), the following formalities are essential to the valid execution of a will in England.

(1) the will must be in writing;

(2) the will must be signed at the end by the testator or by some person in his presence and by his direction;

(3) the signature must be made or acknowledged by the testator in the presence of two witnesses;

(4) each witness must subscribe the will as such in the presence of the testator.

The Wills Act Amendment Act, 1852 (*d*), defines more particularly how the signature at the end of the will may be placed

(*t*) *Infra*, p. 621.
(*u*) 7 Will. 4 and 1 Vict. c. 26.
(*x*) 15 & 16 Vict c. 24.
(*y*) 24 & 25 Vict. c. 114.
(*a*) 7 Will. 4 and 1 Vict. c. 26, s. 7. But as the wills of soldiers on active service and of marines and seamen at sea are excepted from the Wills Act, a will disposing of personalty and made by an infant soldier or sailor over the age of fourteen may thus be valid (*Hiscock, In the Goods of*, [1901] P. 78).
(*b*) 7 Will. 4 and 1 Vict. c. 26, s. 8, is in effect repealed by Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).
(*c*) 7 Will. 4 and 1 Vict. c. 26, s. 9.
(*d*) 15 & 16 Vict. c. 24, s. 1.

and enacts specifically that nothing written below the signature or after the signature has been made shall have any effect.

Signature.

The signature of the testator or witnesses may be by mark (*e*) or initials (*f*), and proof that the party subscribing could not write is not essential to the validity of a signature by mark (*g*). If the will is signed by some other person for and by the direction of the testator, it is equally a good execution whether that other person signs his own name on the testator's behalf (*h*) or writes the testator's name or stamps it with a rubber stamp (*i*).

Acknowledgment before witnesses.

The testator's signature is sufficiently acknowledged by the testator in the presence of the witnesses if the will bearing the testator's signature is placed before the witnesses and they are asked in the presence of the testator to sign as witnesses, even although the witnesses do not know the document is a will and may not have actually seen the signature (*k*).

Lord Kingsdown's Act.

Under the Wills Act, 1861 (*l*) (Lord Kingsdown's Act), wills made by British subjects are in certain cases valid, as regards personal estate, although not made in the form required by the law of the place where the testator was domiciled at the time of his death. If made out of the United Kingdom, a will of a British subject is valid if made according to the form required either by the law of the place where the same was made or by the law of the place where the testator was domiciled when the same was made or by the laws then in force in that part of the British Dominions where he had his domicile of origin. If made within the United Kingdom a will of a British subject is valid if made according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same was made.

No will is revoked or made invalid or altered in construction by reason of any subsequent change of domicile of the person making the same (*m*).

Presumption of due execution.

When a will upon the face of it is properly executed, the presumption is in favour of due execution. Definite proof is necessary to rebut that presumption, and the defective memory of the witnesses alone is not sufficient (*n*).

(*e*) *Clarke, In the Goods of* (1858), 1 Sw. & Tr. 22.
(*f*) *Blewitt, In the Goods of* (1880), 5 P. D. 116.
(*g*) *Baker* v. *Dening* (1838), 8 Ad. & E. 94.
(*h*) *Clark, In the Goods of* (1839), 2 Curt. 329.
(*i*) *Jenkins, In the Goods of* (1863), 3 Sw. & Tr. 93.
(*k*) *Daintree* v. *Butcher* (1888), 13 P. D. 102.
(*l*) 24 & 25 Vict. c. 114, ss. 1, 2.
(*m*) S. 3.
(*n*) *Thomson* v. *Hall* (1852), 2 Rob. E. 426.

Nuncupative will of soldier or sailor.

The Wills Act, 1837, does not affect the validity of wills made by soldiers on actual military service or mariners or seamen at sea (*o*). By Common law, such persons, if over the age of 14, could make a nuncupative will disposing of personal property either orally or by some informal and unattested writing and this right is still preserved.

Attesting witness takes no benefit.

If an attesting witness, or the wife or husband of an attesting witness, takes any benefit under a will, the attestation is valid but the gift is void (*p*).

Revocation by marriage.

Every will made by a man or woman is revoked by marriage except in so far as it exercises a power of appointment over property which would not in default of the exercise of appointment pass to his or her representatives (*q*).

Revocation by destroying will.

No will or codicil can be revoked otherwise than as aforesaid or by another will or codicil executed in manner above specified or by some writing declaring an intention to revoke the same and executed in the manner in which a will is required to be executed or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*r*).

Whether or not a will or codicil is revoked by a subsequent will or codicil is a question of the testator's intention to be gathered from all the testamentary writings.

Simpson v. Foxon, [1907] P. 54

Simpson v. *Foxon.*

The testator made a will on March 15, 1898, whereby he appointed his daughter sole executrix and trustee, and devised and bequeathed all his real and personal property to her upon trust. On September 11, 1903, he insured his life in the British Workmen's and General Assurance Company for £4 13*s.*, and executed a printed form of will provided by the company. This will began, "This is the last and only will and testament of me, John Foxon." It purported to bequeath the policy to H. B., who was appointed the executor of the will. It did not deal with the testator's general estate, nor did it expressly revoke the earlier will. On April 11, 1905, the testator executed a codicil which was described as "a codicil to the last will." The codicil purported to revoke all previous appointments of executors and trustees, and appointed H. S. and W. B. to be joint trustees and executors "of my will." By the codicil the testator gave a legacy to W. B. and H. B. jointly and another legacy to his daughter. The President, Sir Gorell Barnes, decided that the testator did not intend to revoke his first will, and accordingly granted probate of all three documents.

(*o*) 7 Will. 4 and 1 Vict. c. 26, s. 11.
(*p*) S. 15.
(*q*) S. 18.
(*r*) S. 20.

Alteration of will.

No alteration made in a will after execution has any effect unless executed as a will (*s*), and no will or codicil which has been revoked can be revived otherwise than by re-execution of the will or codicil or by the execution of a codicil showing an intention to revive it, the will to be revived being actually in existence (*t*).

Will speaks from death.

On the question whether any property is or is not comprised in a bequest, the will is to be construed so as to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will (*u*).

Bequest to issue of testator does not lapse by death of legatee if he leaves issue.

Where any person being a child or other issue of the testator to whom any property is bequeathed dies in the lifetime of the testator having issue, and any of such issue of such person are living at the time of the testator's death, the bequest does not lapse but takes effect as if the death of such person had happened immediately after the death of the testator unless a contrary intention shall appear by the will (*x*).

Succession on intestacy.

If the deceased dies intestate as to the whole or part of his personal property, such property passes to his administrator or executor and is divisible in accordance with the Statutes of Distribution (*y*). If the deceased leaves a widow (*z*) and issue, the widow takes one-third, unless her right has been barred by antenuptial settlement. Subject to the widow's share the property is divided equally among the issue, but no child except the heir at law may participate unless he brings into hotch pot any settlement or advancement which he may have received from the deceased in his lifetime. The issue take *per stirpes*, that is to say, the issue of a deceased child take the parent's share. If the intestate leaves issue and no widow, the issue take the whole. If the intestate leaves no issue the widow takes the whole of the net real and personal estate up to £500 (*a*). Beyond that amount she takes half of the personal property.

(*s*) 7 Will. 4 and 1 Vict. c. 26, s. 21.

(*t*) S. 22.

(*u*) S. 24 applies to the will of a married woman made during coverture, whether she is or is not possessed of any separate property at the time of making it, and the will does not require to be re-executed or republished after the death of her husband (Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3).

(*x*) 7 Will. 4 and 1 Vict. c. 26, s. 33.

(*y*) 22 & 23 Car. 2, c. 10; Statute of Frauds (29 Car. 2, c. 3), s. 24; 1 Jac. 2, c. 17, s. 7.

(*z*) A divorced wife has no interest on intestacy (*Nares, In the Goods of* (1888), 13 P. D. 35).

(*a*) Intestates Estates Act, 1890 (53 & 54 Vict. c. 29). Where the estate exceeds £500 the widow takes her £500 rateably from realty and personalty. The provisions of this Act do not apply to cases of partial intestacy (*In re Twigg's Estate*, [1892] 1 Ch. 579).

If the estate includes property of the nature of a contingent reversion, its value for the purpose of determining what the widow is entitled to must be estimated as at the death of the intestate (*b*). Thus, if the intestate's whole estate was a policy on the life of another not exceeding £500 surrender or market value, the widow would take it absolutely, and the fact that the life dropped and £2000 became payable on it before another premium was paid would not entitle the next of kin to claim any part of it. Subject to the claim of the widow, if any, the personal property goes to the next of kin of the deceased. If the father is alive he takes it all. If the father is dead, but the mother or any brother or sister is living, they and any children of a deceased brother or sister take in equal shares, the children taking *per stirpes*. If the deceased leaves neither father, nor mother, nor brother nor sister, the property is divided between all the next of kin of equal degree, that is counting up from the deceased to the common ancestor and down to the next of kin. The next of kin thus ascertained take in equal shares *per capita* and there is no representation in the case of one who has died leaving issue (*c*).

Intestacy of married woman.

The estate of a woman is divisible on intestacy in the same manner as the estate of a man except that in the case of a married woman her husband, on surviving her, takes the whole of her property as to which she has died intestate (*c*). In the absence of a will, personal property in possession passes to him directly by operation of law without the necessity of administration (*d*), but the husband taking such property is liable for his wife's debts to the extent of the separate estate which he takes from her (*d*). Where the property is not in possession but is a chose in action, the husband, although entitled *jure mariti*, must take out letters of administration in order to complete his title (*e*). If a married woman has made a will and appointed executors and is only partly intestate, all her property passes to her executors who, to the extent of the intestacy, take it subject to debts in trust for the husband (*f*).

All interests pass on death to personal representatives.

All interests in a policy, whether legal or equitable, pass on death to the personal representatives. They represent the person

(*b*) *Heath, In re*, [1907] 2 Ch. 270.
(*c*) Statute of Frauds (29 Car. 2, c. 3), s. 24 ; 1 Jac. 2, c. 17, s. 5.
(*d*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491.
(*e*) *Partington* v. *A.-G.* (1869), L. R. 4 H. L. 100 ; *Harding, In the Goods of* (1872), L. R. 2 P. & D. 394.
(*f*) *Smart* v. *Tranter* (1899), 43 Ch. D. 587.

of a deceased with respect to all his rights and liabilities upon his contracts even although not mentioned in the contract (*g*).

Right to sue at law.

If the deceased had the right to sue at law upon a policy that right passes to his legal representatives, and the company must look to them for a legal discharge, even although the deceased had no right in equity to the policy. Once the right to sue in law has vested in the representatives of a deceased person it does not pass from them except by an assignment in writing sufficient to satisfy the Policies of Assurance Act, 1867, or the Judicature Act, 1873. Where, therefore, a right to sue in law is traced from a deceased person through his personal representatives, the claimant must show that the representatives were properly constituted and that they executed a written assignment of the policy. Even a specific legatee under the will of the deceased must show an assignment to him from the personal representatives, for otherwise he cannot give a legal discharge (*h*). In the case of chattels, including leaseholds, a specific legatee acquires a legal title upon the assent of the executor to the legacy, and such assent need not be in writing but may be implied from the conduct of the executor (*i*). It is submitted that this rule does not extend to legal choses in action. Before the Policies of Assurance Act, 1867, and the Judicature Act, 1873, an executor could not pass the legal chose in action to a legatee either by assent or express conveyance, and there is nothing in those Acts which enables him to do so except by an assignment in writing.

Equitable interests.

Purely equitable interests in a policy also pass to the legal representatives of a deceased person: but as no assignment in writing is necessary to pass such interests, the assent of the executors to a legacy is sufficient to give the legatee an indefeasible title in equity (*j*).

Application of deceased's estate to pay debts.

The duty of an executor or administrator is to apply the property first in payment of the debts of the deceased. All obligations, present or contingent, which were binding upon a testator during his life even although created by a voluntary deed are debts which must be paid before the claims of beneficiaries

(*g*) *Wills* v. *Murray* (1850), 4 Ex. 843, 865.

(*h*) *Brandt* v. *Heatig* (1818), 2 Moore, 184; *Canham* v. *Rust* (1818), 8 Taunt. 227; *Bishop* v. *Curtis* (1852), 18 Q. B. 878.

(*i*) *Cray* v. *Willis* (1729), 2 P. W. 529; *Doe* v. *Guy* (1802), 3 East, 120; *Elliott* v. *Elliott* (1841), 9 M. & W. 23; *Culverhouse, In re*, [1896] 2 Ch. 251.

(*j*) If, therefore, some considerable time has elapsed since the death it is better not to pay the personal representatives without the concurrence of the legatee.

under the will can be considered. Debts are first paid out of residue. If that is not sufficient they are paid out of general pecuniary legacies which are abated in proportion (*k*). A specific legacy, as, for instance, certain named stock or a certain insurance policy specifically bequeathed, is only liable to abatement to pay debts after the general pecuniary legacies have been exhausted (*l*).

How rights of beneficial owners may be enforced.

The equitable claim of a legatee or next of kin ultimately entitled to the benefit of the policy moneys can only be enforced through the deceased's personal representatives or, if the personal representatives refuse to take proceedings, by suing in his own name and joining the personal representatives as defendants, and the Court will only allow proceedings to be taken in this form if satisfied that there is a reasonable cause of action which the personal representatives themselves ought to have enforced (*l*). If the personal representatives have in the exercise of a *bonâ fide* discretion settled a claim against an insurance company, the beneficiaries cannot question the settlement.

Title of executors,

Personal representatives are either executors or administrators. An executor takes his title by appointment in the will of the deceased. His title is complete as to every interest from the death of the testator, and all acts done by him either

before probate,

before or after probate are binding on the estate (*m*), and even the death of an executor before probate does not invalidate his acts (*n*). An executor cannot sue until probate is granted and although a receipt given by him before probate is a good discharge to the debtor, no debtor ought to pay an executor before probate (*o*). There is always the chance of an apparent executor turning out to be no executor by reason of a subsequent will or invalid execution of the will or otherwise, and a discharge given by an apparent executor without probate would not bind the real executors when probate was granted to them (*o*).

after probate.

But when probate is granted the acts of the executors to whom it has been granted are valid and bind the estate, even although it turns out that the will under which the grant was made was forged and the probate is afterwards revoked and letters of administration granted (*p*).

(*k*) Where the testator has made his real estate a fund to pay debts that may relieve the general or specific legacies.

(*l*) *Yeatman* v. *Yeatman* (1877), 7 Ch. D. 210.

(*m*) *Wankford* v. *Wankford* (1799), 1 Salk. 299.

(*n*) *Johnson* v. *Warwick* (1856), 17 C. B. 516.

(*o*) *Newton* v. *Metropolitan Ry.* (1861), 1 Dr. & Sm. 583.

(*p*) *Allen* v. *Dundas* (1789), 3 T. R. 125.

Title of administrators.

Administrators take their title by a grant of letters of administration which is made either in cases of intestacy or where the will appoints no executors or having appointed executors the executors renounce probate or die before probate, or die after probate without leaving an executor. Acts done by an administrator before the grant do not bind the estate (*q*) unless confirmed by him subsequently to the grant (*r*). If letters of administration are granted in the belief that there is no executor and afterwards a will is found appointing executors the grant of administration is void *ab initio* and all acts done by the administrator are void as against the estate except acts done in the due course of administration, that is, acts which the administrator was compellable to do (*s*). Where letters of administration are revoked for some other reason than the existence of an executor, as, for instance, when the administrator had obtained the grant by suppressing a will which did not appoint an executor, the grant is not void *ab initio*, and notwithstanding the subsequent revocation all acts of the administrator bind the estate (*t*).

Survivorship among executors.

Where there are two or more executors, the title passes to the survivors or survivor upon the death of one or more of them.

Death of sole executor after probate,

Upon the death after probate of a sole executor or of the sole survivor of several executors, the title passes to his executor who, if he proves his own testator's will, cannot renounce the subsisting probate of the first testator's will (*u*).

before probate.

Where an executor survives the testator but dies without having taken probate or renounces probate, the right of such person in respect of the executorship wholly ceases and the representation devolves in like manner as if he had never been appointed an executor (*x*).

Death of executor without leaving executor.

The title of an executor does not pass to his administrator nor does the title of an administrator pass to his executor or administrator (*y*), and therefore on the death of an executor without leaving an executor who accepts probate or upon the death of an administrator if in either case the estate has not been fully administered there must be a grant of letters *de bonis non* to a new administrator who alone can give a discharge.

(*q*) *Wankford* v. *Wankford* (1799), 1 Salk. 299.
(*r*) *Foster* v. *Bates* (1843), 12 M. & W. 226.
(*s*) *Ellis* v. *Ellis*, [1905] 1 Ch. 613.
(*t*) *Boxall* v. *Boxall* (1884), 27 Ch D 220.
(*u*) *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25; *Reid, In the Goods of*, [1896] P. 129.
(*x*) 21 & 22 Vict. c. 95, s. 16.
(*y*) *Moseley* v. *Rendell* (1871), L. R. 6 Q. B. 338.

Personal representative beyond the jurisdiction.

Where an executor appointed by a will or a person entitled to administer is beyond the jurisdiction, the Court may appoint some other person to administer the estate until the proper person shall return and apply for a full grant of probate or administration (*z*), and after a full grant of probate or administration has been made if the executor or administrator is beyond the jurisdiction at, or at any time after, the expiration of twelve calendar months from the death of the testator the Court may make a limited grant in favour of a creditor or legatee, or next of kin (*a*).

Infant executor.

Where an executor is an infant under twenty-one years of age, he cannot act until he attains full age, and if he is a sole executor the Court will not make a grant of probate to him until then, and meanwhile administration with the will annexed is granted to the guardian of the infant executor (*b*). If one of several executors is an infant, the others may act and probate will be granted to them, and to the infant when he attains full age. When the next of kin or person who, but for minority, would be entitled to a grant of administration is under age, a grant may be made to his guardian during infancy.

Temporary grants.

Other temporary grants of administration may be made during the mental incapacity of the person entitled or in the case of a lost will until the will be found.

Married woman as representative.

A married woman has now full capacity to act as executrix or administratrix, and can as such give a complete discharge without the concurrence of her husband (*c*).

Settlement of claims with personal representatives.

From the above it will be seen that an insurance company is safe in paying to or settling with an executor after he has obtained probate. Payment to an administrator must be more carefully considered. Apparently the company are safe in paying the full claim to an administrator, whether permanent or temporary, if they are satisfied that the administration has not been revoked at the time of payment. A receipt given for the full claim would be an act done in due course of administration and would bind the estate even if the administration was subsequently revoked. A settlement of a claim under the same circumstances would probably not bind the estate, and therefore, if a large sum is

(*z*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73; *Suarez, In the Goods of*, [1897] P. 82.

(*a*) 38 Geo. 3, c. 87; 20 & 21 Vict. c. 77, s. 74.

(*b*) 38 Geo. 3, c. 87.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 18); 1907 (7 Edw. 7, c. 18), s. 1.

involved, a settlement of a disputed claim with an administrator should not be made out of Court, but the company should allow proceedings to be brought and make a reasonable payment into Court.

One personal representative may act for all.

Where there are several executors of a will or several administrators in a grant of administration the receipt of one only is a sufficient discharge for money due to the estate and paid before the administration is complete (*d*). But if the administration is complete and executors have become trustees, the receipt of all the trustees is necessary to discharge a debtor to the estate (*e*), and where a person is employed by executors to collect the estate on their behalf he can only be discharged on the receipt of all the executors who employed him (*f*). A company paying policy moneys should, if possible, obtain the receipt of all the executors if more than one.

Insufficient stamp on probate or letters of administration.

If in an action brought by an executor or administrator it appears that the stamp on the grant is not sufficient to cover the value of the subject matter of the action, the title of the executor or administrator is defective and he cannot recover. An insurance company should not pay policy moneys unless the probate or administration is upon the face of it sufficiently stamped, that is to cover the net value sworn. The gross value sworn should be at least sufficient to cover the amount of the policy moneys: but otherwise there is probably no duty on the part of the company to make any inquiry as to the accuracy of the amounts sworn.

Executor's receipt where he has a personal interest.

Where a creditor with an equitable charge upon a policy was appointed executor of the assured and after his death claimed the policy moneys, the office, as they were bound to do in order to obtain a legal discharge, insisted on a receipt from the creditor *quâ* executor. The creditor signed in this form under protest, and in a question between him and the assured's general creditors it was held that he had not surrendered his charge on the policy and only the balance after payment of his own debt was assets in his hands *quâ* executor (*g*).

Foreign grants of

Subject to a statutory exception mentioned below, no title to

(*d*) *Hunt* v. *Stevens* (1810), 3 Taunt. 113; *Nail* v. *Punter* (1832), 5 Sim. 555.

(*e*) *Charlton* v. *Earl of Durham* (1869), L. R. 4 Ch. 433; *Smith* v. *Everett* (1859), 27 Beav. 446; *Jacomb* v. *Harwood* (1751), 2 Ves. Sen. 265.

(*f*) *Lee* v. *Sankey* (1872), 15 Eq. 204.

(*g*) *Glaholm* v. *Rowntree* (1837), 6 Ad. & El. 710.

representation.

sue in an English Court can be based on a probate or administration obtained in a foreign country. If a domiciled foreigner has property in England his representatives must obtain a grant from an English Court (*h*). But where the representatives have obtained probate or letters of administration in Ireland (*i*) or confirmation of executors in Scotland (*k*) or probate or letters of administration in any British possession to which the Colonial Probates Act, 1892, applies (*l*), the grant may be made effective in England by being sealed by the Court of Probate in England.

Payment of policy moneys in absence of proper grant.

If a company pays direct to a beneficiary under a will or to a representative who has not obtained an English grant, the company constitutes itself an executor *de son tort* and is liable to the creditors of the deceased in respect of his debts and to the Crown in respect of death duties (*h*).

English probate not necessary where assured died domiciled out of the United Kingdom.

In the case of moneys payable in respect of a policy upon the life of a person dying domiciled outside the United Kingdom, there is a statutory exception to the above rules to the effect that the title to the policy moneys on such a policy may be established without a grant of representation in the United Kingdom. The following are the statutory provisions.

Revenue Act, 1884, sec. 11, as amended by Revenue Act, 1889, sec. 19

47 & 48 Vict. c. 62. 52 & 53 Vict. c. 42.

Representation in the United Kingdom to constitute the title to assets therein situate.

11. Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a Court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom: Provided that where a policy of life insurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a Court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy.

Claimant must prove title accord-

In the case of claims made in respect of the estate of the assured who has died domiciled abroad, the company should be

(*h*) *New York Breweries Co.* v. *A.-G.*, [1899] A. C. 62.

(*i*) 20 & 21 Vict. c. 79, s. 95; 21 & 22 Vict. c. 95, s. 29.

(*k*) 21 & 22 Vict. c. 56, s. 12.

(*l*) 55 Vict. c. 6, s. 2. The following is a list of the British Possessions to which the Act applies:—Bahamas, Barbados, British Columbia, British Guiana, British Honduras, Cape of Good Hope; Falkland Islands, Fiji, Gibraltar, Gold Coast, Grenada, Hong Kong, Jamaica, Leeward Islands, Manitoba, Natal, New South Wales, New Zealand, Newfoundland, North West Territories, Nova Scotia, Ontario, Orange River Colony, Queensland, Saint Helena, Saint Vincent, South Australia, Southern Nigeria, Southern Rhodesia, Straits Settlement, Tasmania, Transvaal, Trinidad and Tobago, Victoria, Western Australia,

satisfied that the persons making the claim have a good title to sue either by a valid grant of representation in the country where the assured was domiciled or otherwise in accordance with the law of that country.

ing to foreign law.

Estate duty.

Where the claimant is entitled to payment without a grant of representation in the United Kingdom, the Inland Revenue has sometimes claimed payment of death duties from the company (*m*). It is doubtful, however, whether they could substantiate this claim, and it has never been admitted by the offices.

Section XIV.—Renewable Leaseholds for Lives

Insurance policies are frequently granted in connexion with leaseholds for lives. A leasehold for lives is usually a lease granted for the term of three lives and the survivor of the three. A person for whose life the lease is granted is called a *cestui que vie*, and the lessee usually is, but need not necessarily be, a *cestui que vie*. Such leases are usually subject to a right of renewal, that is upon the dropping of one or more of the lives the lessee has the right upon payment of a fine to put in a new life and then the lease runs for the duration of the new lives. And even where there is no right of renewal such leases are in practice constantly renewed by the lessor on payment of a fine. As the liability of the lessee in respect of fines is necessarily an uncertain element it is usually found most convenient to meet the liability by insurance for the amount of the fine either on each of the lives separately or on the joint lives payable on the death of any one.

Life policies granted to secure renewal.

Where the lease for lives is the sole property of the lessee, the necessary insurance is easily arranged and the policy is his own absolute property and does not run with the lease but must be specifically assigned if he assigns his interest in the lease.

Primâ facie title to policy does not run with lease.

Where the lease for lives is the subject of a settlement the question of insurance is more complex and it will be more convenient to deal first with the rights and liabilities of tenant for life, remainderman and trustees with regard to renewals and then to consider how those interests may be met by insurance and how the insurance moneys are to be applied.

Where leasehold for lives is subject of a settlement.

(*m*) Presumably under Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (1). *Vide supra*, p. 523; and see *A.-G.* v *Wack* (1899), The Times, June 14.

Settlement without trustees.

Taking first the case of a lease for lives which is settled by will without the intervention of trustees so that the tenant for life and remainderman have both legal estates, the following rules may be laid down.

Obligation of tenant for life to renew.

In the absence of any direction or condition in the will the tenant for life is not bound to renew the lease (*m*). He cannot be compelled to contribute anything to the cost of renewal unless the remainderman has renewed and the tenant for life afterwards elects to enjoy the benefit of the renewal after the other lives have dropped (*n*). In such case he would become liable to the remainderman for a proportion of the fine equivalent to his enjoyment of the renewal (*n*). But although the tenant for life is not bound to renew, he may, without the consent of the remainderman, renew and at the end of his life tenancy the settled estate will have the benefit of the renewal subject to a lien in favour of the life tenant's estate of the unexhausted value of the renewal (*o*). The terms of the will may impose upon the life tenant the duty to keep the lease up by renewing and putting in a new life for every life which drops during his life tenancy (*n*). *Primâ facie* where there is a direction on the life tenant to renew he must personally bear the whole cost of renewal (*q*); but the will may authorise him to charge the whole or part of the cost of renewal upon the estate. In such case he must personally bear all that he is not authorised to charge (*r*). Thus he must keep down the interest on the charge during his life tenancy, and if the amount which he is authorised to charge is less than the fine for renewal he must pay the balance and has no recourse against the remainderman (*r*). In one case where the obligation of the tenant to renew was upon the construction of the will doubtful but the tenant for life believed he was bound to renew, and in order to meet the fine insured the *cestui que vie* at his own expense without any expectation of recovering the cost from the remainderman, it was held that he could not afterwards recover a proportion of the cost on the basis of a voluntary renewal (*s*).

(*m*) *Nightingale* v. *Lawson* (1785), 1 Bro. C. C. 440; *White* v. *White* (1798), 4 Ves. 24; 9 Ves. 554; *Capel* v. *Wood* (1828), 4 Russ. 500; *O'Ferrall* v. *O'Ferrall* (1834), L. & G. temp. Plunk. 79.

(*n*) *White* v. *White* (1798), 4 Ves. 24; 9 Ves. 554.

(*o*) *Tanner* v. *Elworthy* (1841), 4 Beav. 487; *Biss, In re*, [1903] 2 Ch. 40.

(*q*) *Blake* v. *Peters* (1863), 1 De G. J. & S. 345.

(*r*) *White* v. *White* (1798), 4 Ves. 24; 9 Ves. 554.

(*s*) *Browne* v. *Browne* (1860), 2 Giff. 304.

Cost of fine apportioned between life tenant and remainderman.

Where the renewal fine falls to be apportioned between life tenant and remainderman in proportion to their enjoyment of the benefit of the renewal, their respective shares are finally adjusted at the termination of the estate of the tenant for life. His actual enjoyment can then be estimated. If he has paid the renewal his estate has a lien upon the settled estate for the amount of such renewal less a proportion equivalent to his enjoyment, if any. If the remainderman has paid the renewal either in cash or by permitting it to be charged on the estate, the estate of the tenant for life is liable for a proportion corresponding to his enjoyment. Strictly it is impossible to ascertain the proportion between the enjoyment of the tenant for life and the enjoyment of the remainderman until the death of the *cestui que vie*, but in practice the probable duration of the life of the *cestui que vie* is estimated on the death of the tenant for life, and while the enjoyment of the tenant for life is his actual enjoyment (*t*) the enjoyment of the remainderman is the estimated duration of the life of the *cestui que vie* after the death of the tenant for life (*u*). The actual enjoyment of the tenant for life only begins on the death of the surviving *cestui que vie* under the unrenewed lease. If the tenant for life does not survive the surviving *cestui que vie* under the old lease he takes no enjoyment from the renewal and his estate may recover the whole amount of the fine from the estate in remainder (*x*). Where the tenant for life is himself a *cestui que vie* under the old lease, he can take no benefit from a renewal, and if he renews he may, on renewal, charge the whole fine on the estate (*y*).

Interest upon the cost of renewal.

In the case of the tenant for life having paid the fine voluntarily his estate is entitled to a lien on the settled estate for the amount of the fine with compound interest up to the death of the tenant for life and with simple interest thereafter until payment (*z*). The rule that the tenant for life has to keep down the interest on a loan raised for payment of a fine only applies to cases in which the whole burden of renewal falls on the tenant for life, where there is a direction to renew and the tenant for life is authorised to charge the capital on the estate or some other fund but is not authorised to charge the interest (*z*).

(*t*) *Jones* v. *Jones* (1846), 5 Hare, 440.
(*u*) *Bradford* v. *Brown-John* (1868), L. R. 3 Ch. 711.
(*x*) *Harris* v. *Harris* (1862), 32 Beav. 333.
(*y*) *Lawrence* v. *Maggs* (1759), 1 Eden, 453.
(*z*) *Bradford* v. *Brown-John* (1868), L. R. 3 Ch. 711.

Primâ facie tenant for life insures for benefit of estate.

If a tenant for life insures the lives of the *cestuis que vient* in order to provide a fund for renewal, *primâ facie* he must be held to have so insured on behalf of the estate (*a*), and if the life of a *cestui que vie* drops during the life of the tenant for life he is bound to apply the insurance money in renewal (*a*). Any surplus would accrue for his own benefit, and if there was not sufficient to pay the cost of renewal and repay himself the premiums with interest, he would be entitled to a lien on the estate for any deficiency made good by him. If no life dropped during the life of the tenant for life, the remainderman would probably have the option of adopting or rejecting the policy on behalf of the estate. If he took the policy the estate of the tenant for life would have a lien on the settled estate for the premiums paid and interest. If he declined to take the policy the estate of the tenant for life would have no lien for the premiums, but the policy would remain an asset of his estate and the settled estate would have no further claim on it.

Where tenant for life enjoys renewal at cost of remainderman the latter may demand security.

In the case of the remainderman having paid the fine for renewal and being entitled to recover from the estate of the tenant for life a contribution corresponding to the latter's enjoyment of the renewal, it is essential to provide against the possibility of that estate not being sufficient to meet the claim. Whenever therefore the lives of the *cestuis que vient* under the old lease have dropped and the tenant for life accordingly begins to reap a benefit of the renewal at the expense of the remainderman, the latter is entitled to insist upon proper security that the proportion payable by the tenant for life will be paid at the termination of the tenancy (*b*). It may be that the tenant for life will reap the whole benefit of the renewal, but it is not necessary to insist upon security being given in the first instance for the maximum amount (*c*). A calculation based upon the lives of the *cestui que vie* and the tenant for life will give the sum which will probably be sufficient to meet the claim, and if security is given upon that calculation further security may be demanded if and when it becomes obvious that the original security will not be sufficient (*c*). The security may take the form of an insurance on the life of the tenant for life for the probable amount payable, payment of the premiums being secured upon the rents and profits of the estate

(*a*) *Browne* v. *Browne* (1860), 2 Giff. 304.

(*b*) *Reeves* v. *Creswick* (1839), 3 Y. & C. 715.

(*c*) *Jones* v. *Jones* (1846), 5 Hare, 440.

and a further insurance demanded when the first becomes insufficient (*d*).

Where a leasehold for lives is settled in the hands of trustees, the powers and duties of the trustees in respect of renewal is controlled by statute.

Settlement with trustees.

Trustee Act, 1893, sec. 19

Power of trustees of renewable leaseholds to renew and raise money for the purpose.

19.—(1) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Apportionment of cost of renewal between tenant for life and remainderman.

The above section does not alter the ultimate adjustment of the expenses of renewal between tenant for life and remainderman (*e*). The will or deed of settlement may lay the burden on one or the other as in the case of legal estates or the trustees may have a discretion as to where the burden is to fall (*f*). In the absence of any direction in the settlement, the burden is to be borne in proportion to actual enjoyment (*g*). Where the trustees are

(*d*) *Reeves* v. *Creswick* (1839), 3 Y. & C. 715.

(*e*) *Baring, In re*, [1893] 1 Ch. 61.

(*f*) *Trench* v. *St. George* (1838), 1 Dr. & Wal. 417; *Jones* v. *Jones* (1846), 5 Hare, 440.

(*g*) *Baring, In re*, [1893] 1 Ch. 61; *Jones* v. *Jones* (1846), 5 Hare, 440; *Greenwood* v. *Evans* (1841), 4 Beav. 44.

directed to renew out of the rents and profits of the estate that does not throw the whole burden on the tenant for life (*h*). They may raise the sum by mortgaging the rents and profits, and the tenant for life must keep down the interest during his tenancy and pay his share of capital according to his actual enjoyment (*i*). Where the direction is to pay the fine out of the annual rents and profits then the whole burden falls on the tenant for life for the time being until the amount of the fine is paid (*k*). A bare direction to trustees to renew without specifying where or how the money is to be obtained has been held to throw the burden upon the residue of the general trust funds (*l*).

Cost of renewal charged on corpus.

If trustees raise money by charging the corpus of the estate, and the tenant for life may be ultimately liable to contribute a proportion of the fine in respect of his enjoyment, he may be called upon to give reasonable security to provide for such contribution (*m*), and this may be effected by an insurance on his life with a charge on the annual profits to meet the premiums (*n*).

Cost of renewal paid out of rents and profits.

If the money is paid out of annual rents and profits or advanced by the tenant for life and the tenant for life is not, by the terms of the settlement, bound to bear the whole burden his estate will be entitled to his proper proportion : but he cannot claim repayment before the end of his tenancy because until then his actual enjoyment cannot be ascertained. If he dies during the life of the *cestui que vie* under the old lease, his estate will be entitled to recover the whole fine (*o*).

Power of trustees to insure to provide funds for renewal.

Apart from express authority under the settlement, trustees have apparently no authority to insure the lives of *cestuis que vient* so as to provide a fund for renewal (*p*). In one case where trustees had done so the amount of premiums was disallowed in their account (*p*). Where the consent of all the beneficiaries can be obtained, insurance out of annual profits is the most convenient way of raising the money (*p*).

The details of the following cases where questions arose relating to the insurance of *cestuis que vient* for the benefit of leaseholds for lives may be useful.

(*h*) *Ainslie* v. *Harcourt* (1860), 28 Beav. 313.
(*i*) *Allan* v. *Backhouse* (1813), 2 V. & B. 65.
(*k*) *Gollez* v. *Wood* (1861), 29 Beav. 482.
(*l*) *Stone* v. *Theed* (1787), 2 Bro. C. C. 243.
(*m*) *Jones* v. *Jones* (1846), 5 Hare, 440.
(*n*) *Reeves* v. *Creswick* (1839), 3 Y. & C. 715.
(*o*) *Harris* v. *Harris* (1862), 32 Beav. 333.
(*p*) *Greenwood* v. *Evans* (1841), 4 Beav. 44.

Browne v. Browne (1860), 2 Giff. 304

Browne v. *Browne.*

A lease for lives was settled by will, and on the construction of the will it was doubtful whether the tenant for life other than the first tenant for life was bound to renew the lease. The tenant for life, not being the first tenant for life, thought he was bound to renew, and insured the life of the younger *cestui que vie* in the names of himself and the executors of the will, and paid the premiums until his death. The Court held that even on the assumption that the tenant for life was not bound to insure, yet he did insure for the benefit of the trust in the belief that he was bound to do so at his own expense and without any expectation of having the premiums repaid. The representatives of the tenant for life had therefore no claim on the policy either for the sum insured or for repayment of premiums. Bonus additions, however, were in a different position. According to the terms of the insurance bonus additions were to be applied in diminishing the premiums or to be paid to the insurers at their option. In this case the Court thought it was not unreasonable to assume that the tenant for life would have elected to receive the bonuses accruing in his lifetime and that such bonuses would form part of his estate. A declaration was therefore made that proceeds of the policies should belong to the trust estate except that the bonuses which accrued during the life of the tenant for life should be part of his estate.

Meller v. Stanley (1864), 2 De G. J. & S. 183

Meller v. *Stanley.*

A lessee of a lease for three lives was in the habit of insuring each of the lives and applying the insurance moneys in renewal when a life dropped. He died leaving a will directing his trustees to accumulate the income of his real and personal estate for twenty-one years, and at the end of that period to stand possessed of all the property and accumulations in trust for A for life with remainder to her children successively in tail. The trustees had power to pay the annual premiums on the policies on the three existing lives, to renew the lease, and to obtain other policies "on the plan now adopted." A survived the period of accumulation, and had two children. A life having dropped during A's life tenancy, the trustees received the policy moneys which they applied in renewing the lease, but owing to bonus additions there was a large surplus. They insured the new life. Since the termination of the period of accumulation, the premiums on all the policies were paid out of the income payable to A. On the death of A her representatives claimed the surplus proceeds of the policy on the life which had dropped, and an assignment to them of the three existing policies according to the general rule that where real and personal estate are given together the person who takes the first estate tail in the real estate takes an absolute interest in the personalty. It was held that there was an express trust to hold and apply the policies for the purpose of renewing the leaseholds. The proceeds of each policy as it fell due were to be applied in paying (1) the fine for renewal; (2) the first premium on a new policy; (3) the future premiums on the policies existing at the testator's death. It was therefore ordered that a sum should be retained to meet the future premiums on the old policies, and subject to that and payment of the first premium on the new policy the surplus policy moneys should belong to A's estate.

Section XV.—Policy on Life of Debtor

Insurance on life of debtor.

Where a policy is effected upon the life of a debtor in order to give security to the creditor, the question frequently arises as to whether, in the absence of any express agreement, the creditor is entitled to the policy absolutely or whether he is only entitled as mortgagee and bound to account to the debtor after satisfaction of the debt. Whether the policy is in the name of the debtor or creditor is not material, except as *primâ facie* evidence of ownership, and as a general rule the policy must be deemed to belong to that one of them who, as between themselves, is ultimately liable to pay for it (*r*).

Debtor entitled to policy for which he pays.

If the debtor expressly or impliedly agrees to pay the premiums for an insurance on his life, the policy belongs to him in whatever form it may be effected (*s*). An agreement to pay the premiums may be implied if the creditor, in his account with the debtor, debits the premiums to the debtor, and the debtor either pays them (*t*), or admits that they are properly charged (*u*). But where the creditor has merely charged the premiums against the debtor in his own books that is only evidence of his intention to charge the debtor if he could, and is not sufficient to show that the debtor agreed to pay the premiums or that the policy was his (*x*).

Where creditor undertakes to transfer the policy on repayment of debt.

Where there was no obligation on the debtor to pay premiums during the non-payment of the debt, but he agreed on the debt being paid off to pay a proportion of the premium for the unexpired portion of the current year, it was held that the obligation to pay this proportion of the premium implied an obligation on the creditor to transfer the policy (*y*). But in such a case the policy clearly belongs to the creditor absolutely until the debt is paid off, and where the creditor merely undertakes that on repayment he will transfer a policy which the debtor is under no obligation to pay for, the creditor is not bound to account for the proceeds if the debtor dies before repayment (*z*). And similarly, if the debtor

(*r*) *Brown* v. *Freeman* (1851), 4 De G. & Sm. 444; *Pennell* v. *Millar* (1857), 23 Beav. 172; *Drysdale* v. *Piggott* (1856), 8 De G. M. & G. 546; *Gottlieb* v. *Cranch* (1853), 4 De G. M. & G. 440; *Courtenay* v. *Wright* (1860), 2 Giff. 337; *Salt* v. *Marquess of Northampton*, [1892] A. C. 1.

(*s*) *Storie's Trusts, In re* (1859), 1 Giff. 94; *Simpson* v. *Walker* (1833), 2 L. J. Ch. 55; *Martin* v. *West of England Life and Fire* (1858), 4 Jur. N. S. 158.

(*t*) *Holland* v. *Smith* (1806), 6 Esp. 11.

(*u*) *Morland* v. *Isaac* (1855), 20 Beav. 389.

(*x*) *Bruce* v. *Garden* (1869), L. R. 5 Ch. 32.

(*y*) *Williams* v. *Atkyns* (1845), 2 Jo. & La T. 603.

(*z*) *Bashford* v. *Cann* (1863), 11 W. R. 1037.

has a mere option to purchase the policy on repayment that is not an option which can be exercised by his representatives after his death (*a*). A creditor who has covenanted to assign a policy on repayment of the debt does not thereby undertake to keep the policy on foot; but, on the other hand, he could not sell it or surrender it so as to defeat the debtor's right to it (*b*).

When interest on debt is calculated to cover cost of insurance.

The fact that a debtor has agreed to pay interest which is obviously calculated so as to include the cost of insurance is not sufficient to entitle him to claim as his a policy effected by the creditor on his life (*c*). In such a case the creditor is entitled to the additional interest, whether he effects a policy or not. He is not bound to insure, and if he does insure he insures entirely at his own expense with money which but for the insurance would go into his own pocket.

Debtor's equity of redemption.

Where the policy is effected at the debtor's expense he is entitled to the equity of redemption even although the policy is in the name of the creditor as assured, or has been asigned to him (*d*). Any condition that the creditor may not redeem is void if made at the time the security was created (*e*). On repayment of the debt the debtor is entitled to have the policy assigned to him if not already in his name, and if he dies while the debt is unpaid, his representatives are entitled to have the policy moneys applied in discharge of the debt, and to have the balance paid over to them. Failure on the part of the debtor to pay the premium in accordance with his promise to do so does not entitle the creditor who has paid the premiums on the debtor's default, to treat the policy as his absolute property (*f*). He may add the premiums to the debt, but otherwise the policy still belongs to the debtor (*f*).

Insurance at sole expense of creditor.

If the policy is effected entirely at the creditor's expense, the debtor's representatives have no concern with the application of the policy moneys, and apart from agreement the debtor has no right to a transfer on paying the debt (*g*).

(*a*) *Lewis* v. *King* (1875), 44 L. J. Ch. 259.

(*b*) *Hawkins* v. *Woodgate* (1844), 7 Beav. 565.

(*c*) *Gottlieb* v. *Cranch* (1853), 4 De G. M. & G. 440; *Freme* v. *Brade* (1858), 2 De G. & J. 582; *Preston* v. *Neele* (1879), 12 Ch. D. 760; *Knox* v. *Turner* (1870); L. R. 5 Ch. 515, *Kavanagh* v. *Waldron* (1846), 9 Ir. Eq. R. 279; *Ex parte Lancaster* (1851), 4 De G. & Sm. 524; but see *Courtenay* v. *Wright* (1860), 2 Giff. 337.

(*d*) *Martin* v. *West of England Life and Fire* (1858), 4 Jur. N. S. 158; *Simpson* v. *Walker* (1833), 2 L. J. Ch. 55; *In re Storie's Trusts* (1859), 1 Giff. 94; *Holland* v. *Smith* (1806), 6 Esp. 11; *Morland* v. *Isaac* (1855), 20 Beav. 389.

(*e*) *Salt* v. *Marquis of Northampton*, [1892] A. C. 1.

(*f*) *Drysdale* v. *Piggott* (1856), 8 De G. M. & G. 546.

(*g*) *Brown* v. *Freeman* (1851), 4 De G. & Sm. 444; *Humphrey* v. *Arabin*

Debtor not entitled to have policy moneys applied in extinguishing the debt.

Before the case of *Godsall* v. *Boldero* (*h*) was overruled (*i*), it was held that a policy of life insurance was a policy of indemnity, and that therefore a creditor insuring the life of his debtor could not recover from the insurance company after he had received payment of his debt from the debtor, and as a sort of corollary to that rule it was held that if the creditor received the insurance money on the death of the debtor it ought primarily to be applied in extinguishing the debt (*k*). Both these theories have long been exploded, and now if a creditor insures on his own account without being bound to do so, and without any agreement express or implied to give the debtor the benefit, he may recover both the debt and the insurance money for his own sole benefit. At first sight it seems perhaps unfair that he should be paid twice over, but neither the debtor nor the insurance company have any reason to complain. Each pays in strict accordance with the contract he has made. And there is no reason why either should claim as a windfall the benefit of another contract with which he has no concern.

Where creditor insures as trustee.

Where a creditor has assumed the position of a trustee towards his debtor he may, as trustee, be bound to account for a policy on the debtor's life; as where the debtor assigned to his creditor a contingent reversionary interest in trust to pay the debt and hold the balance to the use of the debtor, and the creditor insured the debtor's life to provide against the contingency (*l*).

Where transaction between debtor and creditor is set aside.

Where a transaction between creditor and debtor is set aside, the right to a policy effected on the debtor's life does not depend on whether the debtor would or would not have been ultimately liable to pay for it under the agreement between them because *ex hypothesi* the agreement has ceased to exist (*m*). Apparently the policy must be considered as the policy of the party who has actually paid the premiums, and if the creditor has paid the premiums he will not, as a rule, be allowed to charge them in

(1836), Ll. & G. (Plunket) 318; *Bell* v. *Ahearne* (1849), 12 Ir. Eq. R. 576; *Law* v. *Warren* (1843), Drury, 31; *Foster* v. *Roberts* (1861), 7 Jur. N. S. 400; *Lea* v. *Hinton* (1854), 5 De G. M. & G. 823; *Baron* v. *Fitzgerald* (1840), 6 Bing. N. C. 201; *Brown* v. *Freeman* (1851), 4 De G. & Sm. 444; *Humphry* v. *Arabin* (1836), Ll. & G. (Plunket) 318; *Bell* v. *Ahearne* (1849), 12 Ir. Eq. R. 576; *Law* v. *Warren* (1843), Drury, 31; *Milliken* v. *Kidd* (1843), 4 Drury, and Warren, 274.

(*h*) (1807), 9 East, 71.

(*i*) *Dalby* v. *India and London Life* (1854), 15 C. B. 365.

(*k*) *Henson* v. *Blackwell* (1845), 4 Hare, 434.

(*l*) *Ex parte Andrews* (1816), 2 Rose, 410.

(*m*) *Pennell* v. *Millar* (1857), 23 Beav. 172.

account against the debtor (*n*), but where the debtor in applying to have the transaction set aside offered to refund the money and interest and to comply with " any other fair and reasonable demand," the Court set aside the transaction on condition that he paid the premiums in exchange for a transfer of the policy (*o*).

Illegality of policy and *ex gratiâ* payment.

If the insurance company has paid the policy moneys without questioning the validity of the policy, the plea that the policy was illegal or void cannot be set up by a creditor as against the debtor or *vice versâ* (*p*).

Debtor trustee of policy for creditor.

A debtor effecting a policy on his own life in order to give security to his creditor is a trustee of the policy to the extent of the debt from the time it is effected (*q*).

Section XVI.—Friendly Societies and Benevolent Funds

Insurance fund not part of member's estate.

Insurance in friendly societies, trade unions, and benevolent funds does not stand on quite the same basis as insurance in an ordinary life company. Apart from the peculiar statutory conditions in the case of registered societies and benevolent funds controlled by special Acts of parliament, the rules of a society may be such as to create a fund which is not *primâ facie* part of the member's estate, but is a fund in the hands of the society as trustees for specific purposes subject to a limited power of appointment by the member in accordance with the rules of the society.

Ashby v. Costin (1888), 21 Q. B. D. 401

Ashby v. *Costin.*

The rules of an unregistered friendly society provided that the committee might pay the death allowance to such person or persons as in their discretion they might think fit, and in the event of there being no surviving relatives nor any special bequest of the allowance by the member then the society should be liable to pay only the funeral expenses of the member. A member of the society died intestate, and the society paid the allowance to his sister. It was held that the creditors of the deceased had no right to the money which was not part of his estate. The Court held that if he had bequeathed the money it would thereby have become part of his estate, and liable to his debts. But the allowance was not the property of the member in the sense

(*n*) *Pennell* v. *Millar* (1857), 23 Beav. 172; *Ex parte Shaw* (1800), 5 Ves. 620; *Bromley* v. *Smith* (1859), 26 Beav. 644.

(*o*) *Hoffman* v. *Cooke* (1801), 5 Ves. 622.

(*p*) *Freme* v. *Brade* (1858), 2 De G. & J. 582; but see *Henson* v. *Blackwell* (1845), 4 Hare, 434.

(*q*) *Winter* v. *Easum* (1864), 2 De G. J. & S. 272.

of its belonging to him absolutely in his lifetime. He had only a certain power of appointment by will, and if he did not choose to exercise that power the allowance was a fund payable among his relatives in the discretion of the committee, and not at his disposal.

Davies, In re, [1892] 3 Ch. 63

Davies, In re.

A clergyman had effected an insurance in the Clergy Mutual Assurance Society. The policy promised to pay the sum insured three months after the assured's decease to the person entitled thereto by the rules. The rules provided that any member of the society might nominate any person or persons his, her, or their executors, administrators, or assigns, to receive any sum assured by any such member, and if no nominee was appointed, or a nominee having been appointed had died in the member's lifetime, the sum should be paid to the member's widow if alive, or, if not, to his children in equal shares, and failing them, to the next of kin; but the sum assured was payable to the assigns of the assured in preference to his nominee in any case where their claim should have arisen under any specific disposition or charge by any instrument in writing not testamentary, and in case there was no nomination was payable to the assigns of the assured by any writing testamentary or otherwise. The assured never made any nomination nor any specific disposition of the policy, but by his will, which did not refer to the policy, he left the residue of his property to the widow and children of a deceased son. His three daughters, who were also the executrices of his will, claimed the policy moneys under the rules, and the widow and children of the deceased son claimed them as part of the residuary estate. North, J., held that the three daughters were entitled. They had a vested interest in the policy moneys under the rules of the society, and that interest could only be defeated by the assured dealing with the property in certain specified ways, that is by nomination, or specific charge, or disposition. He had not dealt with it in any of those ways, and therefore it remained the property of his daughters, and did not pass under a general bequest of residue. North, J., said he did not altogether assent to the language of Mr. Justice Cave in *Ashley* v. *Costin* that the money was not "the property" of the assured because he had a contingent interest in it which would have become absolute if he had exercised his power.

Customs Annuity and Benevolent Fund.

Several cases have been decided relating to claims on the Customs Annuity and Benevolent Fund. This fund was established in 1816 by Act of parliament (*r*), for the benefit of widows and children and other relatives of persons employed in the Customs. The Act and rules establish the conditions upon which the fund shall be distributed upon the death of a member.

Customs Annuity and Benevolent Funds Act, 1816, sec. 9

Directors may admit

9. The said directors shall and may if they deem it expedient admit any person or persons to be nominee or nominees of any subscriber to the said

(*r*) 56 George 3, c. 73 (Private and Personal), amended by 34 & 35 Vict. c. 103, and 59 Vict. c. 14.

fund who may not be a relative or relatives of the said subscriber; and the said nominee or nominees so admitted as aforesaid shall and are hereby declared to have, and thereafter to continue to have to all intents and purposes the same and the like interest in the said fund and in the advantages thereof as if the said nominee or nominees had been a relative or relatives of the said subscriber under and subject in every respect to the rules and regulations approved and ratified as aforesaid. nominees as subscribers.

Customs Annuity and Benevolent Fund Rules, 1872

1. The Customs Annuity and Benevolent Fund shall continue to be raised by subscription upon the principle of life insurance, and shall form a fund for the benefit and relief of widows, children, relatives, and nominees of officers or persons belonging to the department and under the control of Her Majesty's Customs, and the admission by the directors of a nominee or nominees of subscribers under the said Act shall as to the person of such nominee or nominees take place during the lifetime of such subscriber. And any such admission may from time to time be revoked or annulled by the subscriber at his will or pleasure, or by the directors at their discretion, where they shall have just cause to believe that such admission has been procured in fraud of the principle and policy of the fund. Every nominee of a subscriber shall be entitled to such proportion only of his insurance in the fund as shall be limited and directed by the subscriber in conformity with these regulations.

11. The directors may during the lifetime of a subscriber at his instance exclude his widow from all benefit of the fund on account of misconduct on her part proved to their satisfaction.

12. The capital money forthcoming at a subscriber's death by virtue of his insurance shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil, or in any instrument in writing signed by him in the presence of an attesting witness, and deposited with the directors during his lifetime or within three calendar months after his death, and which instrument may at the option of such subscriber be made absolutely irrevocable or in default of any such directions in manner hereinafter prescribed. Provided always that where no such instrument in writing shall have been so deposited as aforesaid, but one shall subsequently be found duly signed and attested as aforesaid, the directors may, if they think fit, receive and act upon such last mentioned instrument at any time before the money forthcoming under the insurance shall have been paid or appropriated, but after such payment or appropriation shall once have been made no instrument or writing containing other directions not deposited with the directors as aforesaid shall have any force or effect whatsoever.

The widow's share of the capital money forthcoming by virtue of her husband's insurance shall not be less than one-third if appropriated in creation of an annuity, nor less than the interest for her life of two-thirds if set apart for investment, and in either case the remainder of the said capital money forthcoming shall be subject to the directions of the subscriber, and shall be applied or paid in any manner or proportions he may think fit for the benefit of his widow, children, blood relations, or any of them, or his nominee or nominees who shall have been duly admitted by the directors . . . if there be no widow then the whole capital fund shall be subject to the directions of the subscriber as aforesaid.

If a subscriber die leaving issue without having by will or such other instrument as aforesaid directing the application of the capital money herein placed at his disposal, the same shall become the property in equal proportions of such of his children as shall be living at his death, and the issue of such, if any, as shall be then dead leaving issue then living, such issue to take among themselves in equal proportions the share to which their parent or respective parents would have been entitled if living.

If there shall be no widow, child, or other issue as aforesaid of such subscriber, the whole capital money shall belong to the person or persons entitled as his next of kin, according to the Statute of Distributions, and shall be paid to the legal personal representatives of such subscriber in trust for such person or persons; but the receipt of the said legal personal representatives shall effectually discharge the directors of the said fund from seeing to the application of such capital money.

Subscriber's interest is a limited power of appointment.

Under the above-mentioned Act and rules the subscriber's interest in the fund is a limited power of appointment (*s*). His share does not form part of his estate to bequeath as he pleases (*t*). The widow takes a vested interest to the extent of one-third, which interest is only defeasible by exclusion under rule 11 for misconduct. Subject to that the widow and children are beneficiaries among whom or to any one of whom the fund may be appropriated by the properly executed direction of the subscriber. A stranger may be admitted as beneficiary by nomination and acceptance under rule 1, and having been admitted the subscriber may appropriate the fund to him to the exclusion of the children. Probably where a beneficial interest in the fund is intended to go to a stranger, that stranger ought to be nominated and accepted as nominee, and a nomination of a trustee will not entitle a beneficiary to a share of the estate. But where a trustee is nominated and the directors of the fund are made aware of the objects of the trust, and accept the nomination of the trustee, that is in effect a nomination and acceptance of the beneficiaries, and the directors of the fund cannot afterward object that there was no formal nomination of the beneficiaries (*u*). The nomination of a stranger under rule 1 and the appropriation of the fund to him under rule 12 may be effected by the same instrument as where a settlement or will is executed and delivered to the directors, and they accept it as a nomination (*u*). The fund may be appropriated to a beneficiary so as to give him and his assigns

(*s*) *A.-G.* v. *Rowsell* (1844), 36 Ch. D. 67*n.*; *A.-G.* v. *Abdy* (1862), 1 H. & C. 266; *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357.

(*t*) *Phillips's Insurance, In re* (1883), 23 Ch. D. 235.

(*u*) *Urquhart* v. *Butterfield* (1887), 37 Ch, D. 357.

an absolutely vested interest not necessarily conditional upon the appointee surviving the subscriber (*x*). Thus an appropriation to the marriage settlement trustees of a child of the subscriber is good as an appropriation to that child, notwithstanding that under the settlement her husband an unadmitted stranger takes a life interest, and the child predeceases the subscriber (*x*).

Nomination of stranger by way of mortgage.

The subscriber may nominate a stranger with the object of mortgaging the subscriber's share to him as security for an advance. The directors ought at the time to be informed of the object of the nomination (*y*). An appropriation of the fund to a mortgagee duly admitted as nominee will be valid to the extent of the debt, and as to the surplus the fund will go as it would have in default of appropriation (*y*).

Phillips's Insurance, In re (1883), 23 Ch. D. 235

Phillips's Insurance, In re.

A subscriber to the Customs Annuity and Benevolent Fund made no nomination under rule 1. He died leaving three children surviving him, and having made a will whereby he purported to bequeath his interest in the fund to a stranger. The Court held that the children were entitled to the fund as against the stranger. The subscriber's interest in the fund was not part of the subscriber's estate to bequeath as he pleased, and he could only appropriate the fund to a stranger if he had been admitted as a nominee under the Act.

Urquhart v. Butterfield (1887), 37 Ch. D. 357

Urquhart v. Butterfield.

A subscriber to the Customs Annuity and Benevolent Fund, being unmarried and illegitimate, made a will by which he appointed trustees, left certain pecuniary legacies, and left the residue of his estate to his uncle. The will contained no reference to the subscriber's interest in the fund. He afterwards became insane, and being domiciled in Scotland a curator was appointed, and at his instance the Court of Session nominated him "nominee" of the subscriber for behoof of the legatees under his will. The directors admitted the curator as nominee, and he paid the premiums until the death of the subscriber, who died without recovering his reason. The will was proved in Scotland. The curator claimed as against the secretary of the fund a declaration that he was entitled to payment as the nominee of the subscriber. It was admitted that the nomination by the curator was as effective as if made by the subscriber himself, but it was contended that a nomination must be for a beneficial interest. The Court held that the directors having accepted the nomination could not now object to its form, and that in effect there was a good nomination of the beneficiaries, and a good appropriation of the fund for their benefit.

(*x*) *Pocock's Policy, In re* (1871), L. R. 6 Ch. 445.

(*y*) *Maclean's Trusts, In re* (1874), 19 Eq. 274.

Pocock's Policy, In re (1871), L. R. 6 Ch. 445

Pocock's Policy, In re.

A subscriber to the Customs Annuity and Benevolent Fund, being a widower, executed and forwarded to the directors an instrument in accordance with rule 12, directing that his share in the fund should be paid to the trustees of his daughter's marriage settlement. The trusts of the settlement were for his daughter for life, and after her death for her husband for life, and after the death of the survivor for the children with an ultimate destination to the daughter absolutely. Neither the trustees nor the daughter's husband were ever formally admitted by the directors as nominees. The daughter died during the subscriber's lifetime, leaving one child. Upon the death of the subscriber, leaving a son, it was contended that the son and daughter's child were entitled to share the fund on the ground that the appointment to the trustees of the marriage was void as being for the benefit of an unadmitted stranger. The Court held that the appointment was good, being essentially for the benefit of his daughter.

Maclean's Trusts, In re (1874), 19 Eq. 274

Maclean's Trusts, In re.

A subscriber to the Customs Annuity and Benevolent Fund executed and deposited with the directors of the fund an instrument in accordance with rule 12, directing that a sum of £1400, amounting to two-thirds of his share, should on his death be paid to the trustees of an insurance company, and requesting the directors of the fund to admit them as his nominees. The appointment was declared to be irrevocable. This document was accompanied by an oral representation from the subscriber that the object of the appointment was to obtain a loan from the insurance company in order to disincumber certain property for the ultimate benefit of his family. The directors of the fund admitted the trustees of the company as nominees. Thereupon the subscriber mortgaged his interest to the insurance company to secure a loan of £900. Upon his death the personal representatives of the subscriber contended that the appointment to a mortgagee was void and contrary to the principle of the Act. The Court held that the appointment was good.

Registered friendly societies, industrial and provident societies, and trade unions.

Insurance policies and death benefits payable by friendly societies, industrial and provident societies, and trade unions which have been registered under the Acts relating thereto are not enforceable by action, and disputes between members or persons claiming under them and the society or union must be settled in manner provided by the rules (*z*). Claims payable on the death of a member are payable to his nominee if nominated in accordance with the statutes (*a*). A nomination, to be effective as a nomination, must comply with the following conditions:—(1) The nominating member must be not less than sixteen years of

Nominations.

(*z*) F. S. A. 1896, sec. 68; T. U. A. 1876, sec. 4; Ind. P. S. A. 1893, sec. 49.

(*a*) F. S. A. 1896, sec. 56; T. U. A. 1876, sec. 10, amended by 46 & 47 Vict. c. 47, sec. 3; Ind. P. S. A. 1893, sec. 25.

age ; (2) the nomination must be in writing under the hand of the member (*b*), and delivered at or sent to the registered office of the society or union, or made in a book kept at such office ; (3) the amount payable to the nominee must not exceed £100.

Nomination exceeding £100.

If the amount of the fund payable by a friendly society or trade union on the death of a member exceeds £100 the nominee is entitled to payment up to that amount, but with regard to the excess the sum is payable to the member's personal representatives as part of his estate (*c*). If the amount of the fund standing to the credit of a member of an Industrial or Provident Society exceeds £100 at the time a nomination is made then such nomination is totally ineffective as such, and the whole fund remains part of the member's estate (*d*).

If, however, at the time of the nomination the amount of the fund does not exceed £100 the nomination is effective to the extent of £100, notwithstanding that the total fund standing to the member's credit exceeds £100 at death (*dd*).

Revocation of nomination.

A nomination may be revoked by a member, and if desired another nominee substituted. But revocation can only be effected in the same manner as the nomination is required to be made, and a revocation made otherwise is ineffective as a revocation of the original nomination (*c*).

Default of nomination.

If there is no properly nominated nominee in existence the fund payable on the member's death forms part of his estate. If he has died intestate the fund up to the amount of £100 is to be administered by the society without letters of administration among such persons as appear to a majority of the directors or trustees to be entitled to receive it. Any excess over £100 is payable to his administrators.

Beneficial interest in fund.

The beneficial interest in the fund does not necessarily belong to the nominee. A person may be nominated on the understanding as between him and the member that he shall hold the fund as trustee, and such trust will be enforced by the Court. If, however, a person is nominated without any such understanding or other reservation he takes a vested beneficial interest, and the member cannot afterwards deprive him of the beneficial

(*b*) In Scotland the nomination must be a probative document according to Scottish law, and the mark of a member who cannot write is not a sufficient signature: *Morton* v. *French*, [1908] S. C. 171. A nomination by such a member would in Scotland have to be executed by a notary public on his behalf.

(*c*) *Bennett* v. *Slater*, [1899] 1 Q.B. 45.

(*d*) *Baxter, In the Goods of*, [1903] P. 12.

(*dd*) *Griffiths* v. *Eccles Provident Society*, [1911] 2 K. B. 275.

interest by assignment *inter vivos* or by will unless he has first revoked the nomination in the manner provided by the Act (*e*).

Assignment *inter vivos* or by will.

Where there is no nomination, or the nomination is bad or has been revoked, or the fund is in excess of £100, the member may pass the beneficial interest by assignment *inter vivos* or by will, and the personal representatives or the society, as the case may be, will hold the money in trust for the assignee or the beneficiary under the will (*e*).

Invalid nomination effective as will.

A nomination which is invalid under the statute as a nomination either because it has not been properly notified, or because it purports to nominate funds in excess of £100, may nevertheless be valid as a will, and the Court will grant administration with the nomination as the will annexed (*f*).

Bennett v. Slater, [1899] 1 Q. B. 45

Bennett v. *Slater.*

A member of a friendly society having nominated a person to receive £100 out of the fund payable on his death, made a will which, without reference to the fund, directed that the whole residuary estate should be divided between certain beneficiaries. The beneficiaries claimed the fund, but it was held that the nominee was entitled, firstly, because the residuary bequest could not be construed as an expression of intention to revoke the nomination, and, secondly, because even if there was such intention expressed in the will it would be inoperative as a revocation.

Griffen, In re, [1902] 1 Ch. 135

Griffen, In re.

A member of a friendly society had not made any effective nomination of the fund payable on his death, but during his lifetime he had purported to assign the policy for valuable consideration. In a contest between the assignee and the administrator of his estate it was held that the assignee was entitled to the fund. There was nothing in the Act to prevent a member who had not made a nomination from passing the beneficial interest by an ordinary assignment. The fund was his property, and except so far as he was restrained by the Act he might alienate it in the ordinary way. The Court discussed the difficulty which might arise in the case of there being a written assignment for value, and subsequently a nomination in favour of a nominee without notice and for value. They declined to decide any such question before it arose, but indicated that although a nomination might be conclusive as between claimants and the society, it was not necessarily conclusive between the claimants. Romer, L.J., also expressed the view that a nominee was not necessarily beneficially entitled to the fund, but that he might be nominated on the footing as between him and the member that he would take the fund as a trustee on behalf of others, and those others could enforce their beneficial interest against him.

(*e*) *Griffen, In re,* [1902] 1 Ch. 135.

(*f*) *Baxter, In the Goods of,* [1903] P. 12.

In the Goods of Baxter, [1903] P. 12

In the Goods of Baxter.

A member of a society registered under the Industrial and Provident Societies Act, 1893, was entitled to shares in value exceeding £100. He signed a nomination paper in the form prescribed by the society, whereby he purported to give the whole amount standing at his credit at the time of his death to his nephew. The paper was signed by him in the presence of two witnesses. It was held that although the nomination was invalid as such, inasmuch as the sum at the member's credit at the time of nomination exceeded £100, yet the writing was testamentary and ought to be admitted to probate as a will and that administration with the will annexed should be granted to the nominee as sole beneficiary.

Griffiths v. Eccles Provident, &c., [1911] 2 K. B. 275

Griffiths v. *Eccles Provident, &c.*

A member of a society duly registered under the Industrial and Provident Societies Act, 1893, nominated the plaintiff as the person to whom the fund standing to his credit in the books of the society should be transferred at his death. At the date of the nomination the total amount of the member's credit was £98 13*s.* At the date of the member's death the total amount of his credit was £103 6*s.* 7*d.* The Court of Appeal (Farwell, L.J., dissenting) held that the nomination was valid and effective to the extent of £100. A nomination was valid if at the time of nomination the member's credit did not exceed £100, and was effective to carry the amount of such credit at that time and any increase at the date of death, but not exceeding £100 in all.

CHAPTER VII

Fire Insurance Claims

Section I.—Loss or Damage by Fire

Usual form of indemnity.

The indemnity usually offered by a fire policy is against "loss or damage by fire." An inquiry into the precise scope of this indemnity resolves itself under two heads. (1) What is the meaning of "fire"? (2) When may the loss or damage be deemed to be caused by the fire?

Meaning of "fire."

Fire within the meaning of a fire policy means fire which has broken bounds. There must be actual ignition where no ignition ought to be. Damage caused by excess of fire-heat in its proper place, or by smoke from a fire in its proper place, is not damage by fire. Thus, where articles are destroyed in process of manufacture by the excessive application of heat, whether by negligence or pure misadventure, the damage cannot be recovered as damage by fire, unless they have actually ignited. If they did ignite there would probably be damage by fire, and therefore the express exception in a fire policy of "loss or damage to property by or through its undergoing any heating or drying process," is by no means superfluous.

Goods burned in process of manufacture.

Austin v. Drewe (1815), 4 Camp. 360; (1816), 6 Taunt. 436

Austin v. *Drewe.*

The insurance was "against all the damage which the assured should suffer by fire on their stock and utensils in their regular built sugar house." The building consisted of seven stories, and from a stove on the ground floor a flue passed up through the other floors for the purpose of heating them. At the top of the flue was a register which was closed at night in order to retain as much heat as possible. One morning when the fires were lit the assured's servants forgot to open the register, and the intense heat which resulted damaged the sugar which was being refined on the top floors. The building was filled with smoke and sparks, but the flames never got beyond the flue and nothing took fire. It was held that the damage to the sugar was not

"damage by fire." Gibbs, C.J., said, "There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiffs' loss arose from the negligent management of their machinery. The sugars were chiefly damaged by the heat; and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans which continued all the time to burn without any excess. . . . Had the fire been brought out of the flue and anything been burned the company would have been liable. . . . This is not a fire within the meaning of the policy, nor a loss for which the company undertake. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney." And in another report (*a*), the same judge is reported to have said, "As no substance therefore was taken possession of by the fire which was not intended to be fuel for it, as the sparks and smoke caused no mischief, but as the damage arose from an excess of heat in the rooms occasioned by the register being shut I am of opinion that the plaintiffs are not entitled to succeed."

Damage done by excessive fire-heat.

Damage done to the heating apparatus or surrounding property by excess of fire-heat without improper ignition is equally beyond the protection of a policy which insures merely against "loss or damage by fire." Thus, damage done by the bursting of a boiler caused by excess of ordinary fire-heat, and absence of water in the boiler (*b*), or by reason of the boiler being old and worn (*c*), is not damage by fire.

Damage by smoke.

There appears to be no direct decision as to whether damage done to property by excessive smoke from a fire which has not broken bounds is damage by fire. On principle it is quite clear that it is not (*d*); but it has been held in America that where there was ignition of soot in a chimney, and consequent obstruction of the flue by the falling of the lining of the chimney, the damage caused by smoke escaping into the room was damage by fire, and this appears to be a perfectly sound decision because the damage was caused in consequence of an improper ignition, that is, the lighting of the soot in the chimney (*e*).

Excess of fire-heat expressly covered.

The meaning of "loss or damage by fire" may be extended by other terms in the policy so as to include damage by excess of fire-heat and other risks *primâ facie* excluded.

Jameson v. The Royal (1873), Ir. R. 7 C. L. 123

Jameson v. *The Royal.*

The insurance was on a distillery "on premises and stock in trade," against loss or damage by fire with an express condition that the insurers should not

(*a*) Holt, N. P. 126, 127.

(*b*) *American Touring Co.* v. *German Fire* (1891), 74 Md. 25.

(*c*) *West India Telegraph Co.* v. *Home and Colonial* (1880), 6 Q. B. D. 51, 60.

(*d*) *Austin* v. *Drewe*, *ante*, p. 650.

(*e*) *Way* v. *Abington Mutual* (1896), 166 Mass. 67.

be liable "for any loss or damage to still coppers or such like occasioned by the ordinary fire-heat under same nor for loss to spirits or such like therein at the time of such loss or damage." In answer to a claim for damage to spirits the insurers pleaded that "the property destroyed consisted of spirits and such like in a still, and that the loss complained of was occasioned by the ordinary fire-heat under the said still." This plea was held bad on demurrer for not alleging that the still was damaged by ordinary fire-heat, and that the loss happened to the spirits therein at the time of such first-mentioned loss or damage. The exception was based on the assumption that "loss or damage by fire," *primâ facie* included loss occasioned by ordinary fire-heat, the exception was ambiguous, and was to be construed strictly against the insurers, and read literally it did not exclude damage happening to the spirits unless such damage happened at the time the still itself was damaged by ordinary fire-heat.

Where only neighbouring property ignites.

The improper ignition which is *primâ facie* an essential element of "fire" within the meaning of a fire policy need not, however, be an ignition of the property insured. If other property in the vicinity is alight, and damage is caused to the insured property by falling walls (*f*), smoke, water (*g*), or otherwise, as a direct consequence of the fire there is "fire" and "damage by fire" within the meaning of the policy.

Lightning.

There must, however, be some ignition either of the property insured of some other property, and consequently damage by lightning without ignition of the property is not loss or damage by fire (*h*).

Fire must be *causa proxima* of damage.

When satisfied that there is a "fire" within the meaning of the policy the next question is whether the damage was caused by the fire. The time-honoured rule is that in all classes of insurance the proximate cause alone can be considered as the cause of damage. This rule is easily stated in general terms, but its precise meaning and application has been contested in a long series of cases, and even at the present day the proximate cause of loss or damage is not always easily determined. The rule with its limitations as applicable to fire insurance may be more specifically stated as follows :—

1. The peril insured against must be the proximate cause of the damage (*i*).

(*f*) *Johnston* v. *West of Scotland* (1828), 7 S. 52; *Ermentrout* v. *Girard Fire* (1895), 63 Minn. 305; 56 Am. S. R. 481; but see *Everett* v. *London Assurance* (1865), 19 C. B. (N. S.) 126.

(*g*) *Geisek* v. *The Crescent Mutual* (1867), 19 La. Ann. 297.

(*h*) *Kenniston* v. *Merchants' Mutual* (1843), 14 N. H. 341; *Babcock* v. *Montgomery* (1849), 6 Barb. N. Y. 637; Arnould's Marine Insurance (2nd Ed.), 831; Bunyon's Fire Insurance (3rd Ed.), 46.

(*i*) *Everett* v. *London Assurance*

(i) It need not be the actual instrument of destruction (*k*). For instance, where fire causes an explosion (*l*) or causes a building to fall (*m*), the damage caused by the explosion or fall is damage by fire.

(ii) If the damage is the necessary consequence of the specified peril under the physical conditions then existing there is *primâ facie* damage by that particular peril (*n*). The cases of fire causing explosion or fall of a building are examples.

(iii) Where the specified peril is one of the causes in a chain of events following in inevitable sequence, it need not be either the first (*o*) or last event in the chain, since all the causes in the chain are *primâ facie* proximate causes of the ultimate damage. Thus, if there were three contiguous houses in a street, and an earthquake caused house A to fall, and as a consequence fire broke out and spread to house B where an explosion occurred whereby house C was wrecked, the damage to house C might be attributed equally to earthquake, fire, or explosion as the proximate cause of loss (*p*), and but for the possible application of the rule in the next paragraph, would be covered by an insurance *simpliciter* against any one of these three perils.

(iv) Even although the peril insured against be the proximate cause of damage within the meaning of the above rule, there are cases where the damage is so far removed from the particular peril in the chain of causation that by the common understanding of insurers and assured it is not deemed to be a consequence of that peril within the meaning of the policy (*q*). For instance, where an

(1865), 19 C. B. (N. S.) 126; *Marsden* v. *City and County Assurance* (1866), L. R. 1 C. P. 232; *Johnston* v. *West of Scotland* (1828), 7 S. 52.

(*k*) *Lynn Gas and Electric* v. *Meriden* (1893), 158 Mass. 570; *Way* v. *Abington Mutual* (1896), 166 Mass. 67.

(*l*) *Scripture* v. *Lowell Mutual* (1852), 64 Mass. 356; *Waters* v. *The Merchants* (1837), 11 Peters, 213; *Caballero* v. *Home Mutual* (1860), 15 La. Ann. 217.

(*m*) *Johnston* v. *West of Scotland* (1828), 7 S. 52; *Ermentrout* v. *Girard Fire* (1895), 63 Minn. 305; 56 Am. S. R. 481.

(*n*) *Montoya* v. *London Assurance* (1851), 6 Ex. 451; *Gabay* v. *Lloyd* (1825), 3 B. & Cr. 793; *Lynn Gas and Electric* v. *Meriden* (1893), 158 Mass. 570; *Milwaukee and St. Paul Ry.* v. *Kellogg* (1876), 94 U. S. 469, 474.

(*o*) *Lewis* v. *Springfield Fire and Mutual* (1857), 76 Mass. 159; *Lynn Gas and Electric* v. *Meriden* (1893), 158 Mass. 570. See, however, *Insurance* v. *Boon* (1877), 95 U. S. 130.

(*p*) *Insurance Co.* v. *Tweed* (1868), 7 Wall. 44.

(*q*) *Taylor* v. *Dunbar* (1869), 4 C. P. 206.

explosion caused by fire takes place at a distance from the insured premises, and such premises are damaged by concussion, the loss is not deemed to be damage by fire (*r*).

2. Where an independent cause operates to produce the damage the fact that the peril insured against has given occasion for the operation of the independent cause does not constitute the damage a damage by the peril insured against (*s*). Thus, if a gable left standing by the fire were afterwards blown down by a violent gale, the damage caused by the falling gable would not be damage by fire (*t*).

(i) This rule may, however, be modified by the custom and practice of insurance business so as to admit recovery in respect of damage which, although not strictly speaking, attributable to the peril insured against as a proximate cause does so commonly follow as a consequence that it is deemed to be covered. For instance, where property is damaged by water thrown on the premises to extinguish the fire (*u*).

3. Where the peril insured against, or any of its inevitable consequences operates directly as a cause of loss, there is damage by such peril, even although some independent peril operates concurrently to cause the damage (*x*).

4. The use of words such as " in consequence of " or " originating from " do not prevent the operation of the rule that the proximate cause alone must be considered (*y*). Thus, loss or damage originating from fire does not include damage done by rioters in the confusion caused by fire (*z*).

There are very few English decisions on the question of proximate cause in fire insurance.

(*r*) *Everett* v. *London Assurance* (1865), 19 C. B. (N. S.) 126; *Caballero* v. *Home Mutual* (1860), 15 La. Ann. 217.

(*s*) *Pink* v. *Fleming* (1890), 25 Q. B. D. 396; *De Vaux* v. *Salvador* (1836), 4 Ad. & E. 420; *Field Steamship Co.* v. *Burr*, [1899] 1 Q. B. 579; *Williams and Co.* v. *Canton*, [1901] A. C. 462; *The Bedouin*, [1894] P. 1; *Inman* v. *Bischoff* (1882), 7 A. C. 670; *Scottish Marine* v. *Turner* (1853), 1 Macq. 334; *Mordy* v. *Jones* (1825), 4 B. & Cr. 394; *Philpott* v. *Swann* (1861), 11 C. B. (N. S.) 270.

(*t*) *Gaskarth* v. *Law Union* (1876), Bunyon's Fire Insurance (3rd Ed.), p. 37.

(*u*) *Stanley* v. *Western* (1868), L. R. 3 Ex. 71, 74; *Johnston* v. *West of Scotland* (1828), 7 S. 52, 54.

(*x*) *Reischer* v. *Borwick*, [1894] 2 Q. B. 548.

(*y*) *Ionides* v. *The Universal Marine* (1863), 14 C. B. (N. S.) 259.

(*z*) *Marsden* v. *City and County* (1866), L. R. 1 C. P. 232.

Everett v. London Assurance (1865), 19 C. B. N. S. 126

Everett v. *London Assurance.*

The insurance was in a house and against "such loss or damage as should or might be occasioned by fire." An explosion of gunpowder in a magazine half a mile distant from the assured's premises damaged the premises by concussion of the atmosphere. The insurers declined to pay and argued that unless the property insured sustained injury by the direct action of fire the loss did not come within the policy. The Court of Common Pleas held that this particular loss was not covered by the insurance. Byles, J., said, "The words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed or by ignition of part of the premises where the article is; in the one case there is a loss in the other a damage by fire." And Willes, J., said, "We are bound to look to the immediate cause of the loss or damage and not to some remote or speculative cause. Speaking of this injury no person would say that it was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the causes of causes to say that this was an injury caused by fire to the property insured. The rule 'in jure non remota causa sed proxima spectatur' determines this case."

The decision in the above case is no doubt correct. Firstly, there was apparently no fire in the ordinary sense of the word, that is, there was no ignition of property, and although an explosion of gunpowder or gas caused by a lighted match, or a spark from a pipe, may be said to be caused by fire, it is probably not a fire in the common acceptance of the word, or in the insurance sense (*a*). Secondly, a loss of this kind happening altogether beyond the ordinary operation of a fire is not to be deemed to be within the contemplation of the parties as a fire risk. The words, however, of the learned judges cannot be accepted as generally applicable to fire insurance claims under all circumstances. The statement that there must be ignition either of the property insured or of the premises in which it is contained is too wide. There can be little doubt that if a fire were to occur on the opposite side of the street from the insured premises damage caused by the heat and smoke would be covered even although there was no actual ignition. So, too, the application of the rule that the proximate cause alone can be considered is too strict. Loss caused by explosion or by the fall of property during the course of a conflagration has never been excluded save under an express exception, and properly so because the explosion or fall is the necessary consequence of the fire under the physical conditions then existing

(*a*) See, however, an American case, *contra*: *Scripture* v. *Lowell Mutual* (1852), 64 Mass, 356,

and the fire is therefore the proximate cause of the loss in the true sense of the word "proximate."

Johnston v. West of Scotland (1828), 7 S. 52

Johnston v. *West of Scotland.*

The insurance was on a house against "loss or damage which the insured shall suffer by fire on the property above described." A house on the opposite side of the street was burned down and a gable wall was left standing in a dangerous condition. The Dean of Guild, who has jurisdiction in these matters, ordered the gable to be pulled down, and as it was being demolished in accordance with his instructions it fell and damaged the assured's premises. It was held that the loss was a loss by fire within the meaning of the policy. Lord Meadowbank made the following note: "The Lord Ordinary is quite clear that in all questions of this kind fire must be the proximate cause of the injury received. But he is not aware of there being any case in which it has been held that in order to entitle the assured to their relief, it should be proved to have been the actual instrument by which the injury sustained was inflicted. Thus if furniture is destroyed not by the fire itself but by water thrown in to extinguish it, or if a mirror should be broken from a stone loosened from the building by the flames, such losses the Lord Ordinary has understood are universally admitted to be covered by a policy of insurance against fire. Neither has it ever been understood that the fire doing the injury should actually have arisen or been in the premises insured; for if from the reflection of the conflagration in a narrow street damage has been occasioned to the tenement opposite to those on fire it is believed it never was disputed that the proprietors of those tenements if insured were entitled to recover. Now in this case it is settled in point of fact that the wall which created the damage fell in consequence of the injury it had sustained by the fire, and therefore, although the wall was the instrument by which the damage was occasioned, the fire was the proximate cause of the injury." Lord Craigie doubted whether the decision was correct "because it does not appear that except for the interference of the Dean of Guild the gable would have fallen." On the finding of fact that the wall fell "in consequence of the injury sustained by the fire" the decision in law appears absolutely sound, although if it had been proved that the wall would not have fallen but for the interference of the Dean of Guild the fire would no longer have been the *causa proxima* of the damage, and the decision ought probably to have been the other way.

Damage caused by electric current.

The proposition that fire need not be the actual instrument of destruction is well illustrated in an American case (*b*) where an electric generating station and plant was insured against "loss or damage by fire." A fire broke out and the heat of the flames caused a short circuit between two lightning conductors. The result of the short circuit was to produce an increase of electric current in the dynamo, whereby extra pressure was put upon a pulley which was ruptured thereby, causing a general break-down

(*b*) *Lynn Gas and Electric Co.* v. *Meriden* (1893), 158 Mass. 570.

in the machinery. The fire had not reached the part of the building where the machinery was, but the damage to the machinery was nevertheless held to be a " loss or damage by fire."

Damage done by efforts to avert or extinguish a fire.

The question as to when damage done to property by efforts made to avert or arrest the consequences of a fire can be deemed to be damage " by fire " is one of some difficulty (*c*). It is clear that damage done by water thrown on to property to arrest a fire cannot strictly be attributed to the fire as a *causa proxima;* but, on the other hand, where the property thus damaged has been saved from certain destruction, the damage is invariably paid for by insurers, and must be deemed by the common understanding of insurers and assured to be covered by an ordinary fire policy. In *Stanley* v. *Western* (*d*) Kelly, C.B., said :

" I agree that any loss resulting from an apparently necessary and *bonâ fide* effort to put out a fire, whether it be by spoiling the goods by water or throwing the articles of furniture out of window or even the destroying of a neighbouring house by an explosion for the purpose of checking the progress of the flames, in a word, every loss that clearly and proximately results whether directly or indirectly from the fire is within the policy."

And in *Johnston* v. *West of Scotland* (*e*) Lord Meadowbank, in the passage already quoted, said :

" If furniture is destroyed not by the fire itself but by water thrown in to extinguish it . . . such loss is universally admitted to be covered by a policy of insurance against fire."

The above statements, however, are purely *obiter dicta,* and in England there appears to be no direct decision to the effect that damage caused by efforts to extinguish a fire is damage by fire. In America it is admitted that damage to property which has been saved from certain destruction by fire then actually raging on the premises ought to be paid for as damage by fire. But it has been said that damage by water, demolition, removal of furniture, and the like is not to be deemed damage by fire : (1) where the peril of fire is not an actual existing peril, but merely an apprehended peril ; or (2) where the property would not in fact, have been consumed by the fire even if the efforts to save it had not been made. It has been held in Pennsylvania (*f*), that where a fire was raging in the neighbourhood, but never reached

(*c*) Bunyon's Fire Insurance (3rd Ed.), 51.
(*d*) (1868), L. R. 3 Ex. 71.
(*e*) (1828), 7 S. 52, 54.
(*f*) *Hillier* v. *Alleghany Mutual* (1846), 3 Pa. 470.

the premises in which the goods insured were deposited, their removal under the reasonable apprehension of danger did not entitle the owner to recover the damage so caused as loss or damage by fire. But there are other American and Canadian cases to the contrary effect, where it is said that the fact that fire has not reached the insured premises (*g*) or that the property would not have been consumed (*h*) is not material, the question is was there reasonable apprehension justifying the precaution? (*h*). If so there is damage by fire. Some of these cases were considered in an English marine insurance case, *The Knight of St. Michael* (*i*). The insurance was upon freight, and the perils insured against included fire and "all other perils, losses, and misfortunes that shall or have come to the hurt, detriment, or damage of the subject matter." Owing to the heating of a cargo of coals a large part of the cargo was discharged at an intermediate port, and there was a consequent loss of freight. It was held, in fact, that this discharge was a necessary precaution for the safety of the vessel, as otherwise the cargo would have ignited by spontaneous combustion. No part of the cargo had, in fact, ignited at the time the discharge was made. The underwriters admitted that if there had been actual ignition they would have been liable for loss occasioned by an act done to avert its consequences, but in this case they contended that there was no existing peril, but only an apprehension of a peril, and that there was therefore no loss by that peril. Gorell Barnes, J., held that although strictly there might not have been a loss by fire the loss was incurred in order to avoid a certainty of loss by fire, and therefore it was so analogous that it must be held to be covered by the general words "all other losses and misfortunes." In a fire policy there are no such general words, but the learned judge cited with approval the dictum of Kelly, C.B., in *Stanley* v. *Western* (*k*), and probably that dictum has now been so long acted upon as an accurate statement of the law that all insurers on a fire policy must be deemed to cover the class of loss there indicated. It may therefore be said, without serious doubt, that a fire policy against loss or damage by fire covers consequential salvage damage as follows :—

If there was reasonable justification for the measures taken to avert damage by fire, damage to property caused by—

(*g*) *Geisek* v. *The Crescent Mutual* (1867), 19 La. Ann. 297.
(*h*) *Balestracci* v. *The Firemen's* (1882), 34 La. Ann. 844.
(*i*) [1898] P. 30.
(*k*) *Supra*, p. 657.

(1) water (*l*),
(2) demolition (*m*),
(3) removal (*n*),

is covered as damage by fire ; and it is immaterial whether—

(*a*) fire had or had not actually reached the premises or goods insured (*o*) ;
(*b*) the measures were taken by or on behalf of the assured or some other person (*p*) ;
(*c*) the measures were taken for the purpose of saving the property in respect of which the claim is made, or for the purpose of saving other property threatened by fire (*p*) ;
(*d*) the property damaged would or would not have been ultimately consumed by fire (*q*).

Damage done by metropolitan fire brigade.

In the case of fires within the metropolitan area there is a special statutory provision that any damage occasioned by the fire brigade in the due execution of their duties shall be deemed to be damage by fire within the meaning of any policy of insurance against fire (*r*). The brigade has express power to break into or pull down any premises for the purposes of putting an end to the fire. They may also interrupt the water supply for the purpose of obtaining greater pressure at the scene of the fire. Damage done by such acts may therefore be recovered under a fire policy, although the property where the damage was done was not even remotely threatened by fire. It may be that the Act in this respect is merely declaratory, but it does in the case of fires within the metropolis remove a doubt as to whether certain kinds of damage can be recovered as damage by fire.

Damage by thieves and rioters during fire.

Loss or damage to property by thieves or rioters during the confusion caused by a fire is frequently paid for as " damage by fire." In *Levy* v. *Baillie* (*s*) the insurance was on stock-in-trade, and a claim was made for £85 in respect of goods injured in removal, and £1000 in respect of goods abstracted by the crowd. No

(*l*) *Stanley* v. *Western* (1868), L. R. 3 Ex. 71 ; *Johnston* v. *West of Scotland* (1828), 7 S. 52, 54 ; *Geisek* v. *Crescent Mutual* (1867), 19 La. Ann. 297 ; *Lewis* v. *Springfield Fire and Mutual* (1857), 76 Mass. 159.

(*m*) *Stanley* v. *Western* (1868), L. R. 3 Ex. 71 ; *City Fire* v. *Corlies* (1839), 21 Wend. 367.

(*n*) *Stanley* v. *Western* (1868), L. R. 3 Ex. 71 ; *Levy* v. *Baillie* (1831), 7 Bing. 349 ; *Balestracci* v. *The Firemen's* (1882), 34 La. Ann. 844 ; *Thompson* v. *Mutual* (1848), 6 U. C. Q. B. 319.

(*o*) *Balestracci* v. *The Firemen's* (1882), 34 La. Ann. 844 ; *Geisek* v. *The Crescent Mutual* (1867), 19 La. Ann. 297.

(*p*) *City Fire* v. *Corlies* (1839), 21 Wend. 367.

(*q*) *Balestracci* v. *The Firemen's* (1882), 34 La. Ann. 844.

(*r*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90, s. 12).

(*s*) (1831), 7 Bing. 349.

objection appears to have been taken on the ground that loss by theft was not covered by the policy. And in a Canadian case (*t*) the Court expressed an opinion that goods lost or stolen in the confusion occasioned by the fire were within the terms "loss or damage by fire." On principle, however, it seems clear that loss occasioned by the felonious act of third persons cannot be attributed to the fire which only provided the opportunity for the intervention of an entirely independent cause of damage.

Marsden v. City and County Assurance (1866), L. R. 1 C. P. 232

Marsden v. *City and County.*

The policy was on plate glass "against loss or damage originating from any cause whatsoever except fire, breakage during removal, alteration or repair of premises." A fire broke out in some premises adjoining the assured's house, and the assured began to remove his furniture and stock-in-trade, and whilst he was so engaged a mob feloniously broke in the windows for the purpose of plunder. The Court held that the breakage was not damage by fire within the meaning of the exception, and that the insurers were liable. Erle, C.J., said, "No doubt the remote cause of the damage was fire, but the proximate cause was the lawless violence of the mob. I think the general rule of insurance law that the proximate and not the remote cause of the loss is to be regarded as the rule which must govern our decision in this case. The assembling of the crowd was caused by the fire, and but for the fire probably the plaintiff's windows would not have been broken. But the breakage was not caused by the fire: it was the result of the assured's attempt to save his stock and furniture, coupled with the desire of the mob to seize what they could lay their hands on." And Willis, J., said, "The word 'originating,' which has been so much relied on, does not prevent the operation of the rule *in jure non remota causa sed proxima spectatur* any more than the word 'consequences' did in *Ionides* v. *The Universal Marine*" (*u*).

Loss or damage by riot, civil commotion, and theft, is usually expressly excepted from the risk in a fire policy, but it seems to follow from the above decision that, even although not expressly excepted, damage by thieves and rioters consequent upon a fire cannot be recovered as damage by fire.

Damage by inherent vice.

It is a well-known rule in marine insurance that when loss or damage is caused solely by the defective condition of the thing insured, the assured cannot recover, as where a vessel on a time policy goes to sea in an unseaworthy condition and, having met with only ordinary weather, has to put into a port of refuge for repairs (*x*).

(*t*) *Thompson* v. *Montreal Insurance* (1848), 6 U. C. Q. B. 319.
(*u*) (1863), 14 C. B. (N. S.) 259.
(*x*) *Fawcus* v. *Sarsfield* (1856), 6 E. & B. 192.

Spontaneous combustion.

On the above principle it was held in America that where certain cases of oilcloth were consumed by spontaneous combustion solely due to the condition in which they were shipped, they were not lost by fire within the meaning of a marine policy (*y*). And in an English marine case, *Boyd* v. *Dubois* (*z*), fire broke out in the hold and consumed a cargo of hemp. It was alleged that the hemp was shipped in a defective condition, and that the fire was due to consequent fermentation. The allegation was not proved, and the assured recovered, but Lord Ellenborough said that, " if the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, then, upon the common principles of assurance law the assured cannot recover for a loss which he himself has occasioned." On the other hand, in a case in Montreal (*a*), a fire policy on a quantity of coal stored on land was held to cover the risk of spontaneous combustion due to the coal having been negligently stacked in a damp condition. On the whole, there appears to be no very sound reason why, if there is actual ignition, a loss by fire should be excluded on the ground of spontaneous combustion. Loss due to inherent vice is excluded from a marine risk because it is not a loss which is caused by any of the perils insured against. It is loss solely due to an independent cause. But if the inherent defect of the thing insured is brought into activity by a peril insured against, or if the inherent defect gives rise to a peril insured against, it does not follow that the loss will not be covered. Negligence of the assured or his servants giving rise to a peril insured against does not defeat the claim of the assured. The *dictum* of Lord Ellenborough in *Boyd* v. *Dubois* was at *nisi prius*, and was purely *obiter*, and the distinction between a case of inherent vice causing loss independently of the perils insured against, and a case of inherent vice giving rise to one of the perils insured against, and causing loss through that peril, may well have escaped the learned judge's observation. But, however that may be, it is submitted that in fire risks upon articles such as haystacks, coal, and inflammable spirits, the risk of ignition consequent upon spontaneous combustion is covered unless expressly excepted. The policy does usually contain an exception of " loss or damage to property occasioned by or happening through its own spontaneous

(*y*) *Providence Washington* v. *Adler* (1885), 65 Md. 162.
(*z*) (1811), 3 Camp. 132.
(*a*) *British American* v. *Joseph* (1857), 9 Low. Can. R. 448.

fermentation or heating." It is conceived that, if a stackyard was insured, and one stack were to ignite through spontaneous combustion, the loss of that stack would fall within the exception; but if the fire were to spread to the rest of the stacks their loss would be recoverable. The exception only excludes the loss of the particular thing which has been lost through its own spontaneous combustion.

Fire caused by wilful act of assured.

Where a wilful act of the assured operates as a proximate cause of loss the assured cannot recover (*b*). Every insurance contains an implied exception to this effect, and no express exception is necessary (*c*). The reason for the exception is sufficiently obvious from a business point of view. Legally it may be expressed in two ways (*d*). (1) When the instrument of loss, such as fire, is put in operation by the wilful act of the assured, it is no longer a "peril," that word involving something fortuitous or unexpected as far as the assured is concerned. (2) No man can take advantage of his own wrong doing. A wilful act of the assured which merely increases the risk does not, apart from warranty, affect the policy. To defeat the claim it must operate as a proximate and not merely a remote cause of loss (*e*). Thus, apart from express conditions, the introduction of highly inflammable goods or of lights and fires into dangerous positions does not affect the insurer's liability, unless (i) the assured's deliberate intention was to cause a fire; or (ii) the necessary consequence of the act done was to cause a fire. Incendiarism on the part of the assured must be alleged and proved by the insurers as on a criminal charge (*f*).

Wilful act of assured's servants or agents.

The claim is not defeated by the wilful act of the assured's servants or agents, if he was not privy to their acts (*g*). The assured can therefore recover even if the property insured was feloniously burned by his wife (*h*) or other member of his household (*i*). In the case, however, of a corporation being insured it probably could not recover if the fire was wilfully caused by one of its principal officers (*j*).

(*b*) *Bell* v. *Carstairs* (1811), 14 East, 374; *Horneyer* v. *Lushington* (1812), 15 East, 46; *Oswell* v. *Vigne* (1812), 15 East, 70.

(*c*) *Britton* v. *Royal* (1866), 4 F. & F. 905, 908.

(*d*) *Trinder Anderson* v. *Thames and Mersey*, [1898] 2 Q. B. 114, 127.

(*e*) *Thompson* v. *Hopper* (1858), F. B. & E. 1038.

(*f*) *Thurtell* v. *Beaumont* (1823), 1 Bing. 339; *Hoffman* v. *Western Marine* (1846), 1 La. Ann. 216.

(*g*) *Dudgeon* v. *Pembroke* (1877), 2 A. C. 284.

(*h*) *Midland Insurance* v. *Smith* (1881), 6 Q. B. D. 561.

(*i*) *Perry* v. *Mechanics' Mutual* (1882), 11 Fed. Rep. 485.

(*j*) *Meily and Co.* v. *London and*

Wilful destruction where justified by circumstances.

If the wilful act of the assured is done for the purpose of avoiding a peril insured against the loss may be recoverable (*k*) as where property is wilfully destroyed for the purpose of checking a conflagration (*l*). And it has been said that if a wilful burning is otherwise a justifiable act and not done merely for the purpose of obtaining the insurance money it is a loss by fire which may be recovered under the policy (*k*). Thus, Emerigon says that an insurer on a marine policy is liable where the ship was deliberately burned to prevent plague spreading (*m*). It is very doubtful whether such a principle would be applicable to ordinary fire risks on a fire policy. It could not be said, for instance, that if bedding or furniture were burned after infectious illness that such loss could be recovered from the insurers.

Intention to destroy.

Even if the assured has not in fact been guilty of incendiarism, if it be proved that he effected the policy with intent to destroy the property the whole insurance will be void (*n*).

Over-valuation is evidence of intention.

Over-valuation of property insured constitutes important evidence in support of a plea of wilful fire-raising or insurance with fraudulent intent (*o*).

Hercules Insurance v. Hunter (1835), 14 S. 800

Hercules Insurance v. *Hunter.*

The amount of loss having been submitted to arbitration the arbitrators found that the actual value of the property was as valued by the assured. The Court held that the insurers were bound by the award in so far that they could not dispute the valuation for the purpose of assessment or contend that the policy was void by reason of a fraudulent over-valuation, but they were entitled before a jury to prove that there was a fraudulent over-valuation as evidence of an alleged fraudulent intention to destroy the property. The jury having found that there was a fraudulent over-valuation, but no intention to destroy the property the assured obtained judgment for the amount of the award (*p*).

Fire caused by assured's sovereign.

In marine insurance the principle that the assured cannot recover in respect of damage proximately caused by his own wilful act was, in the case of aliens, extended so as to prevent recovery in respect of damage wilfully done by the alien Government of which the assured was a subject (*q*). The alien assured

Lancashire Fire (1906), 148 Fed. Rep. 683.

(*k*) *Gordon* v. *Rimmington* (1807), 1 Camp. 123.

(*l*) *Ante*, p. 657.

(*m*) Emerigon, i. 434.

(*n*) *Hercules Insurance* v. *Hunter* (1835), 14 S. 147.

(*o*) *Hercules Insurance* v. *Hunter* (1836), 14 S. 1137.

(*p*) *Hercules Insurance* v. *Hunter* (1836), 14 S. 1137, 1142.

(*q*) *Conway* v. *Gray* (1809), 10 East, 536; *Campbell* v. *Innes* (1821), 4 B. & Ald. 423.

was identified with the acts of his own Government on the ground that it would be otherwise impossible to avoid fraudulent collusion between the assured and his Government for the purpose of obtaining the insurance money. No such identity was admitted between the home Government and its own subjects (*r*). Even in the case of aliens there is nothing unlawful in insuring them against the acts of their own Government when at peace with the insurer's country, and when the terms of the policy and the circumstances under which it was made show that both parties intended that the risk of such loss should be covered, it must be deemed to be covered accordingly (*s*). The rule, then, is at most a presumption that aliens are not insured against the acts of their own Government. The insurers must prove that the loss was in fact a loss occasioned by an act authorised by the Government. They must prove the legality of the act and the authority of the perpetrator (*t*). In America the whole principle of identification of the assured with the acts of his own Government has been much doubted (*t*). Whether if occasion arose the principle would be applied to fire insurance either in this country or America must remain an open question. The kind of case that would fall within the principle would be the destruction of property under stress of military necessity. The ordinary fire policy excepts loss by military power, but analogous cases not within the exception might arise.

Fire caused by negligence of assured or his servants.

Negligence of the assured (*u*) or his servants (*x*) is no defence to an action by the assured on his policy. The proximate cause of the loss is fire, even although the fire has been caused by negligence. The insurers are therefore liable unless (1) negligence of the owner or his servants gives the underwriter a right of cross-action which extinguishes the claim; (2) negligence of the owner

(*r*) *Hagedorn* v. *Whitmore* (1816), 1 Stark. 157, 159, and cases cited in footnote.

(*s*) *Simeon* v. *Bazett* (1813), 2 M. & S. 94; aff. sub nom. *Bazett* v. *Meyer* (1814), 5 Taunt. 824.

(*t*) *Ocean Insurance* v. *Francis* (1828), 2 Wend. 64.

(*u*) *Shaw* v. *Robberds* (1837), 6 A. & E. 75; *Jameson* v. *The Royal* (1873), Ir. R. 7 C. L. 126; *Davidson* v. *Burnand* (1868), L. R. 4 C. P. 117, 121; *Trinder Anderson* v. *Thames and Mersey*, [1898] 2 Q. B. 114; *California Insurance* v. *Union Compress* (1889), 133 U. S. 387; *Columbian Insurance* v. *Lawrence* (1836), 10 Pet. 507; *Phœnix* v. *Erie Transportation* (1886), 117 U. S. 312, 323; *Johnson* v. *Berkshire Mutual* (1862), 86 Mass. 388; *Huckins* v. *People's Mutual* (1855), 31 N. H. 238; *Liverpool and London and Globe* v. *McNeill* (1898), 89 Fed. Rep. 131; *Gove* v. *Farmers' Mutual* (1868), 48 N. H. 41; *contra*, *Young* v. *Washington* (1853), 14 Barb. N. Y. 545.

(*x*) *Austin* v. *Drewe* (1815), 4 Camp. 360, 362; *Dobson* v. *Sotheby* (1827), 1 M. & M. 90; *Busk* v. *Royal Exchange* (1818), 2 B. & Ald. 73; *Mickey* v. *Burlington* (1872), 35 Iowa, 174; *Gates* v. *Madison Mutual* (1852), 5 N. Y. 469.

works some personal disability upon him. It has been settled by a long series of authorities that negligence of the assured's servants does not give the underwriter a right of cross-action. The assured does not contract not to be negligent. Then does negligence of the owner work any personal disability? The only personal disability of the kind known to the law is fraud, and therefore unless there is fraud the assured is entitled to recover notwithstanding that he was negligent (*y*). Even gross negligence will not debar the assured from his right to an indemnity unless it was *crassa negligentia æquiparata dolo*, that is conduct so reckless and careless of consequences that it amounts in law to a wilful act (*z*).

Where assured wilfully abstains from checking a fire.

It has been said that refusal to take obvious precautions to prevent or stop a fire may disentitle the assured, such as leaving a coal which has fallen out of the grate, or a candle shade which has become alight, to set fire to the whole house (*a*). It is questionable, however, whether such wilful omission can be used by the insurer except as evidence of a wilful act which cannot be proved by direct evidence.

Insanity of assured.

If the assured is so insane as not to be legally responsible for his acts an act of incendiarism will not disentitle him from recovering (*b*). If the act of the insane man is apparently wilful and deliberate, the question will be whether he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong (*c*).

Drunkenness of assured.

The assured may, while drunk, deliberately set fire to his premises. Can he recover on his fire policy? Criminal law does not excuse an offender on the ground that an offence was committed under the influence of drink (*d*). The crime is deemed to have commenced when, being sober, he voluntarily intoxicated himself. But if intent is of the essence of the crime charged, drunkenness may be pleaded to show that there was no such intent (*e*). In the same way it would seem that drunkenness

(*y*) *Trinder Anderson* v. *Thames and Mersey*, [1898] 2 Q. B. 114.

(*z*) *Trinder Anderson* v. *Thames and Mersey*, [1898] 2 Q. B. 114; *Pipon* v. *Cope* (1808), 1 Camp. 434.

(*a*) *Chandler* v. *Worcester Mutual* (1849), 57 Mass. 328; *Jameson* v. *The Royal* (1873), Ir. R. 7 C. L. 126.

(*b*) *D'Autremont* v. *The Fire Association* (1892), 65 Hun. 475.

(*c*) *McNaghten's Case* (1843), 10 Cl. & F. 200.

(*d*) *Pearson's Case* (1835), 2 Lew. C. C. 144.

(*e*) *R.* v. *Thomas* (1837), 7 C. & P. 817; *R.* v. *Moore* (1852), 3 C. & K. 319.

may be pleaded by an assured in reply to the defence that the property was burned by his wilful act. If the assured was so drunk that he did not know what he was doing, it was not his wilful act, and there appears to be no bar to his recovering on the policy. In criminal law it is argued that the drunken perpetrator of a crime is guilty because the crime was the consequence of his voluntary act of getting drunk, but that is looking to the remote and not to the proximate cause, and it is submitted that the rule of *causa proxima* prevents the use of the same line of argument in insurance cases.

Excepted perils.

When loss arising from a particular cause is excepted either expressly or by implication, all damage arising as the proximate consequence of such cause is excepted, notwithstanding that the peril insured against is one of the events in the inevitable chain of causation or even the actual instrument of destruction (*f*).

Rule of *causa proxima* applies.

Thus, where loss consequent upon explosion is excepted from a fire policy, the exception will equally exclude (1) damage caused by fire consequent upon explosion; (2) damage caused by explosion consequent upon fire (*g*). Where the policy was expressed not to cover "loss or damage by fire . . . occasioned by or through any earthquake," and an earthquake caused a lighted stove in one house to be upset, and in consequence the house took fire and the fire spread to other houses, in so far as it spread without the intervention of other than natural causes, it was a fire caused by or through earthquake (*h*). But remote consequences of the excepted cause are not excluded (*i*). Thus, where damage occasioned by incendiarism was excepted, the neighbouring proprietor wilfully set fire to his house and the wind carried the flames to the assured's house and set it on fire. It was held that if the fire spread in consequence of the influence of the ordinary elements the destruction of the assured's house was the proximate result of the incendiary act, and therefore excepted from the risk; but if, on the other hand, the fire had been communicated by a

(*f*) *Stanley* v. *Western* (1868), L. R. 3 Ex. 71; *Insurance Co.* v. *Tweed* (1868), 7 Wall. 44.

(*g*) *Stanley* v. *Western* (1868), L. R. 3 Ex. 71.

(*h*) *Tootal Broadhurst* v. *London and Lancashire* (1908), *The Times*, May 21; *Scottish Union and National* v. *Alfred Pawsey and Co.* (1908), *The Times*, October 17.

(*i*) *Marsden* v. *City and County* (1866), L. R. 1 C. P. 232; *Anderson* v. *Marten*, [1907] 2 K. B. 248.

fireman removing goods from the burning house and accidentally throwing some portion of the burning material upon or near the assured's premises there would have been the intervention of an independent cause, and the loss would not have been the proximate but the remote result of incendiarism, and the assured could have recovered notwithstanding the exception (*k*). In the absence of evidence indicating some independent cause the Court presumed that the fire spread by natural causes (*k*).

The use of such words as " in consequence of," " by means of," does not operate so as to exclude damage which is merely the remote consequence of the excepted peril. Unless there is a clear indication of a contrary intention (*l*) the rule of *proxima causa* will be applied to all cases of exceptions from the general risk (*m*).

Burden of proof.

The rule generally recognised in English Courts for determining the burden of proof in the case of an alleged exception is that if the assured prove, or if it be admitted, that the loss was caused by the general risk insured against, that is fire, the burden of proof lies upon the insurers to show that, although the loss was caused by fire, the fire was of such a nature as to bring the case within one of the exceptions, as, for instance, that it was a fire caused by earthquake or by incendiarism (*n*). The general application of such a rule has been questioned in America, where it is said that the strict rules of evidence lay upon the assured in the first instance the burden of proving that he has suffered loss from a peril insured against, and that it is not within the excepted perils (*o*). Thus, if there was a bare admission on the record that the loss was caused by fire, the burden of proof would still be on the assured to show the nature of the fire. Evidence, however, of the fact that the premises were burned and that there was nothing in the circumstances to suggest that the fire was caused by earthquake, incendiarism, or other excepted peril would be sufficient *primâ facie* evidence to throw the burden on the insurers of proving the existence of the alleged exception (*p*). Logically this is probably the correct view, but for practical

(*k*) *Walker* v. *London Provincial* (1888), 22 L. R. Ir. 572, 575, 577.

(*l*) *Heffron* v. *Insurance Co.* (1890), 132 Pa. 580.

(*m*) *Marsden* v. *City and County* (1866), L. R. 1 C. P. 232.

(*n*) *Gorman* v. *Hand-in-Hand* (1877), Ir. R. 11 C. L. 224; *Thurtell* v. *Beaumont* (1824), 8 Moore, 612; *Hercules* v. *Hunter* (1836), 14 S. 1137, 1141.

(*o*) *Sohier* v. *Norwich Fire* (1865), 93 Mass. 336.

(*p*) *Kingsley* v. *New England Mut. Fire* (1851), 62 Mass. 393.

purposes the rule that the burden of proving the exception is on the insurer is substantially accurate.

The burden of proof in the case of alleged earthquake fires was discussed in two cases arising out of the earthquake in Jamaica, in January, 1907.

Scottish Union and National v. Alfred Pawsey & Co. (1908), The Times, Oct. 17

Scottish Union and National v. *Alfred Pawsey & Co.*

This case was tried before a jury in Jamaica. The action was brough upon four policies on certain stock-in-trade in the assured's premises. Three of the policies contained the condition that the policy did not cover "loss or damage by fire occasioned by a happening through . . . earthquakes," and the fourth policy contained the condition that the policy did not cover "loss or damage by fire during (unless it be proved by the assured that the loss or damage was not occasioned thereby) or in consequence of . . . earthquake." The questions left to the jury, and the answers, were as follows:— 1. Was the fire which destroyed the assured's property occasioned by, or did it happen through an earthquake? No. 2. Did the fire which destroyed the assured's property occur during or in consequence of an earthquake? No. On these findings judgment was entered for the assured, and the insurers appealed on the ground of misdirection, and a verdict against the weight of evidence. The appeal was ultimately heard by the Judicial Committee of the Privy Council. In the case of all four policies the judge at the trial placed upon the insurers the burden of proving that the fire which destroyed the premises was an earthquake fire, and not an independent fire. This ruling was not objected to as regards the first three policies, but it was objected to as regards the fourth, and it was held in the Privy Council that as regards the fourth policy the ruling was wrong, but, inasmuch as the jury found that the premises were not burned during the earthquake the error in the ruling was immaterial, and no cause for a new trial. The contested points in the case were (1) whether the fire which consumed the premises in question was one or the other of two fires which broke out at or about the time of the earthquake, and spread through the town, viz. (i) a fire which had its origin in building A on the east, or (ii) a fire which had its origin in building B on the west; (2) whether the A fire was an earthquake fire; (3) whether the B fire was an earthquake fire. On the first question there was conflicting evidence; both fires spread in the direction of the assured's premises, and it was obviously an open question for the jury to say which fire actually consumed them. The Board were of opinion that on the assumption that one or other of the fires was an independent fire the jury were justified in finding for the assured, if on the evidence they were satisfied that the destruction of the insured property was due, or might well have been due, to the independent fire, or to that fire and the other fire conjointly. On the assumption, therefore, that there were two fires, an earthquake fire and an independent fire, it was for the insurers to prove affirmatively that the property was destroyed by the earthquake fire. On the second question, whether the A fire was an earthquake fire or an independent fire, the undisputed evidence was that the fire was first detected from half to three-quarters of an hour after the shock. The Board were of opinion that it could not be said that the fire followed the

earthquake shock so quickly as to lead to any very strong presumption that the one event was the cause of the other. Apart from this presumption the only definite theory set up by the insurers was that the fire was caused by the ignition of a quantity of safety matches which were stored on the premises, and were apparently crushed by the falling buildings at the time of the shock. The Board were of opinion that if the jury came to the conclusion that this view was insufficiently supported, and that the origin of the fire was not accounted for they were entitled to act on the footing that the fire was an independent fire and not an earthquake fire. Here, again, the burden was on the insurers to prove affirmatively that the fire was caused by earthquake. On the third question, whether the B fire was an earthquake fire or an independent fire, there was conflicting evidence as to whether smoke was first seen rising from the premises a few minutes before or a few minutes after the shock. Again the Board were of opinion that if in the opinion of the jury it was not conclusively shown that the fire broke out after the shock they were entitled to act on the footing that the fire was an independent fire.

Tootal Broadhurst Lee & Co. v. London and Lancashire Fire (1908), The Times, May 21st

Tootal Broadhurst Lee & Co. v. London and Lancashire Fire.

The plaintiffs claimed in respect of three policies which contained the following clauses :—"If a building or any part thereof shall fall except as a result of fire all insurance by this company in it or its contents shall immediately cease and determine," and "This policy does not cover . . . loss or damage by fire occasioned . . . by or through any earthquake." This case was tried before Bigham, J., and a Middlesex special jury. It was admitted that the fire which consumed the property insured had its origin in a building belonging to C., but the parties were in issue as to whether it broke out before the earthquake shock in a top room occupied by C., or whether it broke out after and in consequence of the shock in a lower room occupied by Dr. A., as a consulting-room. There was conflicting evidence given by Dr. A. and his maidservant as to whether a stove with a Bunsen burner which Dr. A. had been using to sterilise instruments was or was not alight at the time of the shock. There was also a statement by Dr. A., which he afterwards contradicted, to the effect that after the shock the first fire which he saw was in his consulting-room, where a mass of flame was reaching right up to the ceiling. On the other hand, there was evidence that there was a kerosene stove in the upper room, and C. stated that there was smoke in his room before the shock. A considerable number of witnesses said that from some distance off they saw a great column of smoke and a fire in this house before the earthquake. Bigham, J., left it to the jury to say whether the fire which consumed the assured's premises was a fire occasioned by or through earthquake. He said the onus of proof was on the insurers to make out that the fire was an earthquake fire. They must not even leave the jury in reasonable doubt. The jury must be satisfied that it was an earthquake fire.

On the question whether the insurance ceased on the fall of the buildings, if the jury thought that the fall which took place was of such a substantial nature that the risk to the remaining portion was increased they would on that ground find for the insurers. The jury found that the fire was caused by earthquake, and judgment was entered for the defendants.

Question for the jury.

The above cases show how much is left in the hands of the jury when the question is whether the loss is or is not caused by an excepted peril. The verdict of the jury will not be disturbed in the Court of Appeal if there is any evidence to support it. In the *Scottish Union Case* Sir Arthur Wilson, in stating the opinion of the Board, said—

> "It is not enough to show that adverse criticism may justly be applied to the verdict or to the evidence upon which it was based. It is not enough to show that a contrary verdict might well have been found. It is not enough that those sitting in appeal should consider that a contrary verdict would have been preferable to that actually returned. It is for the jury to decide questions of fact, and their decision upon such questions cannot be interfered with by an appellate tribunal unless it be shown that that decision was one which could not reasonably have been arrived at upon the evidence before the jury."

Gorman v. *Hand-in-Hand.*

In an Irish case, *Gorman* v. *Hand-in-Hand* (*q*), two hay-ricks had been burned, and the uncontroverted evidence was that both went on fire simultaneously, that fresh tracks to and from the ricks through a potato plot were discovered, and that none of the farm servants had been there. The Court of Appeal held that although there was strong evidence of incendiarism they could not disturb a verdict for the assured. The judge may direct a verdict against the party on whom the onus lies, if there is no evidence on which the jury could find the allegations proved; but the judge may not direct a verdict for the party on whom the proof lies unless the facts in issue are uncontroverted. Although all the facts proved in evidence are undisputed, the fact in issue may be the inference to be drawn from that evidence, and in drawing such inferences the jury may be directed to act on their own experience of life (*r*).

Partial loss followed by total loss from excepted peril.

In marine insurance if a partial loss from perils insured against is followed by a total loss from an excepted peril, so that the assured is not ultimately prejudiced by the partial loss, no recovery can be had in respect of such partial loss (*s*). This principle may be due to the peculiar nature of the subject matter in marine risks, and it is doubtful whether it has any application to an ordinary fire risk. The fact, however, that property damaged by fire was immediately thereafter consumed by an excepted peril as, for instance, if it was destroyed by an earthquake, might be held to

(*q*) (1877), Ir. R. 11 C. L. 224.
(*r*) *Gorman* v. *Hand-in-Hand* (1877), Ir. R. 11 C. L. 224.
(*s*) *Livie* v. *Janson* (1810), 12 East, 648; *Knight* v. *Faith* (1850), 15 Q. B. 649.

discharge the insurers who, if liable, would be unable to exercise the usual option to reinstate the premises, and would have to pay the damage on very doubtful evidence as to what the extent of it was.

Section II.—Amount of Loss Payable

General rule.

THE insurers' liability in respect of a fire claim is measured by the depreciation in the market value of the property; but it cannot exceed (1) the amount insured; (2) the amount of the assured's insurable interest. If the depreciation in the value of the property exceeds either or both of the two last-mentioned items, it must be reduced so as to correspond with the smaller of them (*t*).

No consequential loss,

In estimating the actual damage to the property it is important to remember that *primâ facie* an insurance on property covers the loss of or damage to the property insured; but no consequential damage. It is not an indemnity of the assured against all the consequences of the fire, but only against loss or damage to the property, and therefore the amount of damage can in no case exceed the full value of the property insured.

such as loss of rent or profits,

The result of the principle is that an insurance on property *simpliciter* does not cover loss of rent, occupancy, business profits, wages of servants or workmen rendered idle, and similar consequential damages (*u*).

unless expressly insured

Consequential loss may be expressly insured against, and loss of rent and non-occupancy during repairs are very common subjects of insurance. Business profits may also be specifically insured, and owners of monopolies, such as patent rights, may insure against diminution of royalties consequent upon the premises of a licensee being destroyed by fire (*x*).

as a specific subject of insurance.

Insurances upon these specific subjects of consequential loss must be distinguished from insurances upon the property itself. They must be dealt with as separate insurances upon an incorporeal right. Thus, the damage done to the property ceases to be

(*t*) *Glasgow Provident* v. *Westminster Fire* (1887), 14 R. 947, 988.

(*u*) *Wright* v. *Pole* (1834), 1 A. & E. 621; sub nom. *Sun Fire* v. *Wright*, 3 Nev. & Man. 819; *Shelbourne* v. *Law Investment*, [1898] 2 Q. B. 626; *Menzies* v. *North British* (1847), 9 D. 694; *Farmers' Mut.* v. *New Holland Co.* (1888), 122 Pa. 37.

(*x*) *The National Filtering Oil Co.* v. *The Citizens* (1887), 106 N. Y. 535.

a factor in the calculation of the insurer's liability, and the measure of such liability is the diminution in value of the incorporeal right insured, provided it does not exceed (1) the amount insured; (2) the amount of the assured's insurable interest in the incorporeal right. For example, in *Westminster Fire* v. *Glasgow Provident* (*y*), the incumbrancer on the property had insured specifically on rent. He had an insurable interest in the property in respect of his incumbrance; but not being in possession of the property the loss of rent fell entirely on the proprietor. The incumbrancer had no insurable interest in the rent, and could therefore recover nothing in respect of such loss.

Principles upon which damage is assessed.

The liability of the insurers in respect of damaged property is not necessarily the same as the cost of reinstatement (*z*), and even where the insurer has an option to reinstate, that does not entitle the assured to take the cost of reinstatement as the proper measure of damages (*a*). The proper measure of damages is the difference between the value of the undamaged property before the fire, and the value of the damaged property after the fire (*b*).

Undamaged value.

The undamaged value before the fire is to be taken at the market value immediately before the fire (*c*). In marine insurance the value taken is the value at the commencement of the risk, but this principle appears to be applicable to marine insurance only, and the weight of authority is against extending it to fire risks. The value therefore is the market value at the time and place of the fire (*d*). The assured is not entitled to take the cost price or the cost of construction or manufacture as conclusive evidence of the value of the property at the time of the fire (*e*). It may be *primâ facie* evidence (*f*), but it is subject to abatement under three heads: (1) the assured may have paid more than its value; (2) the market value may have fallen since the time

Market price.

Cost price.

(*y*) (1888), 13 A. C. 699.

(*z*) *Westminster Fire* v. *Glasgow Provident* (1888), 13 A. C. 699; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 383; *Pitman* v. *Universal Marine* (1882), 9 Q. B. D. 192.

(*a*) *Commonwealth Insurance* v. *Sennett* (1860), 37 Pa. 205.

(*b*) *Westminster Fire* v. *Glasgow Provident* (1888), 13 A. C. 699; *Hoffman* v. *Western Marine* (1846), 1 La. Ann. 216; *Grant* v. *Aetna Fire* (1860), 11 Low. Can. R. 128.

(*c*) *Equitable Fire* v. *Quinn* (1861), 11 Low. Can. R. 170; *Hilton* v. *Phœnix* (1898), 92 Me. 272; *Washington Mills* v. *Commercial Fire* (1882), 13 Fed. Rep. 646; 135 Mass. 503.

(*d*) Bunyon on Fire Insurance (3rd Ed.), 150.

(*e*) *Equitable Fire* v. *Quinn* (1861), 11 Low. Can. R. 170.

(*f*) *Marchesseau* v. *The Merchants* (1842), 1 Rob. (La.) 438.

of purchase; (3) wear and tear or damage other than that insured against may have depreciated the value of the particular property. Conversely the property may for similar reasons have risen in value, and the assured is entitled to the benefit of the rise (*g*). Although he will thereby realise a profit without having specifically insured on profits, he, in fact, recovers no more than the loss or damage to the property. The market value of a parcel of whisky in bonded store was held to include the amount of Government tax which was unpaid, but for which the assured remained liable (*h*). On the other hand, a merchant or shopkeeper insuring his stock cannot recover the retail value of the stock because he would thereby be recovering loss of profits on his retail business, and more than the actual loss or damage to the property (*i*).

Government Duty.

Retail price.

When property is destroyed in the hands of a vendor who has contracted to sell the vendor is not entitled to take the sale price as conclusive evidence of the value of the property. The test of value is the market price irrespective of the contract price, and the latter can only be recovered when there is a special condition in the policy substituting the contract price for the market price (*k*).

Sale price.

Mr. Bunyon, in his book on Fire Insurance, puts the case of a fire in which a large quantity of some scarce commodity is consumed and the market price thereby greatly enhanced (*l*). If the assured only gets the value of the goods immediately before the fire he cannot restock his premises without great additional expense. This expense, however, is only incurred so that he may not lose his profits, and if there was no specific insurance on profits it seems clear that he can only recover the value of the goods according to the market price immediately before the fire.

When market value is enhanced by the fire.

Often an old house or an old article, although not so valuable in the market, is just as serviceable to the assured as a new house or a new article; and when the old thing is destroyed by fire the assured may be compelled to erect or buy a new thing. That is to say, he cannot be reinstated, and therefore in a sense he cannot be indemnified, without an expenditure which exceeds the value of the thing destroyed. In such case he is not entitled to

When an old article is as serviceable as a new one.

(*g*) *Equitable Fire* v. *Quinn* (1861), 11 Low. Can. R. 170.

(*h*) *Hedger* v. *Union* (1883), 17 Fed. Rep. 498; *Wolfe* v. *Howard Insurance* (1853), 7 N. Y. 583.

(*i*) *Fisher* v. *Crescent Insurance* (1887), 33 Fed. Rep. 544.

(*k*) Bunyon on Fire Insurance (3rd Ed.), 151.

(*l*) Bunyon on Fire Insurance (3rd Ed.), 150.

claim the full value of a new thing (*m*). He is only entitled to the value of the old thing, and that value does, in fact, indemnify him because, when he erects or buys a new thing at a greater cost, he has the benefit of the greater value of his property. In estimating the value of old houses, old machinery, old furniture, and other things of the same sort, no definite rule can be laid down as to what proportion of the cost price should be deducted for wear and tear, each case depends on the particular facts given in evidence (*n*).

Amount insured as evidence of value.

The amount of the insurance inserted in the ordinary fire policy is merely a limit of the amount recoverable. It is not a valuation of the property binding on the parties unless the words " valued at " are used (*o*). When the insurer or his agent is party to an appraisement of the property for the purpose of the insurance the amount so settled is probably *primâ facie* proof of value (*p*), but otherwise the amount stated in the policy as the amount insured on any particular subject is not even *primâ facie* evidence of the value. Where the assured has, in his preliminary proof of loss, valued the property destroyed, he is not bound by such valuation, and may amend his valuation at the trial (*q*). The preliminary proof may be used as evidence, but not conclusive evidence, against him (*q*).

Total and constructive total loss.

When the property is totally destroyed, that is to say when it is rendered incapable of repair, and the debris is of no value whatever, the assured is entitled to a cash payment of the full value of the property destroyed (*r*). In marine insurance, where the property insured is so damaged that the cost of repairs will exceed the repaired value, there is a constructive total loss, and the assured is entitled to give notice of abandonment to the underwriters who, if the notice was justified by the facts, are bound to pay the full value as for a total loss, and are entitled to the damaged property as salvage (*s*). There is no such right

(*m*) *Guinn* v. *Phœnix* (1890), 80 Iowa, 346 ; *Hilton* v. *Phœnix* (1898), 92 Me. 272 ; *Hercules Insurance* v. *Hunter* (1836), 14 S. 1137, 1141 ; *Vance* v. *Forster* (1841), Ir. Ct. R. 47.

(*n*) *Vance* v. *Forster* (1841), Ir. Ct. R. 47 ; *Brinley* v. *National* (1864), 52 Mass. 195.

(*o*) *Hercules Insurance* v. *Hunter* (1836), 14 S. 1137 ; *Vance* v. *Forster* (1841), Ir. Ct. R. 47 ; *Waynesboro Mutual* v. *Creaton* (1881), 98 Pa. 451 ; *Millaudon* v. *Western Marine* (1836), 9 La. 27 ; *Wallace* v. *Insurance Co.* (1832), 4 La. 289.

(*p*) *Maryland Home* v. *Kimmell* (1899), 89 Md. 443 ; *Lebanon Insurance* v. *Kepler* (1884), 106 Pa. 28 ; *Perry* v. *Mechanics' Mutual* (1882), 11 Fed. Rep. 485.

(*q*) *Trull* v. *Roxbury Mut. Fire* (1849), 57 Mass. 263 ; *Hoffman* v. *Western Marine* (1846), 1 La. Ann. 216.

(*r*) *Monteleone* v. *The Royal* (1895), 47 La. Ann. 1563.

(*s*) *Angel* v. *Merchants' Marine*, [1903] 1 K. B. 811.

of abandonment in the case of ordinary fire risks, and if the salvage is of any value whatever, the assured is only entitled to a money payment of the difference between the value of the undamaged property and the value of what is left (*t*). But in practice insurers do usually pay as for a total loss on goods which are seriously damaged, and when they do so pay they are entitled to the damaged goods as salvage, or to the value of them if sold (*u*). And similarly if they pay a total loss on real property they are entitled to anything in the nature of salvage which may be realised or realisable from the ruins.

Damaged value.

The value of damaged property is the value which it will fetch at a fair sale in the open market. If the assured sells the property at a fair sale by auction after notice to the insurers, the price realised affords strong *primâ facie* evidence of value (*x*); but a sale by auction without notice to the insurers has been held in America to be inadmissible as evidence against them (*x*).

Sale by auction.

Difference between repaired value and cost of repair.

When the property is capable of repair or reinstatement the damaged value may be estimated by deducting the cost of repair from the repaired value, and the damage payable is then arrived at by taking the difference between the undamaged value and the damaged value thus—

	£
Undamaged value	100
Repaired value £110	
Cost of repair 70	
Damaged value	40
Amount recoverable	60

or in a case where the repaired value is less than the undamaged value—

	£
Undamaged value	100
Repaired value £90	
Cost of repair 70	
Damaged value	20
Amount recoverable	80

(*t*) Bunyon on Fire Insurance (3rd Ed.), 155; *Hough* v. *People's Fire* (1872), 36 Md. 398.

(*u*) *Skipper* v. *Grant* (1861), 10 C. B. (N. S.) 237; *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, 118; *Roux* v. *Salvador* (1836), 3 Bing. N. C. 266, 288; *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, 471.

(*x*) *Hoffman* v. *Western Marine* (1846), 1 La. Ann. 216.

The same result is arrived at by taking the cost of repairs, and either deducting therefrom, or adding thereto the difference between the undamaged value and the repaired value according to whether the latter is greater or less than the former.

Vance v. *Forster.*

In *Vance* v. *Forster* (*y*) certain machinery was destroyed by fire, and had to be replaced by new machinery. The Court laid down the following rule for ascertaining the insurer's liability: "I think it would be a fair criterion to see what would be the expense of placing new machinery such as was in the mill before, and to deduct from that expense the difference in value between such new machinery and the old machinery which was destroyed. I think such difference is the actual loss sustained by the plaintiff."

Ultimate test is the saleable value.

Estimation of loss based on the cost of repair is not, however, a conclusive test. The assured may not have such an interest in the property as entitles him to demand that the owner shall repair it, as in the case of an incumbrancer, and if the property is not in fact repaired the cost of repair may not be representative of the actual loss. The damaged value in the market may be considerably less than the difference between the repaired value and the cost of repairs. When that is shown to be the case the presumption of value based on the cost of repairs is displaced and actual saleable value must be taken (*z*).

Depreciation in value caused by severance.

Loss of value due to severance may be taken into account in estimating the damaged value of the property. Thus, in the case of a building: site and building together may be worth more than the cost of the bare site plus the cost of constructing the buildings, and, therefore, where a building is burned the loss is the difference in market value of the site and premises before the fire and the site and premises after the fire, and if part of that loss is due to a depreciation of the value of the site, that may be recovered on a policy which purports to insure the buildings (*a*). Lord Watson expressed an opinion that if two houses standing side by side were insured in one policy by the owner of both, and one was burned down, he could calculate as part of his loss the consequent depreciation in the value of the other. If one building only was insured he

(*y*) (1841), Ir. Ct. R. 47.

(*z*) *Westminster Fire* v. *Glasgow Provident* (1888), 13 A. C. 699.

(*a*) *Westminster Fire* v. *Glasgow Provident* (1888), 13 A. C. 699; *contra*, *Bardwell* v. *Conway Insurance* (1877), 122 Mass. 90.

could not recover the depreciation in value of the uninsured building consequent upon the burning of the insured building. That would be contrary to the rule that damage to the insured property is the only damage recoverable, and that other consequential damage cannot be recovered. The principle of loss by severance laid down by Lord Watson appears to be equally applicable to insurances on goods, and it is submitted that loss consequent upon the breaking of an assortment is recoverable, although this was controverted by Lord Young in the Court of Session (*b*). Thus, if a pair of carriage horses value £500 were insured, and one only was destroyed the assured would be entitled to recover say £300, £250 for the horse lost and £50 for depreciation in value of the other.

Right to enter and inspect damaged property.

After a fire the insurers ought to have all reasonable opportunity of entering and inspecting the premises in order to ascertain the extent of the damage or the value of the salvage. The right to enter upon the insured premises is sometimes made a condition of the policy, but even in the absence of any express condition such right may possibly be implied as flowing of necessity from the nature of the contract and the custom of insurance business (*c*). The right of the insurers to enter does not exclude the assured from the possession and control of his property, and if the insurers remained longer than was reasonably necessary for the purpose of investigating the damage they would be liable to an action of trespass (*d*). When the property damaged is inspected by the insurers the assured should have an opportunity of being present and should therefore be notified beforehand of the intended examination (*e*).

Where property is not in assured's possession.

In cases where the property is not in the possession or control of the assured, as where the assured is a ground landlord or an incumbrancer, there is, of course, no implied condition that the insurer shall have access to the premises, and probably an express condition in ordinary printed form would be held inapplicable to the circumstances and therefore to be taken *pro non scripto*.

Statutory right of salvage corps.

Under the Metropolitan Fire Brigade Act, 1865 (*f*), the insurers may, through the salvage corps, have a greater right of

(*b*) *Glasgow Provident* v. *Westminster Fire* (1887), 14 R. 947.

(*c*) *Oldfield* v. *Price* (1860), 2 F. & F. 80; Bunyon on Fire Insurance (3rd Ed.), 54.

(*d*) *Oldfield* v. *Price* (1860), 2 F. & F. 80.

(*e*) *Masters* v. *Lefevre* (1870); Bunyon on Fire Insurance (3rd Ed.), 54.

(*f*) 28 & 29 Vict. c. 90, ss. 12, 29.

entry and possession than they would have under the contract. The fire brigade has statutory power to enter and take possession of any property within the Metropolis for the purpose of extinguishing fires, and by section 29 it is provided that if the insurance companies or a sufficient number of them establish a salvage corps, the fire brigade shall, without charge, render such salvage corps all necessary assistance, and band over to their custody the property salved. The salvage corps has therefore a statutory right to the custody of the salvage, not only against the assured, but against all others. No doubt this right must be deemed to be restricted so as to give them the custody for such time only as is reasonably necessary for the purpose of ascertaining the damage done, and realising the salvage, if the insurers have become entitled to it, but during the time the salvage corps have the custody the right of the assured or other owner or occupier to the possession or control of the property would appear to be excluded (*g*).

Company liable for total loss without regard to assured's rights of indemnity against third persons.

Subject to the limitations imposed by the amount of insurance and extent of the assured's interest the assured is entitled to a full indemnity in respect of the total damage done to the property insured without any deduction in respect of claims which the assured may have against others in respect of the loss (*h*). The obligation of the insurers is *primâ facie* to pay the total fire damage, not the ultimate damage which the assured may suffer after he has realised all available rights against third parties for extinguishing or diminishing his loss (*i*).

Collingridge v. The Royal Exchange (1877), 3 Q. B. D. 173

Collingridge v. The Royal Exchange.

The proprietor of certain house property insured it, and the insurers undertook to pay in respect of "any loss or damage by fire to the buildings" not exceeding £1600. The premises were afterwards acquired by the Metropolitan Board of Works under compulsory powers and the amount of compensation was assessed. Before conveyance or payment of the compensation the premises were burned down, and it was held that the assured could recover the full amount of the damage notwithstanding his rights under the compulsory purchase.

American cases.

In an American case (*k*) where the owner of the fee simple

(*g*) *Joyce* v. *Metropolitan Board of Works* (1881), 44 L. T. 811.

(*h*) *Dickenson* v. *Jardine* (1868), L. R. 3 C. P. 639.

(*i*) *Westminster Fire* v. *Glasgow Provident* (1887), 14 R. 947, 966.

(*k*) *Foley* v. *Manufacturers* (1897), 152 N. Y. 131; *Foley* v. *Farragut Fire* (1893), 71 Hun. 369.

insured buildings, partially constructed under a building agreement, he was held entitled to the entire damage by fire, notwithstanding that the builder was bound to make good the loss and was not entitled to the contract price until the work was completed. In another American case where the reinstatement of the premises involved the rebuilding of a party wall, the insurers were liable for the total damage including the whole value of the party wall, notwithstanding that the assured might recover half the cost of rebuilding the party wall from the adjoining owner (*l*).

Principle of indemnity preserved by subrogation.

The principle of personal indemnity in such cases is preserved by giving the insurer who has paid a loss the benefit of all rights which have accrued or may thereafter accrue to the assured in diminution or extinction of the loss ; but the insurer is not entitled to estimate the value of the assured's choses in action, and set them off against the damage to the property. Even where before action brought the assured has realised claims or received benefits in diminution of his loss it is doubtful whether his claim for damages is thereby reduced or whether the insurer must not rely on his right of subrogation and counter-claim for what the assured has received instead of setting it off in diminution of the claim. Practically, the distinction is of little importance if the assured is solvent ; but if he is insolvent the importance is obvious. It is submitted that the insurer's right is one of counter-claim and not set-off, and that therefore in the first instance the damage must be estimated and paid as at the time of the loss.

Reinstatement by third party.

The question has been raised whether the assured is entitled to recover the insurance money if before action brought some third person has reinstated the premises, for example, where a mortgagee has insured on his own interest and the mortgagor or his insurers have reinstated the premises. In *Westminster Fire* v. *Glasgow Provident* (*m*) it was said that if the first incumbrancers had reinstated the premises the second incumbrancers would have suffered no loss ; but it is doubtful whether this is strictly accurate. It is submitted that the right of action by the second incumbrancers against their insurers accrued when the premises were burned, that the insurers were bound to pay the damage to the extent of their assured's debt, and that the benefit arising from the reinstatement

(*l*) *Monteleone* v. *The Royal* (1895), 47 La. Ann. 1563.

(*m*) (1888), 13 A. C. 699.

of the premises, whether reinstated before or after action brought, would be a matter for subrogation, the insurers being entitled, if the insurance was for the benefit of the incumbrancer alone, to an assignment of the debt and transfer of the security including therein the benefit of the reinstatement. It has been decided in America (*n*) that a mortgagee is entitled to recover from his insurer, notwithstanding that the owner of the equity of redemption has reinstated, whereas in Canada (*o*) there is an opinion to the opposite effect. It is submitted that the American decision is correct.

Where assured might have, but has not, compelled third party to reinstate.

In *Westminster Fire* v. *Glasgow Provident* (*p*) it was argued in the House of Lords that as the second incumbrancers were entitled under 14 Geo. 3, c. 78, s. 83, to call upon the insurers of the prior incumbrancers to lay out the insurance money in reinstating the premises, but had omitted to do so, they had only themselves to blame if they suffered loss, and therefore they could not recover from their own insurers. As the point had not been pleaded the House refused to consider it seriously, but, apart from the question as to whether the statute applied to Scotland at all or whether it was applicable between mortgagor and mortgagee or between prior and puisne incumbrancers, Lord Selborne indicated that before the insurers could rely on this statute as a defence they must show that their assured knew there were other insurances, that they knew they had the legal right to intervene, and probably that they, the insurers, called upon them to intervene. But it is very doubtful whether failure to take advantage of the statute could ever be relied on as a defence.

No liability beyond assured's insurable interest.

Where the assured has insured on his own behalf only, he cannot recover more than the amount of his insurable interest at the time of the loss (*q*). This follows from the presumption that the contract of fire insurance is a contract of personal indemnity, and that the intention of the parties is to protect the interest of the assured, and not to provide him with a gambling speculation on the interests of others. If the assured has insured on behalf of others as well as on his own behalf, he may recover in respect

(*n*) *Foster* v. *Equitable Mut.* (1854), 68 Mass. 216.

(*o*) *Mathewson* v. *Western Assurance* (1859), 10 Low. Can. R. 8.

(*p*) (1888), 13 A. C. 699.

(*q*) *Anderson* v. *Commercial Union* (1885), 55 L. J. Q. B. 146, 149; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 400.

of their interest as well as his own. The amount of insurable interest which various persons interested in property such as tenants for life, landlords and tenants, mortgagors and mortgagees, bailors and bailees, may have in the property, has already been considered, as has also the question when, and in what form one person interested may insure not only on his own behalf, but on behalf of others who have also an insurable interest (*qq*). For the present purpose it will only be necessary to consider the position of the assured who has insured on his own behalf, and is entitled only to an indemnity on his own interest.

Insurable interest may be

The insurable interest of one who is not absolute proprietor of the property insured consists either in (1) some proprietary right in the property, or (2) some liability which may arise on the destruction of the property. Frequently the insurable interest is a combination of these two elements. Thus, a tenant has insurable interest in respect of the value of his lease, and in respect of his liability to repair.

a proprietary interest.

In so far as the interest of the assured is a proprietary interest it has been said that he is entitled to recover the depreciation in the market value of his interest. Such depreciation is not necessarily met by paying the assured the same proportion of the damage as the market value of his interest bears to the total value of the property. For instance, a partial loss may for the time being entirely destroy the market value of a tenant's interest, and the immediate depreciation of the market value of the assured's interest may thus be greater than the total damage done to the property. It is very doubtful, however, whether depreciation in market value of a limited interest is the proper test of the amount recoverable. It is said that the rule of strict indemnity requires that it should be the test, and that the assured should recover no more and no less. But it may be questioned whether this is not a misapplication of the rule. As was pointed out in *Collingridge* v. *The Royal Exchange* (*r*), a fire policy promises to pay the loss or damage to the premises and not the total loss or damage to the assured, and although the presumption against speculative risks has led to the adoption of the rule that the assured shall not be deemed to have insured, and shall not recover beyond the value of his insurable interest, there seems to be no good reason for extending the rule so far as to make the contract mean something other than is expressed on the face of it. It is

(*qq*) *Supra*, pp. 129, 144. (*r*) (1877), 3 Q. B. D. 173.

therefore submitted that the proper rule for estimating the primary liability of the insurers on a limited proprietary interest is not what was the depreciation in value of the assured's interest, but what was the loss or damage to the property, and the assured is entitled to recover that amount up to the extent of his proprietary interest in the property.

An interest arising from possible liability.

In so far as the assured's interest is a possible liability in which he will, or may, be involved by the destruction of the thing insured, the assured is entitled to recover to the extent of the liability incurred. The fact that the liability has not been enforced against him, and that he has made no actual payment in respect of the loss is no answer to his claim against the insurers (*s*). If the assured, in fact, incurs no liability in respect of the loss it is perhaps doubtful whether he is entitled to recover. On the one hand, it may be said that a person in the position of a tenant or bailee is entitled to recover the full amount of damage so as to indemnify him against any possibility of his being thereafter charged with liability, and incurring expense in resisting or settling a doubtful claim. On the other hand, if he is paid by the insurers the amount of the damage and no attempt is made to charge him with liability, he does recover more than he loses, and there are no rights to which the insurers can be subrogated so as to preserve the principle of indemnity. It is submitted that the terms of an ordinary fire policy do entitle him to recover. He cannot have complete indemnity unless he does, and this fact ought to weigh in the balance more than the other fact that he may ultimately have more than an indemnity.

In either case loss is payable up to the limit of interest.

It is probably therefore true in all cases of insurance on property that the assured is primarily entitled to recover the total fire damage up to the amount of his insurable interest, and that the rule of subrogation alone is to be relied on to preserve the principle of strict indemnity.

Separate interests entitled to separate indemnity.

Where several persons having separate interests have insured each on his own interest, it is no answer to A's claim for indemnity against his own insurer for the insurer to say that B has already been paid by his insurer the total fire damage. Recovery by B can only satisfy A's claim if B recovered with the authority of A in respect of A's interest as well as his own (*t*).

(*s*) *California Ins. Co.* v. *Union Compress Co.* (1889), 133 U. S. 388.

(*t*) *Clover* v. *Greenwich Insurance* (1886), 101 N. Y. 277; *Scottish Amicable* v. *Northern Assurance* (1883), 11 R. 287.

Westminster Fire v. Glasgow Provident (1888), 13 A. C. 699 (*u*)

Westminster Fire v. Glasgow Provident.

The owners of certain mills in Scotland had borrowed money on the security of their mills, and granted bonds (mortgages) to their creditors A, B, and C, the security of the later bondholders being postponed to the security of the earlier. Each of the bondholders caused insurance to be effected each to protect their own interest, and each with a different office. These were all practically in the same form, and were in the name of the respective bondholders *primo loco*, and in the name of the owners in reversion, but there was no privity of agreement between the bondholders. The premiums were paid by the bondholders, but were debited in account against the owners. C's bond was for £1000 and £917 11*s.* 6*d.* was outstanding. His insurance was for £900. The policy recited that the assured were "C and X, Y (the owners) jointly and severally in reversion." Then followed the condition for payment. "The Society hereby agrees with the insured that if the said property or any part thereof shall be destroyed by fire . . . the society will pay or make good all such loss or damage to an amount not exceeding in respect of the several matters described in the margin hereof the sum set opposite thereto respectively, and not exceeding in the whole the sum of £900." In the margin this sum was apportioned over different parts of the premises insured. The premises were damaged by fire. Immediately before the fire the value of the site and premises was sufficient to satisfy all the bondholders. The value of the site and salvage after the fire was valued by C's valuators at £3500, and by the insurer's valuators at £6900, that is to say, in either case it was not sufficient to satisfy the prior bonds, which amounted to £8600. The value of the premises apart from the site was never sufficient to satisfy the prior bonds. The prior bondholders recovered from their insurers the total fire damage, amounting to £5668 16*s.* 8*d.*, and applied it in reduction of their debt against the owners. This sum would have been sufficient for the complete reinstatement of the premises. C, with the consent and concurrence of the owners, then raised an action in the Court of Session against their insurers, claiming in respect of each item in their policy, the total amount of fire damage to the extent of the sums apportioned thereon. The Inner House found that the damage to the property in so far as it did not exceed the sum insured upon each item, was in all £350, made up of £190 the sum insured on the principal building, £120 the sum insured on one year's rent thereof, and £40 in respect of three other items. The insurers contended that when there were several policies upon different interests in the same premises no more could be recovered in the aggregate upon all the policies than the total damage done by the fire. Here they contended that the position was the same as if the owner had insured for his own benefit, and for the benefit of the successive incumbrancers. He could have recovered the total fire damage but no more, and the incumbrancers would have been entitled to the benefit of that sum in accordance with the priority of their securities. Here the total fire damage had already been paid, and the prior incumbrancers had applied the same in part satisfaction of their debt. To this payment the insurers admitted that they were bound to contribute rateably in proportion to the sums insured by them, but they contended that they were not bound to pay postponed

(*u*) Sub nom. *Glasgow Provident* v. *Westminster Fire* (1889), 14 R. 947. This report of the case in the Court of Session ought to be consulted alone with the report of the appeal to the House of Lords.

incumbrancers, who would also apply the money in reduction of their debt, and so the owners would receive more than the total damage to the premises, a result that was contrary to the principle of strict indemnity. This argument was rejected by a majority of the judges in the Court of Session, and by a unanimous decision of the House of Lords. It was held that separate fire policies covering the same subjects effected without priority by independent incumbrancers for the protection of their several interests were not to be treated as if they had been effected by the owner of the subjects merely because he was made a party to each policy in respect of his right of reversion. Each insurance was a separate insurance on the interest of each incumbrancer, and each was entitled to an indemnity from his own insurer. If the premises were so damaged by fire that what was left was insufficient to satisfy the prior incumbrancers, a puisne incumbrancer was entitled to recover the amount of his debt from his insurers. The total fire damage was not to be taken as the total amount recoverable from all the insurers and then divided in proportion to their interests among the assured. Each assured was entitled to an indemnity for his immediate loss from his own insurer notwithstanding that the result of that might be indirectly to give some one else something more than an indemnity. As a matter of fact no one would in the long run get more than an indemnity, because the insurer's rights of subrogation would prevent that result. The judgment in the House of Lords was upon this basis, that whereas the value of the premises before the fire was sufficient to cover all the incumbrancers the fire had so reduced the value that even after the first incumbrancers had applied the insurance money received by them in part extinction of their debt, the value of the land and salvage was not sufficient to meet the balance of the first incumbrancers' debt. The security of the postponed incumbrancers was in this view practically extinguished and each was clearly entitled to the total fire damage not exceeding the amount insured by him on each item or the amount of his debt. The item of £120 on rent was disallowed on the ground that the postponed bondholder, not being in possession, had no insurable interest in the rent.

Questions not decided by *Westminster Fire* v. *Glasgow Provident.*

The judgment of the House of Lords in the above case leaves open the question whether a postponed incumbrancer would be entitled to recover in all or any of these four cases: (1) if the premises before the fire had been insufficient to satisfy the prior incumbrances; (2) if after the fire the premises had been sufficient to satisfy the balance of the prior incumbrancers' debt (after payment by their insurers) and leave sufficient to satisfy the postponed incumbrancers' debt, but with a smaller margin of security; (3) if the value of the premises had not been reduced by more than the amount paid to the prior incumbrancers so that after the fire the premises had been sufficient to satisfy the balance of the prior incumbrancers' debt and leave the same margin of security as before; (4) if the owner or prior incumbrancers reinstated the premises so that after reinstatement the postponed incumbrancers were left with the same margin of security as

before the fire. It is submitted that in each of these four cases the postponed incumbrancer would primarily be entitled to recover from his insurers the amount of the fire damage done to the premises not exceeding the amount of his debt.

In the first case, the fact that a prior incumbrancer could not, even before the fire, have been satisfied out of the premises, does not divest a postponed incumbrancer of all interest in them. The prior incumbrancers might be paid off without having recourse to the security, and then the security would be available to the postponed incumbrancer.

In the second case, the fact that the margin of security is reduced should entitle an incumbrancer to an indemnity, even although a bare security is left. His interest is to have the security maintained with the same ample margin. And this appears to be the view that was taken in the Court of Session (*x*). The facts of the case as reported in Session Cases were not quite the same as assumed in the judgments in the House of Lords. The figures show that the balance of the prior incumbrancers' debt could have been satisfied out of the salvage, and even on the lowest estimate something would have been left, and on the insurers' estimate of the salvage sufficient would have been left to satisfy the pursuers. This possibility appears, however, to have been treated by the Court of Session as immaterial, and they base their judgments on this, that "the value of the security was diminished by fire" and "that the damaged subjects did not in fact afford as good a security for the diminished debt as the entire subjects afforded for the whole debt before the fire."

In the third and fourth cases the question is whether the amount payable is the amount of damage at the time of the fire or whether subsequent benefits which reduce the damage are to be set off against this amount. It has already been submitted that the benefit accruing to the assured from reinstatement is properly matter of subrogation and counter-claim, and not set-off, and the same rule appears to be applicable to the case where the amount paid to the prior incumbrancer is equivalent to the damage done, so that when he has reduced his debt by that amount the security of the assured is undiminished. Primarily the assured is entitled to the whole amount of damage, but the insurer may counter-claim

(*x*) *Glasgow Provident* v *Westminster Fire* (1887), 14 R. 947, 963.

in respect of the benefit which the assured has received from the fact that prior charges on the property have been paid off.

Liability limited to the sum insured.

The assured cannot recover more than the specific amount insured on the property, or on each distinct part of the property when the sum is apportioned into several risks. For this purpose each term of insurance is a distinct risk, that is to say, in an ordinary fire policy renewable from year to year, the insurers undertake to make good all loss or damage by fire up to the specified amount during each current year of insurance. If the property is burned down and a loss paid the insurers are only liable in the balance of the sum insured for any subsequent loss during the same year of insurance. When the insurance is renewed for another year, the insurers again become liable for loss or damage up to the specified amount. If the insurers elect to reinstate, and before they have done so the premises are again burned down, they are liable to make good the damage whether the second fire happened during the same year of insurance or during a renewal of the insurance, or even after the insurance had expired altogether. Having elected to reinstate the insurers are liable as on an agreement to build, and they are not discharged from this obligation by reason of accidental fires which make the cost of reinstatement much greater than the sum insured (*y*).

Section III.—Reinstatement

Circumstances under which the right to reinstate arises.

One of the most important conditions in a fire policy from the insurers' point of view is that which reserves to them the right of replacing or repairing the property instead of paying a money indemnity to the assured. It is particularly valuable in circumstances similar to those which gave rise to the case of *Westminster Fire* v. *Glasgow Provident* (*z*), that is, where there are several insurers on several interests, and their total liability may be far greater than the total amount of fire damage. If in the case just mentioned the companies interested had taken advantage of their right to reinstate, and had joined in giving notice to their several insurers that they elected to reinstate, they would have discharged their liability by one payment of the fire damage

(*y*) *Smith* v. *Colonial Mutual* (1880), 6 Vict. L. R. 200.

(*z*) (1888), 13 A. C. 699.

divided between them instead of each having to pay to their assured the total fire damage up to the amount insured without any right of contribution from the other companies.

The insurers may insist on the right to reinstate—

(1) where they have reserved express power by their contract;

(2) where they have suspicion of fraud or arson;

(3) when they are requested to do so by any person, other than the assured, who is interested in or entitled to the premises damaged by fire.

Their right on the last two heads is under the statute 14 Geo. 3, c. 78, which will be discussed later. On the last head the statute creates not only a right against the assured, but also a duty on the part of the insurer towards the person interested who demands that the statute shall be put in force. Where the insurer has neither statutory nor express contractual right to reinstate he cannot, as against his assured, insist on doing so, but must pay a money indemnity (*a*).

Where election to reinstate is reserved by the policy.

The usual form of reinstatement clause gives the insurers an option to pay a money indemnity or to restore to the assured *in specie* the property damaged or destroyed. The alternative is not merely to lay out the insurance money in reinstatement as far as it will go, but to reinstate completely. If the insurers elect to reinstate their liability is not limited either by the amount insured, the amount of the damage, or the assured's insurable interest.

Election must be made by unequivocal notice

Primâ facie the obligation of the insurers is to pay a money indemnity, and if they desire to reinstate they must give the assured unequivocal notice that they intend to exercise their option (*c*). Such notice must be given within the time limited (*d*), if any, or otherwise within a reasonable time (*e*). Notice must be given to the assured or his agent having authority to receive such notice on his behalf (*f*). Where the owner insured and the policy was indorsed "loss, if any, payable to mortgagee," it was held that notice of election to reinstate was properly given to the owner, and notice to the mortgagee was unnecessary (*g*).

(*a*) *Wallace* v. *Insurance Co.* (1832), 4 La. 289.

(*c*) *Daul* v. *Firemen's Insurance* (1883), 35 La. Ann. 98.

(*d*) *Maryland Home* v. *Kimmell* (1899), 89 Md. 443.

(*e*) *Anderson* v. *Commercial Union* (1885), 55 L. J. Q. B. 146; *Sutherland* v. *Sun Fire* (1852), 14 D. 775.

(*f*) *Supra*, p. 201.

(*g*) *Heilmann* v. *Westchester Fire* (1878), 75 N. Y. 7.

within the time limited, if any,

Where the option to reinstate was conditional upon giving notice within sixty days after the completion of proofs, it was held that the proofs meant the formal preliminary proof of loss and not proof of loss before an arbitrator (*h*); but where after delivery of formal proofs the insurer returned them for correction, and the assured made the desired correction without objection, he was held to be estopped from contending that they were complete when first delivered, and time for giving notice ran from the delivery of the corrected proofs (*i*).

and before election to pay a money indemnity.

If the insurers have elected to pay a money indemnity they cannot afterwards change their minds and say they will reinstate (*j*). It is not, however, always easy to determine what constitutes such an election. When after loss the assured signed an indorsement on the policy, "Pay the loss under the written policy to B," and the company added their indorsement, "Assented to," it was held that the company had not waived their right to reinstate, but had merely assented to an assignment of the benefit of the policy as it stood to B (*k*).

Sutherland v. Sun Fire (1852), 14 D. 775

Sutherland v. *Sun Fire.*

A stationer's premises and stock were insured and damaged by fire. The company, before any formal claim was made, sent an expert to examine the premises and report on the damage. After a formal claim was made the insurers made an offer of a cash payment which was refused. They then offered to refer the amount of damage to arbitration, but the assured declined to arbitrate. The insurers then said they would reinstate, and on the assured subsequently bringing an action for the money indemnity it was held that the offer to reinstate was a good defence, and did not come too late. Lord Ivory, however, expressed some doubt. He thought the offer of a cash payment was an election to adopt the course of settlement by payment, but that the subsequent refusal of the assured to go to arbitration as provided by the policy threw the whole question open again and entitled the insurers once more to make their own election.

Scottish Amicable v. Northern Assurance (1883), 11 R. 287

Scottish Amicable v. *Northern.*

This case arose out of the same fire as that which gave rise to the later case of *Westminster Fire* v. *Glasgow Provident* (*m*), the insurers who had insured the first incumbrancers joined with the insurers of the postponed incumbrancers in trying to effect a settlement. The fire occurred on August 1,

(*h*) *Clover* v. *Greenwich* (1886), 101 N. Y. 277.

(*i*) *Kelly* v. *Sun Fire* (1891), 141 Pa. 10.

(*j*) *Sutherland* v. *Sun Fire* (1852), 14 D. 775; *Scottish Amicable* v. *Northern* (1883), 11 R. 287; *Morrell* v. *Irving Fire Co.* (1865), 33 N. Y. 429.

(*k*) *Tolman* v. *Manufacturers* (1848), 55 Mass. 73.

(*m*) (1888), 13 A. C. 669.

1881, and there were prolonged negotiations for settlement. The assured, the first incumbraneers, elaimed a certain sum or reinstatement. The insurers took no notice of the alternative claim for reinstatement, but disputed the amount elaimed. A minute of reference to arbitration on the question of damage was prepared by the insurers, but was not signed as the insurers insisted upon all the companies being made parties to the reference. On February 1, 1882, the assured raised their action for payment, and in their defence the insurers for the first time offered to reinstate. It was held that the offer came too late. The Court was satisfied from the terms of the correspondence that the insurers had elected to settle in money for the loss covered by the policy, and that the only difference between the parties was the amount payable.

What constitutes an election to pay a money indemnity.

Whether or not there has been an election to pay a money indemnity to the exclusion of the right to reinstate depends therefore on the circumstances of each case, and no definite rule can be laid down as to what is or what is not an election (*mm*). It would seem, however, that the insurers ought to be allowed a reasonable opportunity of ascertaining the probable amount of money damage which they would have to pay if they should ultimately decide to settle by payment. A reference, therefore, to an expert to ascertain the damage, even although made by mutual consent of the parties, is not necessarily an election to pay (*n*). If it is merely a preliminary investigation by which neither party is to be bound, the presumption would be that there was no election; but, on the other hand, if there is an agreement to arbitrate, the presumption would be that the insurers had elected to pay in money (*o*). The offer to settle by payment of a certain sum of money cannot be deemed by itself to be an election to pay in money if that offer is refused; but where such an offer is made, and particularly where negotiations are prolonged as in the *Scottish Amicable Case*, the insurers should always state that the offer is made without prejudice to their right to reinstate in the event of their money offer being refused.

When assured disputes the insurers' right to reinstate.

Where the insurers have elected to reinstate, but the assured questions their right to do so and demands a money payment, the insurers need not proceed with the work until the dispute has been settled, and if an action is brought for the money they may plead their election as a defence (*p*). If the insurers like to take the risk of the dispute being ultimately decided against them, they

(*mm*) *Lancashire Insurance* v. *Barnard* (1901), 111 Fed. Rep. 702.

(*n*) *Langan* v. *Aetna Insurance* (1900), 99 Fed. Rep. 374.

(*o*) *McAllaster* v. *Niagara Fire* (1898), 156 N. Y. 80.

(*p*) *Kelly* v. *Sun Fire* (1891), 141 Pa. 10.

may proceed to reinstate, and the Court will not restrain them from doing so pending the trial of the action (*q*). If the assured interferes and prevents the insurers from reinstating, and does his own reinstating, and it is ultimately decided that the insurers were right and ought to have been allowed to reinstate, the assured can recover nothing, not even the sum which the insurers must necessarily have expended on reinstatement (*r*).

When reinstatement is impossible,

Reinstatement of premises may become a practical impossibility either because they are no longer in the possession or control of the assured (*s*), or because the authorities have ordered the premises to be demolished (*t*), or because building regulations prevent them being reinstated as they were originally built (*u*). Such impossibility does not entitle the insurers to say that, as their choice of alternatives has gone, they are entitled to be discharged altogether from the contract (*s*). Since they cannot elect to reinstate they must pay the money damage (*x*).

and insurers have elected to reinstate,

If the insurers do, in fact, elect to reinstate and thereafter it appears that reinstatement is impossible, they are not entitled on that account to go back on their election. After election the insurers are in the same position as contractors who have agreed to rebuild, and have been paid the price (*y*). If they do not perform their obligation they are liable in damages. So long as the non-performance is not caused by the interference of the assured the insurers are liable, whether it was caused by their own default or by circumstances over which they have no control. Like all contractual obligations, the obligation is *primâ facie* absolute and impossibility of performance affords no defence.

they must pay damages.

Alchorne v. Favill (1825), 4 L. J. (O. S.) Ch. 47

Alchorne v. *Favill.*

The insurers elected to reinstate a house which had been absolutely destroyed. Before the fire the building projected beyond the line of the other buildings in the street. The Building Act, 14 Geo. 3, c. 78, required that the building when rebuilt should be set back in line with the others. A certain area of building space was thus lost, and although the insurers rebuilt the premises so as to correspond as nearly as possible with their condition before the fire, the value of the new buildings was considerably less than the

(*q*) *Bisset* v. *The Royal* (1821), 1 D. 174.

(*r*) *Beals* v. *The Home* (1867), 36 N. Y. 522.

(*s*) *Anderson* v. *Commercial Union* (1885), 55 L. J. Q. B. 146.

(*t*) *Brown* v. *The Royal* (1859), 1 E. & E. 853; *Monteleone* v. *The Royal* (1895), 47 La. Ann, 1563.

(*u*) *Alchorne* v. *Favill* (1825), 4 L. J. (O. S.) Ch. 47.

(*x*) *Monteleone* v. *The Royal* (1895), 47 La. Ann. 1563.

(*y*) *Brown* v. *The Royal* (1859), 1 E. & E. 853.

value of the old, and the insurers were bound to indemnify the assured by a money payment in respect of the difference.

Brown v. The Royal (1859), 1 E. & E. 853

Brown v. *The Royal.*

The insurers elected to reinstate a house which had been damaged by fire. Before they could do so the house was condemned by the Commissioners of Sewers under the Metropolitan Building Act, 1855, and ordered to be demolished. The insurers thereupon refused to reinstate or pay the insurance money. In an action for damages for breach of contract the insurers pleaded that they elected to reinstate, and were proceeding to do so when performance became impossible by reason of the order of the Commissioners, and that the said order was made on account of the dangerous condition of the premises, and that the dangerous condition was not caused by the fire, but existed before the fire. On demurrer it was held that the plea was no defence to the claim. The Court said that the defendants were bound by their election and if performance became impossible or (which was all that was shown) more expensive than they had anticipated, still they must either perform their contract or pay damages for not performing it. They expressed no opinion as to the mode in which the damages were to be assessed.

When authorities prohibited reinstatement in wood.

In an American case (*z*) the insurers elected to reinstate and afterwards the building authorities prohibited reinstatement unless brick was used instead of wood, as before. It was held that the election was irrevocable, and that the insurers were bound to reinstate with brick or pay damages for their failure to do so. The damages would include the cost of reinstatement in brick, and consequential damages for undue delay such as loss of business.

When partially reinstated premises were burned.

If after the insurer has elected to reinstate and has partially completed the work the premises are again burned down, the insurer must make good the fresh damage as part of his obligation to reinstate (*a*).

Damages where work is done badly.

If the insurer does the work of reconstruction badly and the result is less valuable than the original building, he must make good the deficiency (*c*). And not only is he liable for the difference in value, but he is liable for all consequential damages flowing from defect in reinstatement as the natural and probable consequence of such defect. Thus, apart altogether from whether such interests were expressly insured in the policy he would be liable for loss of business, loss of rent and other kinds of incidental damage (*d*).

(*z*) *Fire Association* v. *Rosenthal* (1885), 108 Pa. 474.

(*a*) *Smith* v. *Colonial Mutual Fire* (1880), 6 Vict. L. R. 200.

(*c*) *Ryder* v. *Commonwealth Fire* (1868), 52 Barb. 447.

(*d*) *Henderson* v. *Insurance Co.* (1896), 48 La. Ann. 1031.

No credit for improved value.

Although the insurer is liable to make good the difference if he produces an inferior article, he gets no credit if he produces a superior article. He is not in the absence of express agreement entitled to any rebate in respect of new for old. That is a matter which he must take into consideration before he offers to reinstate.

Damages for delay.

The insurer must complete the reinstatement within a reasonable time or he will be liable to pay damages for delay (*e*). If he fails to complete after having commenced to reinstate the assured may himself complete and sue the insurer for the cost (*f*). In some policies the election of the insurer to reinstate merely suspends the right of action for the sum insured, and the conditions are so framed that if the insurer does not proceed with the work and complete within a reasonable time the assured can sue on the policy for the total amount of fire damage (*g*). As a rule, however, the condition is so framed that after election to reinstate within the time limited the sole obligation of the insurer is to do so, and the obligation to pay a money indemnity is discharged (*h*).

Joint obligation of co-insurers.

When several companies give their joint undertaking to reinstate, they are jointly and severally liable for the fulfilment of the obligation, and the assured may sue any one for any defect or delay notwithstanding that the defect or delay is caused solely by the default of another of the companies (*i*).

Insurers' claim for damages against contractor.

Insurers who have elected to reinstate are not relieved from their responsibility by delegating the work to contractors or others, however competent they may be. If the persons entrusted with the work do not perform it properly the insurers are liable to their assured. The insurers may sue the contractor for breach of his contract with them, but they may not be so fortunate in their suit against him as the assured has been in his suit against them. The contractor is not bound by the findings in the action between the assured and insurers.

Times Fire v. Hawke (1859), 28 L. J. Ex. 317 (*k*)

Times Fire v. *Hawke.*

The insurers elected to reinstate A's house, and employed B to do the work. When the work was completed A was dissatisfied, and brought an

(*e*) *Fire Association* v. *Rosenthal* (1885), 108 Pa. 474.

(*f*) *Morrell* v. *Irving Fire Co.* (1865), 33 N. Y. 429.

(*g*) *Haskins* v. *Hamilton Mut.* (1855), 71 Mass. 432; *Langan* v. *Aetna Insurance* (1900), 99 Fed. Rep. 374.

(*h*) *Morrell* v. *Irving Fire Co.* (1865), 33 N. Y. 429; *Parker* v. *Eagle Fire* (1857), 75 Mass. 152; *Wynkoop* v. *Niagara Fire* (1883), 91 N. Y. 478.

(*i*) *Hartford Fire* v. *Peebles Hotel* (1897), 82 Fed. Rep. 546.

(*k*) At *Nisi Prius*, 1 F. & F. 406.

action against the company which was referred to arbitration, and an award was made against the company. The company then sued B for breach of contract, and the jury found a verdict for B. It appeared that B had, as regards some of the painting, instead of completing the job, given A £5 in satisfaction. The Court of Appeal thought that probably the company was entitled to nominal damages for this breach, but as the point had not been pleaded they refused to disturb the verdict.

Queen Insurance v. Vey (1867), 16 L. T. 239

Queen Insurance v. Vey.

A company had by separate policies insured a lessee in respect of improvements and his lessor in respect of the entire premises. Both policies reserved to the company the right of reinstatement. On a fire occurring the insurers paid the lessee sufficient to reinstate the premises, and he undertook to do so. The lessee having failed to reinstate the premises the lessor made a claim and was paid by the insurers, who then brought an action against the lessee for breach of his promise. He pleaded that there was no consideration for his promise, but the Court held there was and that the lessor was entitled to sue for damages.

Where election to reinstate is *ultra vires*.

The terms of an insurance company's memorandum and articles may limit the right of the directors to reinstate to cases where the company can rebuild at a cost no greater than the amount insured (*l*). If they elected to reinstate in a case where the cost would be greater the election would be *ultra vires*, and apparently the assured could not sue the company for damages for breach of their obligation to rebuild, but he could still sue them for the money indemnity. In so far as the company had in fact reinstated, the assured would probably have to make an allowance for the value of the work done.

Extent of obligation.

The insurers who have elected to reinstate are bound to put the house substantially in the same state as before the fire (*m*). They are not bound to give the assured a new house for an old one; and therefore when premises are only partially destroyed they are not bound to pull down the old walls and rebuild them entirely on account of some defect in their foundation. If by incorporating the old with the new the repaired building is made as good as the old one the insurers do all that can be required of them (*m*).

Buildings must be reinstated on the same site.

When the right of reinstatement is exercised in respect of buildings, the insurers must reinstate them on the same site. They cannot fulfil their obligation by reinstating them elsewhere. But the fact that the site has passed out of the possession or control of the assured does not deprive them of their right to reinstate if

(*l*) *Zalesky* v. *Iowa State* (1899), 108 Iowa, 392.

(*m*) *Times Fire* v. *Hawke* (1858), 1 F. & F. 406.

they can obtain permission to do so. Thus, if a mortgagor has insured and the mortgagee has gone into possession the insurers may fulfil their obligation by reinstating the premises in the hands of the mortgagee (*n*).

Machinery and other movable property need not.

When the right of reinstatement is exercised in respect of goods or other movable property the locality of the thing is not an essential element of reinstatement. If the thing cannot be replaced in the same locality owing to the destruction of premises, change of possession, or for some other reason, the insurer may fulfil his obligation by offering to supply a similar article in such reasonable place as the assured may be willing to receive it. And even if reinstatement in the same place is possible the insurers cannot insist on placing the substituted article in that place if, for some reason, it is inconvenient for the assured to have it replaced in the original locality, and he expresses a desire to have it delivered in some other convenient place (*n*).

Anderson v. Commercial Union (1885), 55 L. J. Q. B. 146

Anderson v. *Commercial Union.*

The assured was an oil and colour manufacturer, and was lessee of premises where he erected a steam engine, plant and machinery. He mortgaged his interest, made default in payment, and in November, 1882, an action by the mortgagees for possession was pending. Under these circumstances he effected insurance on the machinery, and the policy contained the usual condition providing that the company might discharge their liability by reinstatement. In December a fire occurred, and the premises and machinery were damaged. In January the mortgagees went into possession. The insurers elected to reinstate, and repaired the machinery while the premises were in possession of the mortgagees. The assured objected to this course, and claimed payment of the amount of loss or damage. The dispute went to arbitration, and the arbitrator stated a case for the opinion of the Court as to whether the insurers were entitled under the circumstances to exercise the option of reinstating the machinery. The assured contended that the fact that the premises and machinery had passed from the possession of the assured made it impossible for the insurers to reinstate within the meaning of the contract, and that they were therefore bound to indemnify them by a money payment. The Court of Appeal held that the insurers were entitled to exercise the option of reinstating the machinery; the assured might have removed the machinery to some other convenient place and required the insurers to repair it there, but he left it where it was, and the insurers had fulfilled their contract by repairing it.

Reinstatement under 14 Geo. 3, c. 78.

The right of the insurers, under the Statute 14 Geo. 3, c. 78, to cause the insurance money to be laid out in reinstatement,

(*n*) *Anderson* v. *Commercial Union* (1885), 55 L. J. Q. B. 146.

and their duty to do so when so required by other persons interested, must be distinguished from the insurers' right of election under the contract. When they exercise their right under the contract they must restore the premises to their original condition, no matter what the ultimate cost may be. When they exercise their right or are compelled to perform their duty under the statute the obligation is merely to cause the insurance money to be expended in rebuilding or repairing the premises as far as the money will go. There is no obligation to make complete reinstatement if the insurance money is insufficient.

Metropolitan Building Act, 1774, sec. 83

An Act for the further and better Regulation of Buildings and Party Walls: and for the more effectually preventing mischiefs by fire within the Cities of London and Westminster and the Liberties thereof and other the Parishes, Precincts and Places within the Weekly Bills of Mortality (*p*), the Parishes of Saint Mary-le-Bow, Paddington, St. Pancras, and St. Luke at Chelsea, in the County of Middlesex. 14 Geo. 3, c. 78, sec. 83.

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83. And in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered, be it further enacted by the authority aforesaid, that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorised and required upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings have been guilty of fraud or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended as far as the same will go towards rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall within sixty days next after his, her, or their claim is adjusted give a sufficient security to the governors or directors of the insurance office where such house or houses or other buildings are insured that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be in that time settled and disposed of to and amongst all the contending parties to the satisfaction and approbation of such governors or directors of such insurance office respectively.

(*p*) This is the area within which, prior to the Registration of Births, Deaths, and Marriages Act, 1836, provision was made for the recording of deaths in London. The area to which the Act applies corresponds substantially to the present Metropolitan area as defined in the Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), s. 250.

Scope of the statute.

The statute only applies to insurances on any house or houses or other buildings, and is therefore inapplicable to policies on goods or other movable property such as trade fixtures or tenant's fixtures, which would not pass under a conveyance of "all that house and buildings" (*q*). The insurers cannot exercise the right as against the assured unless (1) reinstatement has been demanded by some other person interested in the premises, or (2) they have reasonable grounds of suspicion of fraud or arson. The statute does not say that the assured must be the suspected person, and probably the words are not so limited by any necessary implication. If within sixty days the assured gives a sufficient security that the money shall be laid out in repair or reinstatement the insurers are bound to pay over the money so that the assured may execute the work himself.

Whether it applies outside the Bills of Mortality.

There is still some doubt as to whether the application of section 83 of 14 Geo. 3, c. 78, is not confined to buildings within the Bills of Mortality. The statute is primarily a London Building Act, applicable only to the areas specified in the title to the Act. The greater part of the Act has been repealed and replaced by more recent Metropolitan Building Acts, but the 83rd and 86th sections have been preserved. The difficulty is created by the fact that throughout the Act numerous provisions are prefixed with the qualification "within the limits aforesaid." On the other hand, some provisions, as in the 84th section, are prefixed with the words "within the limits aforesaid or elsewhere within the kingdom of Great Britain." Several provisions, however, including the 83rd and 86th sections, are in general terms without any indication of the limits of their application. In *Vernon* v. *Smith* (*r*) it appears to have been assumed by the Court of King's Bench that the application of the 83rd section was limited to the Bills of Mortality, but the question was neither argued nor decided. Then, in *Richards* v. *Easto* (*s*), Baron Parke, delivering the judgment of the Court of Exchequer, said that the 84th and 86th sections were of general application, and not local. This dictum, however, in respect of the 86th section was unnecessary. The decision was sufficiently supported by the fact that the 84th section was general, and it is expressly stated in that section that it is so. In *Filliter* v. *Phippard* (*t*) the question was whether section 86, which exempts

(*q*) *Gorley, Ex parte* (1864), 4 De G. J. & S. 477; *Quicke's Trusts, In re*, [1908] 1 Ch. 887.

(*r*) (1821), 5 B. & Ald. 1.

(*s*) (1846), 15 M. & W. 244.

(*t*) (1847), 11 Q. B. 347.

proprietors from liability in respect of fires accidentally beginning on their property, was a defence to an action brought by the proprietor of land against his neighbour for damages by fire alleged to have been caused by the defendant's negligence. Lord Denman, C.J., delivering the judgment of the Court of Queen's Bench said, with reference to this section, " We cannot doubt that Baron Parke in *Richards* v. *Easto* (*u*) rightly viewed it as a general law." They, however, gave judgment for the plaintiff on the ground that the section did not apply to fires caused by the negligence of the defendant or his servant. The opinion as to the general application of the statute did not therefore affect the ultimate decision of the Court. In *Ex parte Gorley* (*x*) the application of the 83rd section beyond the Bills of Mortality was definitely argued and decided for the first time (*y*).

Gorley, Ex parte (1864), 4 De G. J. & S. 477

Gorley, Ex parte.

The assured was lessee of certain licensed premises and effected insurance for his own benefit on the premises and trade fixtures therein. The assured in his lease covenanted to deliver up the trade fixtures to the lessor at the termination of the lease. He mortgaged his leasehold interest in the premises and fixtures to secure a loan. The premises were destroyed by fire and the assured became bankrupt. The assignee in bankruptcy claimed the insurance money, but the lessor and mortgagees claimed that it should be applied towards reinstatement. The Commissioner in Bankruptcy decided that the application of the 83rd section was limited to the Bills of Mortality and held that the assignee was entitled to the insurance money (*z*). On appeal Lord Westbury held that the section was of general application and that in so far as the premises were concerned the insurance money thereon must be applied in reinstatement; but in so far as the fixtures were concerned the assignee was entitled to the insurance money thereon since the section applied only to houses and buildings.

Westminster Fire v. Glasgow Provident (1888), 13 A. C. 699

Westminster Fire v. *Glasgow Provident.*

The question was raised in the House of Lords whether the 83rd section applied to Scotland. Lord Halsbury, L.C., declined to consider the point as it was not pleaded or argued in the Courts below. Lord Selborne gave no opinion on this point either, but Lord Watson said, " Having regard to the preamble of the statute and to the general scope of its provisions, it humbly appears to me that if a question were to arise as to its applicability within the realm of England beyond the Bills of

(*u*) (1846), 15 M. & W. 244.

(*x*) (1864), 4 De G. J. & S. 477; 11 L. T. 319.

(*y*) The point was argued at length before Page Wood, V.C., in *Simpson* v. *Scottish Union* (1863), but the case was decided on other grounds, and no opinion was expressed on the scope of the statute.

(*z*) Sub nom. *Ex parte Leney and Evenden* (1864), 10 L. T. 697.

Mortality, the decision in *Ex parte Gorley* (*b*) would have to be carefully considered. In my opinion the Act was not intended by the Legislature to have any application to Scotland. It was passed in order to amend previous legislation which had no reference to that country, and the whole tenor of its enactments and the remedies which these provide appear to me to indicate that they were not meant to be administered by Scotch Courts." And during the argument Lord Watson said that the provision contained in section 86 to the effect that the defendant might "plead the general issue" would have been utterly unintelligible and incapable of application in the Scotch Courts.

Present state of the law.

At present Lord Westbury's decision in *Ex parte Gorley* (*b*), to the effect that the 83rd section applies throughout England, is binding on all Courts of first instance in England, and has been followed in a recent case by Swinfen Eady, J. (*d*); but the whole question is open to review in the Court of Appeal. In Scotland there is no decision binding any Court, Lord Watson's opinion being purely *obiter*. It is submitted that, notwithstanding what Lord Watson has said, the decision of Lord Westbury in *Ex parte Gorley* is right. The same arguments apply equally to sections 83 and 86. In neither is there the slightest shadow of reason for limiting the provisions to the Bills of Mortality. The evil intended to be remedied was general, not local. Too much stress ought not to be placed on the fact that section 84 is expressly applied to the whole of Great Britain. It is not a necessary inference that because there is no corresponding expression in sections 83 and 86 that therefore they must be deemed to be limited in operation to the Metropolitan area. The fact that section 84 is a penal section may account for the greater precision in defining the limits. If it had been intended to limit the application of sections 83 and 86 it is difficult to understand why such general words should be used, while in section 85, where the provisions as to police are of an essentially local character, the application should be expressly limited to fires "within the limits aforesaid." As regards the application of these sections to Scotland there is no doubt that section 84 was intended to apply to Scotland, and therefore Lord Watson's observations do not apply to the whole Act. Again, the criticism that the provisions in section 86 relating to procedure would be inapplicable to Scotland is not a conclusive argument against the application of the rest of the section or the rest of the Act to Scotland. It was by no means uncommon to insert such provisions in statutes which were clearly intended to

(*b*) (1864), 4 De G. J. & S. 477.
(*d*) *Quicke's Trusts, In re,* [1908] 1 Ch. 887.

apply to Scotland, as, for instance, the Copyright Act, 1842, where there is a similar provision as to pleading the general issue (*e*). Such provisions must, on applying the Act to Scotland, be taken *pro non scripto*. It is submitted, therefore, that sections 83 and 86 do apply not only to England beyond the Bills of Mortality, but to the whole of Great Britain, that is, within the same limits as was expressly enacted with regard to the penal section 84. The provisions of this Act do not apply to Ireland (*f*).

Meaning of "insurance money."

The meaning of the words "insurance money" has been the subject of considerable discussion. Primarily no doubt the words refer to the money which, but for the Statute, would be payable to the assured in cash, and do not mean the total sum insured. Difficulty, however, arises where the assured's interest in the buildings is less than their total value as in the case of a lessee or tenant for life. A cash payment to him of, say £100, might represent the full value of his interest in the buildings, and would therefore completely indemnify him; but if the landlord or reversioner not being insured demanded reinstatement, the expenditure of £100 in rebuilding might mean only a partial reinstatement, and leave the assured to a great extent unindemnified. This would be a strange result if the amount insured was sufficient to cover a complete reinstatement. On the other hand, if the company is bound to make complete reinstatement the statute which is primarily designed for the protection of the community operates to increase the contractual liability of the company. It is submitted, however, that it has this effect. The "insurance money" is the sum which the company contracts to pay. It contracts to pay an indemnity. The proportion of the amount insured required to indemnify the assured may vary according to circumstances. If the statute is invoked a larger sum is required to indemnify an assured with a limited interest than would be required if the statute were not invoked, and the company must pay accordingly. Another way of putting the assured's case is that where the statute may be invoked he has an insurable interest to the full value of the property, and is thus entitled *primâ facie* to recover the full value (*ff*). This is the "insurance money" which must be laid out in reinstatement,

(*e*) 5 & 6 Vict. c. 45, s. 26.

(*f*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355, 366.

(*ff*) *Simpson* v. *Scottish Union* (1863), 1 H. & M. 618, 628; *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355, 366.

although it may be that if the statute was not invoked the company could say that the assured was bound to accept the smaller sum which in that event would fully indemnify him.

Who are entitled to the benefit of the statute.

It has been doubted whether section 83 of 14 Geo. 3, c. 78, entitles all persons interested in the property to interfere, or whether its application is not limited to a certain class of persons interested. The words of the section are that the insurers shall cause the insurance money to be laid out in rebuilding " upon request of any person or persons interested in or entitled unto any house or houses or other buildings . . . damaged by fire." These words are sufficiently wide, but the concluding words of the section providing that the insurers may pay if " the money shall be . . . settled and disposed of to the satisfaction of all the contending parties " has suggested the inference that the section is only available to persons who are interested in the sense that they have a claim upon the insurance money. Thus, in *Westminster Fire* v. *Glasgow Provident* (*g*), Lord Selborne doubted whether the section applied so as to entitle a postponed bondholder to call upon the insurer of a prior bondholder to lay out the insurance money payable to the latter in reinstatement, each bondholder having insured on his own interest and clearly having no claim on the other's insurer. Speaking of the section, he said : " It has not, as far as I know, ever been decided that it applies as between mortgagor and mortgagee or (which is the same thing in effect) as between prior and puisne incumbrancers." There is practically no authority on the point, but *Ex parte Gorley* (*h*) is authority for holding that " persons interested " are not limited to persons who have some claim on the insurance money, because in that case the insurance by a lessee was clearly effected for his own benefit, and the lessor and mortgagee made no claim to the insurance money, but only claimed a right to insist that the insurers should reinstate instead of paying the money to the lessee's assignee in bankruptcy. It should also be noted that in that case the lessee's mortgagee was one of the applicants for reinstatement, and although the case contains no decision that he alone would have been entitled to interfere, it is significant that it does not appear to have been suggested throughout the proceedings that the section was not enforceable by a mortgagee desiring to obtain the benefit of the mortgagor's insurance. In one case it was argued that although

(*g*) (1888), 13 A. C. 699.

(*h*) (1864), 4 De G. J. & S. 477.

a lessor could enforce the statute against a lessee who insured, a lessee could not enforce it against a lessor who insured entirely for his own benefit (*i*). The case was settled, and the point was not decided. In *Wimbledon Park Golf Club, Ltd.* v. *The Imperial* (*k*) a lessee sought to enforce the statute against the lessor's insurers, and it was not suggested that the statute did not apply to such a case.

In the case of *In re Quicke's Trusts* (*l*) it was held that where trustees of settled land had insured under the powers contained in the Conveyancing Act, 1881, s. 42, and the Trustee Act, 1893, s. 18 (1), and had paid the premiums out of income, the remaindermen were entitled as against the tenant for life to claim the benefit of the statute and have the insurance moneys applied in reinstatement of the premises.

It is submitted, therefore, that the statute can be enforced by a mortgagee against the mortgagor's insurers and *vice versâ*, and by a lessee against the lessor's insurers and *vice versâ*, and by a remainderman against the insurers of the tenant for life, and that the person claiming the right to enforce the statute need not show that he has otherwise any claim to the benefit of the insurance money.

Contracting out of the right to claim the benefit of the Act.

It may be that by reason of the terms of the contract between the assured and the party claiming reinstatement the assured may be entitled to payment of the insurance money in cash. If so, the party so claiming reinstatement will not be allowed to enforce the statute so as to violate his contractual obligations, and the Court will, at the instance of the assured, grant an injunction restraining him from giving notice to the insurers or otherwise enforcing the statute.

Reynard v. Arnold (1875), L. R. 10 Ch. 386

Reynard v. *Arnold.*

A lessee in pursuance of a covenant in the lease effected insurance on the premises for the joint benefit of lessor and lessee. Under the lease the lessee had an option to purchase the premises at a specified price within a specified time. On a fire happening the lessee elected to purchase and demanded that the insurance money should be applied in part payment of the price. The lessor, on the other hand, demanded reinstatement, and gave notice to the office under the statute. The Court held that the lessee was right, and granted an injunction restraining the lessor from requiring the insurance money to be applied in reinstatement.

(*i*) *Paris* v. *Gilham* (1813), Coop. Ch. C. 56.

(*k*) (1902), 18 T. L. R. 815.

(*l*) [1908] 1 Ch. 887.

As between mortgagor and mortgagee, the mortgagee may be entitled, either by the express terms of the mortgage deed or under the terms of section 23 of the Conveyancing Act, 1881 (*m*), to have any insurance money applied towards discharge of the mortgage debt, and if so, the mortgagee could restrain the mortgagor from demanding that the insurers should apply the money in reinstatement (*mm*). In *Rayner* v. *Preston* (*n*), where it was decided that a vendor who had effected insurance and then contracted to sell was not trustee of the insurance for the benefit of the purchaser, it was said that the purchaser might have obtained the benefit of the insurance by giving notice to the vendor's insurers to cause the money to be laid out in reinstatement, and this is no doubt right since, although the purchaser was not by his contract entitled to claim any benefit from the insurance, he was, on the other hand, under no contractual obligation to permit the money to be received in cash by the vendor, and therefore there was nothing to prevent him enforcing the statute in his own interest. But where the conditions of sale provide that the purchaser shall take all risks after the agreement is signed, this probably precludes the purchaser from getting the benefit of the vendor's insurance by demanding reinstatement.

Reinstatement may be demanded although no suspicious circumstances.

If a request is made for reinstatement the insurers are bound to comply with it, although neither they nor the parties applying have any suspicion of fraud (*o*). The right of the insurers to reinstate upon reasonable suspicion of fraud or arson is distinct from their right and duty to reinstate when properly required to do so.

There must be a distinct demand before the claim is settled.

The demand to reinstate must be made to the insurers before they have paid the insurance moneys to the parties otherwise entitled to payment (*p*). The demand must also be a distinct and definite request to the insurers to act upon the statute. A mere claim to the benefit of the insurance money is not sufficient.

Simpson v. Scottish Union (1863), 1 H. & M. 618

Simpson v. *Scottish Union.*

A lessee insured the demised premises in pursuance of a covenant in the lease. After a fire had occurred the lessor went to the insurer's office, and the Secretary said that the case was a suspicious one. The lessor then said that

(*m*) 44 & 45 Vict. c. 41. *Vide infra*, p. 774.

(*mm*) This, however, would not affect the right of the office to exercise its option under a reinstatement clause in the policy or to rely upon the statute if they suspected fraud.

(*n*) (1881), 18 Ch. D. 1.

(*o*) *Vernon* v. *Smith* (1821), 5 B. & Ald. 1.

(*p*) *Simpson* v. *Scottish Union* (1863), 1 H. & M. 618.

he claimed to be entitled to the benefit of the policy and to have the amount laid out towards rebuilding the houses. After this conversation the lessor sent the following notice to the Secretary: "Sir, As the owner of the houses . . . destroyed by fire on the 10th instant, insured in your office by A. B., I hereby give you notice not to pay any money in respect of that policy to him or any one on his behalf, believing myself to be entitled to the benefit of that insurance, having sustained a heavy loss by the burning of these premises." Thereafter the insurers settled with the lessee by paying him a sum insured by him under a separate policy on his stock-in-trade in consideration of his abandoning all claims upon the first-mentioned policy. The lessor thereupon proceeded to rebuild, and during the rebuilding made demand upon the company to pay the insurance money to him or expend it on rebuilding. On refusal the lessor completed the reinstatement, and sued the insurers for the insurance money. The Court decided that there was no sufficient request to have the money applied under the terms of the statute. No reference was made to the statute, and there was nothing more than a demand to have the benefit of the insurance moneys. In the absence of a formal demand to the insurers to reinstate the premises pursuant to the statute the person interested had no right under the statute to claim any benefit from the insurers. And even when a formal demand was made the applicant had no right to have the moneys paid to him, and the insurers had no power to deal with the money otherwise than by reinstating the premises.

The statute gives third parties no claim to a charge on the insurance money.

Apart from the right to require the insurers to cause the money to be laid out in reinstatement the statute does not confer upon any person any right to claim the benefit of an insurance (*q*). When the money has been paid unconditionally to the assured, the statute does not give other persons interested any right to follow the money in his hands, and they cannot by reason of the statute demand that the assured who has received the money shall reinstate or otherwise apply the money for their benefit (*r*). And even where it was alleged that the assured's solicitors had by misrepresentation on a point of law induced a person interested to refrain from enforcing the statute it was held that he had thereby no claim against the assured (*r*). He was not entitled to rely upon what was merely a statement of opinion. Third persons may by contract be entitled to demand that the assured shall apply the insurance moneys in reinstatement or otherwise give them the benefit of the insurance (*s*); but the statute 14 Geo. 3, c. 78, cannot be prayed in aid of any such claim after the insurance money has been paid over (*t*). In the case of *In re Quicke's Trusts* (*u*),

(*q*) *Simpson* v. *Scottish Union* (1863), 1 H. & M. 618.

(*r*) *Rayner* v. *Preston* (1881), 18 Ch. D. 1.

(*s*) *Garden* v. *Ingram* (1852), 23 L. J. Ch. 478.

(*t*) *Leeds* v. *Cheetham* (1829), 1 Sim. 146; *Lees* v. *Whiteley* (1866), L. R. 2 Eq. 143.

(*u*) [1908] 1 Ch. 887.

where the trustees of settled land had insured under their powers under the Conveyancing and Trustee Acts and paid the premiums out of income, the insurance money was paid to the trustees. They took out an originating summons to have the rights of the tenant for life and the remainderman to the insurance money determined. It was held that the remaindermen were entitled to exercise their right under the statute and require the sum received to be applied in rebuilding. No point was taken on behalf of the tenant for life that it was too late for the remaindermen to invoke the statute, and the decision seems to be inconsistent with the principles just stated.

Procedure to enforce the statute.

In *Simpson* v. *Scottish Union* (*x*), Page Wood, V.C., said that a third party interested in the property might enforce the statute against the insurers by a mandatory injunction, and that the insurers might thereby be compelled to expend the insurance money in reinstatement. In *Wimbledon Park Golf Club, Limited*, v. *The Imperial* (*y*), Wright, J., thought that a party interested had no right to compel the insurers to undertake the reinstatement, and held that his proper remedy was an injunction against the insurers to restrain them from paying over the insurance money until they should have obtained a sufficient security from the assured that the money should be expended in reinstatement. Now, there is no doubt that if the assured does tender a sufficient security the insurers are bound to hand the money over to him, and the fact that such security has been given is a complete answer to any claim made by the party interested against the insurers. Apparently a personal bond without sureties given by the assured will be sufficient security if the assured is financially sound (*z*). It is submitted that the bond should be executed in favour of the party interested as well as in favour of the insurers, for otherwise it is a mere indemnity to the insurers, and affords no security to the party claiming reinstatement. But it is possible that the assured may be so financially unsound that he is not in a position to offer sufficient security that the money paid will be expended in reinstatement, or he may be able but unwilling to give security. In either case the party claiming reinstatement will receive no benefit from an order against the insurers restraining them from parting with

(*x*) (1863), 1 H. & M. 618.
(*y*) (1902), 18 T. L. R. 815.
(*z*) *Wimbledon Park Golf Club, Limited*, v. *The Imperial* (1902), 18 T. L. R. 815.

the money, and it is submitted that his right under the statute does entitle him to compel the insurers to cause the insurance money to be paid out in rebuilding, and that Page Wood, V.C., was right when he suggested that a mandatory injunction was his proper remedy. The objections suggested by Wright, J., that the insurers had no power to enter on the premises, and that the parties interested were not agreed as to what should be rebuilt, may be answered by saying that the statute gives the insurers implied power to enter and reinstate any premises which they have insured, and if the parties cannot agree as to the form of reinstatement they must be content to have the insurance money expended in so far as it will go in a replica of the old building.

Payment of insurance money into Court.

The insurers may be able to escape the responsibility of rebuilding the premises by paying the insurance money into Court. If the assured demands payment of the money and a third party interested demands reinstatement, there is a proper case for interpleader, and the insurers by bringing the money into Court will get a discharge and payment of their costs (*a*). The issue will then be between the assured and the party claiming reinstatement, and if the latter succeeds the order of the Court would be to pay the money out to a builder named in the order on the certificate of an architect or surveyor that the work had been duly completed.

Section IV.—Double Insurance

Apart from conditions each insurer liable for whole loss but entitled to contribution from co-insurers.

Double insurance is where the assured insures the same risk with two or more independent insurers. Over-insurance is where the aggregate of all the insurances is more than the total value of the assured's interest at risk. Apart from express condition, both double insurance and over-insurance are perfectly lawful. A man may insure with as many insurers as he pleases and up to the full value of his interest with each one (*b*). If a loss occurs he may, in the absence of the *pro rata* contribution clause, select any one or more insurers and recover from him or them the total amount of the loss (*c*). If he fails to recover his whole

(*a*) *Paris* v. *Gilham* (1813), Coop. Ch. C. 56.

(*b*) *Millaudon* v. *Western Marine* (1836), 9 La. 27.

(*c*) *Godin* v. *London Assurance* (1758), 1 W. Bl. 103. In some American cases the assured recovered only a *pro rata* share where apparently there was no express *pro rata* clause. *Barnes* v. *Hartford Fire* (1882), 9 Fed. Rep. 813; *Blake* v. *Exchange Mut.* (1882), 78 Mass. 265.

loss from those against whom he has proceeded in the first instance, he may recover the balance from any one or more of the others. But in no event is he entitled to recover more than his loss because each contract is a contract of indemnity only, and therefore when he has recovered his total loss from some one or more of his insurers his claims against the others abate. The right to discuss his insurers in any order is a valuable right for the assured, for it protects him against loss in the event of one or more of his insurers becoming insolvent; but as it would be a considerable hardship on the insurers that one alone of several co-insurers should bear the whole loss, the doctrine of contribution was evolved, apparently by Lord Mansfield, who held that in marine insurance an insurer who paid more than his rateable proportion of the loss should have a right to recover the excess from his co-insurers, who had paid less than their rateable proportion (*d*). The same general principles of liability and contribution have been held to apply to fire insurance (*e*) and in Scotland in a case of insurance against liability for accidents, Lord Low, Ordinary, expressed an opinion that they apply to all classes of indemnity insurance (*f*). As a rule, however, fire insurance companies are not content to leave their liability on this basis, and have accordingly inserted conditions in their policies in order to protect themselves as far as possible against fraudulent over-insurances, and at the same time to obtain the maximum benefit from the contributory liability of co-insurers.

Conditions relating to double insurance.

Most fire policies contain one or other or both of the following conditions: (1) requiring the assured to disclose other insurances upon the same property subsisting at the time the policy is issued; (2) providing that in the event of other insurances subsisting at the time of the loss the company shall only be bound to pay to the assured their proper proportion of the loss. The clauses designed to effect these objects appear in many different forms and with many variations in detail, but in construing them it is always important to remember that they are aimed primarily at double insurance, that is, at cases where the assured has made

(*d*) *Newby* v. *Reed* (1762), 1 W. Bl. 416; *Rogers* v. *Davis* (1777), 2 Park, 601; *Davis* v. *Gildart* (1777), 2 Park, 601; and see Marine Insurance Act, 1907, 6 Edw. 7, c. 41, secs. 32, 80.

(*e*) *North British* v. *London, Liverpool, and Globe* (1877), 5 Ch. D. 569, 583.

(*f*) *Sickness and Accident* v. *General Accident* (1892), 19 R. 977; 29 S. L. R. 836. The rule, therefore, might also apply to guarantee and fidelity insurances, *Seaton* v. *Heath*, [1899] 1 Q. B. 782; but see *American Surety Co.* v. *Wrightson* (1910), 16 Com. Cas. 37.

contracts with other insurers upon the same property and the same interest and against the same risk, and unless a condition contains words which compel a different construction it ought only to be applied to cases which are strictly cases of double insurance.

Double insurance means insurance on the same property.

The first essential element of double insurance is that the insurances must be on the same property. The Courts of Pennsylvania have held that another insurance does not "cover the same property" within the meaning of the conditions requiring notice and providing for *pro rata* liability unless such other insurance covers identically the same property no more and no less (*g*). This, however, is contrary to the general consensus of authority elsewhere (*h*). There does not appear to be any English authority on this point, but after considering the decisions in the other American States and in Canada, the better opinion undoubtedly seems to be that there is double insurance within the meaning of these conditions, and for the purposes of contribution, whenever another policy does in effect cover a substantial part of the property already insured, and English fire insurance companies have for long acted upon this assumption. Thus there is double insurance where item A is insured by one insurer and items A and B are insured for a single undivided premium by another insurer, or where goods are covered by a floating policy and part of the goods so covered are also insured specifically. Such policies are contributing policies, and liable to abatement under the *pro rata* condition. In a recent case (*i*) Hamilton, J., expressed a doubt as to whether the equitable doctrine of contribution was applicable to a case where in one policy a bank was insured against loss of securities from fire, burglary, or dishonesty of employees in a sum of £40,000 without apportionment, and in another policy the bank was insured against loss through dishonesty of employees, and a maximum amount was insured against each employee. This case does not, however, appear to throw any serious doubt on the proposition that there may be contribution, although the risk

(*g*) *Lumber Exchange Co.* v. *American Central* (1898), 183 Pa. 366; *Clarke* v. *Western* (1891), 146 Pa. 561; *Royal Insurance* v. *Roedel* (1875), 78 Pa. 19; *Sloat* v. *Royal Insurance* (1865), 49 Pa. 14.

(*h*) *Unitarian Congregation* v. *Western* (1866), 26 U. C. Q. B. 175; *Ogden* v. *East River* (1872), 50 N. Y. 388; *Page* v. *Sun Insurance* (1896), 74 Fed. Rep. 203; *Ramsay Woollen Cloth Co.* v. *Mutual Fire* (1854), 11 U. C. Q. B. 517; *Lesure Lumber* v. *Mutual Fire* (1897), 101 Iowa, 514; *Houyh* v. *People's Fire* (1872), 36 Ind. 398.

(*i*) *American Surety Co.* v. *Wrightson* (1910), 16 Com. Cas. 37.

covered by the two policies is not identical either in respect of the subject matter or the perils insured against.

The same risk.

There is no double insurance unless at least a substantial part of the same risk is covered by both insurances, and the fact that two insurances may under certain circumstances overlap so as to insure the same property against the same risk for a brief period does not constitute a double insurance within the meaning of the condition requiring notice to be given (*k*), although, on the other hand, if the loss does in fact happen when the property is covered by both insurances there would probably be double insurance within the meaning of the *pro rata* clause and for the purposes of contribution.

Australian Agricultural Insurance v. Saunders (1875), L. R. 10 C. P. 668

Australian Agricultural Insurance v. *Saunders.*

An insurance against fire was effected on wool "in all or any shed or store on station or in transit to Sydney by land only, or in any shed or store, or any wharf in Sydney until placed in ship." This policy contained the condition, "No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing." Subsequently the assured effected a marine insurance, "at and from the River Hunter to Sydney per ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne, and of transhipment on landing, and reshipment at Sydney." The wool was shipped to Sydney, where it was landed and deposited in the stevedore's warehouse to await reshipment. The wool was burned while in the warehouse, and this action was brought on the fire policy. The insurers pleaded double insurance without notice; but the Court held that there was in fact no double insurance. This loss was not covered by the marine policy, and they thought there was no possibility of the policies overlapping, but even if there was a possibility of overlapping during a short period, that was not "insurance elsewhere" within the meaning of the condition, and Pollock, B., said (*l*), "These conditions have been of late inserted into fire policies with the object of enabling the insurers to know the character of the risk and that the parties had the real value of the goods insured. But it would manifestly be quite immaterial to the underwriters of a fire policy, whether they knew or not that the assured had a wide marine policy also even if the two policies might in some event overlap;" and Blackburn, J., said (*m*), "I think the meaning of an insurance elsewhere in the fire policy is an assurance specifically covering the same risk and not a mere possibility that at some point another policy should attach;" and Lush, J., said (*n*), "The clause refers to subsequent insurances obviously intended to cover the same risk."

(*k*) *Australian Agricultural Insurance* v. *Saunders* (1875), L. R. 10 C. P. 668; *Mead* v. *American Fire* (1897), 13 Hun. App. 476.

(*l*) 33 L. T. 447, 450.
(*m*) L. R. 10 C. P. 668, 676.
(*n*) L. R. 10 C. P. 668, 677.

In an American case (*o*) the *pro rata* clause applied to "other insurances subsisting at the time of the fire, whether valid or invalid." The assured had previously effected an insurance with another company, but on some alterations being made on the premises that company refused to cover the additional risk. The assured therefore effected this policy, covering the premises as altered, and it was held that the company could not set up the original policy as a contributing policy since it was an insurance upon a different risk.

The same interest.

The next essential element of double insurance is that the insurances must cover the same interest (*p*). Where two people have different interests in the same property, and each insures his own interest on his own behalf, there is no double insurance, even although the aggregate of the two insurances is more than the total value of the property (*q*). Thus there may be independent insurance by the owner and bailee of goods (*r*), by the owner and mortgagee of house property (*s*), by a vendor and purchaser (*ss*), or by a landlord and his tenant (*t*). If each insures his own interest only there is no double insurance, and each as between his insurer and himself is entitled to a full indemnity in respect of his interest, but if the one has, apart from the insurance, a right of recourse against the other in respect of the damage, his insurer is subrogated to that right, and thus in the result one insurer may have to bear the whole loss. On the other hand, a bailee, mortgagee, or lessee may insure the owner's interest as well as his own, and if the insurance is with the owner's consent, and he also has insured, there is a double insurance of the owner's interest (*u*).

(*o*) *Liebrandt* v. *McDowell Stove Co.* (1888), 35 Fed. Rep. 30.

(*p*) *Godin* v. *London Assurance* (1758), 1 Burr. 490.

(*q*) *North British and Mercantile* v. *London, Liverpool, and Globe* (1877), 5 Ch. D. 569; *Glasgow Provident* v. *Westminster Fire* (1887), 14 R. 947; (1888), 13 A. C. 699; *Nichols* v. *Scottish Union* (1885), 2 T. L. R. 190; *Scottish Amicable Heritable Securities* v. *Northern* (1883), 11 R. 287; *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355.

(*r*) *California* v. *Union Compress* (1889), 133 U. S. 387; *Traders' Insurance* v. *Pacaud* (1894), 150 Ill. 245; *Lowell Manufacturing Co.* v. *Safeguard Fire* (1882), 88 N. Y. 591.

(*s*) *Morrow* v. *Lancashire* (1898), 26 Ont. A. R. 173; *Planters' Mutual* v. *Rowland* (1886), 66 Ind. 236; *Foster* v. *Equitable Mutual* (1854), 68 Mass. 216; *De Witt* v. *Agricultural Insurance* (1898), 157 N. Y. 353; *Burton* v. *Gore District Mutual* (1865), 12 Grant, 156; *Tuck* v. *Insurance Co.* (1876), 56 N. H. 326.

(*ss*) *Acer* v. *Merchants' Insurance* (1870), 57 Barb. 68.

(*t*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 287.

(*u*) *Home Insurance* v. *Baltimore* (1876), 93 U. S. 527; *Robbins* v. *Firemen's Fund* (1879), 16 Blatchf. 122; *Fire Insurance* v. *Merchants* (1886), 66 Ind. 339; *Hough* v. *People's Fire* (1872), 36 Ind. 398.

Godin v. London Assurance (1758), 1 Burr. 490

Godin v. *London Assurance.*

M, a merchant in St. Petersburg, was indebted to A, a London merchant. M loaded goods on board A's ship for carriage to London. A insured the goods partly on his own behalf, and partly at the request of M. M sold the goods to T, and indorsed bills of lading to him, and T insured the goods on his own behalf. In an action by T on his policy, it was held that he was entitled to recover the full value. There was no double insurance, within the proper signification of the term, because, although T might, as indorsee of the bills of lading, be entitled to the benefit of A's policy, he could not obtain such benefit without first paying off the debt to A, who had a lien upon it.

Lord Mansfield said, "If T was not to have the benefit of both policies in all events then it can never be considered as a double policy . . . for although there be two insurances yet it is not a double insurance; to call it so is only confounding terms. If T could recover against both sets of insurers yet he could not recover against the underwriters of A's policy without some expense, nor without also first paying and reimbursing to A the premiums he paid, and also the charges. This is by no means within the idea of double insurance. Two persons may insure two different interests: each to the whole value; as the master for wage, the owner for freight. But a double insurance is where the same man is to receive two sums instead of one or the same sum twice over for the same loss by reason of his having made two insurances on the same goods on the same ship. T is entitled to receive the whole from the defendants on their policy, whatever shall become of A's policy; and they will have a right, in case he can claim anything under A's policy, to stand in his place for a contribution to be paid by the underwriters to them." In so far, therefore, as T did ultimately become entitled to the benefit of the other policy there would be a double insurance to which the underwriters would contribute rateably. In so far as A took the benefit of his policy to satisfy his debt there was no double insurance, and no contribution because the insurances were on different interests.

North British and Mercantile v. London, Liverpool, and Globe (1877), 5 Ch. D. 569

North British and Mercantile v. *London, Liverpool, and Globe.*

Barnett and Co., wharfingers, held grain belonging to Rodocanachi and Co., merchants, and by the custom of the trade, the wharfingers were liable for any loss, however occurring. B. and Co. insured with the London, Liverpool, and Globe, grain in their warehouse at Rotherhithe, "the assured's own, in trust, or on commission, for which they are responsible." R. and Co. insured their grain with the North British and Mercantile. Both policies contained the condition that if at the time of the loss there should be any other subsisting insurances, whether effected by the insured, or by any other person covering the same property the company should not be liable for more than a rateable contribution. A fire occurred in the warehouse, and the grain was destroyed. The loss was by agreement between the companies paid in full to the owners without prejudice to their right of contribution *inter se*. It was held that this was not a case of double insurance because the two companies had insured distinct interests. The insurers of the wharfingers insured them in respect of their own interest and liability, and the owners of the goods could have made no claim on that insurance. Apart from the condition the North British,

on paying the loss to the merchants, would be entitled to subrogation to their claim against the wharfingers, and as the wharfingers would be entitled to an indemnity from the London, Liverpool, and Globe, the latter would have to bear the whole loss. Since there was no double insurance there was no right of contribution either on general common law principles or by reason of the *pro rata* clause which had no application. Mellish, L.J., said, "Now I do not know of any English cases on the subject of contribution as applied to fire policies; but I can see no reason why the principle in respect of contribution should not be exactly the same in respect of fire policies as they are in respect of marine policies, and I think if the same person in respect of the same right insures in different offices there is no reason why they should not contribute in equal proportions in respect of a fire policy as they would in respect of a marine policy. The rule is perfectly established in the case of a marine policy that contribution only applies when it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights. The reason of that is obvious enough. Where different persons insure the same property in respect of their different rights they may be divided into two classes. It may be that the interest of the two between them make up the whole property as in the case of a tenant for life and remainderman. Then, if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interest, and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole as in the case of mortgagor and mortgagee, but wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure to the full value because in certain events, for instance if the other person became insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest: but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think, whenever that is the case, the company which has insured the person who has the remedy over, succeeds to his right of remedy over, and then it is a case of subrogation."

Scottish Amicable v. Northern Insurance (1883), 11 R. 287

Scottish Amicable v. *Northern Insurance.*

Certain house property was disposed in security (mortgaged) to successive incumbrancers. Each insured in his own name *primo loco*, and in the name of the proprietors in reversion, and each policy contained the *pro rata* liability clause. After a loss the first incumbrancers brought this action against their insurers, who contended that they were only bound to pay a rateable proportion with the insurers of the other incumbrances. It was held that the clause did not apply since no individual interest was doubly insured except

that of the proprietor, and as there was not sufficient to satisfy the various incumbrancers there could be no claim in respect of his interest. In the *Glasgow Provident* v. *Westminster* (*u*) this decision was further considered and approved by the Court of Session.

Andrews v. Patriotic (1886), 18 L. R. Ir. 355

Andrews v. *Patriotic.*

Certain house property was insured by landlord and tenant independently. The tenant covenanted to repair but not to insure, and each insured *simpliciter* on the property without specifying his interest. A fire having occurred the tenant recovered the full loss from his insurers and subsequently became bankrupt without having reinstated the premises. The landlord then sued his insurers, who contended that they were only liable for a *pro rata* contribution under the clause in their policy. It was held that landlord and tenant had each insured only his own interest in the premises, and that as the landlord could obtain no direct benefit from the tenant's insurance there was therefore no double insurance, and the landlord was entitled to recover the whole loss from the insurers whose only recourse would be against the tenant in respect of his covenant to repair. Palles, C.B., said, "*Primâ facie* you would not expect to find a condition making void the policy or reducing the sum recoverable by reason of the act of a third party over whom the assured had no control, unless such act would involve the reinstatement of the premises or an indemnity against the risk insured against being received by the assured from some other source than that provided by the policy. . . . I have to express my decided opinion, and it is in my view a necessary part of our decision in this case that there is no law in this country (Ireland) which entitles the landlord of a house destroyed by fire to insist, in the absence of express contract, on the money received by his tenant from an insurance company being specifically applied to the reinstatement of the premises. In my opinion the remedy of the landlord in this country is a remedy *in personam* against the tenant upon his covenant to repair, and is nothing more. He has no specific right, such as the landlord has in England under the statute."

When assured receives indirect benefit from insurance on another interest.

The judgment of Palles, C.B., in *Andrews* v. *Patriotic* raises the question whether insurances by different persons on different interests may not be treated as double insurances if one person will or can get the benefit of both, as in the case suggested where under the provisions of 14 Geo. 3, c. 78, a landlord could compel his tenant's insurer to cause the insurance money to be expended in reinstatement. Probably in the case of this statute the answer is that no one is bound to invoke the statute, but may rely on his own insurers to pay the loss, in which case there is no double insurance. If, however, the landlord does invoke the statute and compels reinstatement by the tenant's insurer, then there is double insurance, and the tenant's insurer can call upon the landlord's insurer to contribute rateably to the cost of

(*u*) (1877), 14 R. 947.

reinstatement. The same observations apply to mortgagors and mortgagees and other persons who have insured their own interest but are also in a position to avail themselves of other parties' insurances by calling on the insurers to reinstate. Again, if the assured is so placed that he must necessarily derive benefit from another party's insurance, it may be that *pro tanto* there is double insurance even although the insurances are on different interests.

Nicholls v. Scottish Union (1885), 2 T. L. R. 190; 4 R. 1094

Nicholls v. *Scottish Union.*

The rules of a building society provided that any property mortgaged to the society should be insured in the name of trustees, and that the premiums should be charged to the member; that in the case of loss the insurance moneys should be applied in paying off the debt or at the option of the board in repairing the damage. The society sold certain paper mills to A. and Co. who mortgaged the property to the society in order to secure part of the purchase price remaining unpaid. An insurance in X. Co. was effected in accordance with the rules of the society, and subsequently A. and Co. insured the property for their own benefit with Y. Co. Both policies contained the usual *pro rata* liability clause. On a loss occurring A. and Co. sued their insurers, who contended that they were only liable to a *pro rata* contribution. A divisional Court sustained this contention on the ground that the society's policy insured the interest of both parties, since the debt was to be paid off with the insurance money. There was, therefore, a double insurance and consequently the *pro rata* clause applied.

The decision in *Nicholls* v. *Scottish Union* is not altogether satisfactory. It does not appear that the mortgagees insured anything but their own interest. It is true they charged the mortgagor with the insurance premiums and contracted to give him the benefit of the insurance by paying off the debt, but there was not an insurance of the mortgagor upon his own interest, and the decision can only be supported on the ground that there is a double insurance where the assured has a contractual right to the benefit of another party's insurance on his own interest. This is at least a doubtful proposition, and it is open to question whether in such circumstances as appeared in *Nicholls* v. *Scottish Union* the true view is not this, that each insured their own interests, and that therefore each insurer ought to have paid in full in the first instance, but that since the mortgagor had a contractual right against the mortgagee to have his debt paid off from the mortgagee's insurance moneys the mortgagor's insurer ought to have been subrogated to the benefit of that contract, so that in

the result the whole loss should have fallen on the mortgagees' insurers.

For the benefit of the same assured.

Whether or not the insurances must in every case be strictly on the same interests it is clear there can be no double insurance unless at or before the time of the loss the same person has become entitled to the benefit of the whole or part of both insurances, either directly as the assured or indirectly by being in a position to claim the benefit of the insurance money.

De Witt v. Agricultural Insurance (1898), 157 N. Y. 353

De Witt v. *Agricultural Insurance.*

A, the owner of a building, having insured it, sold it to B, but took a mortgage for part payment of the purchase price. The policy was indorsed by consent of all parties, "B is now recognised as owner of this policy and property . . . loss, if any, payable to A mortgagee as interest may appear." B then contracted to sell to C, and C insured the property in his own name. Before completion, A, thinking that the property had been conveyed to C, went to the first insurers, and for his own protection, and without the knowledge or authority of B or C, obtained an indorsement on the policy to the effect that C was now owner. A fire having occurred B assigned the benefit of this policy to C, who sued upon it. The company contended that the policy was void by reason of the double insurance of C. It was held that there was no double insurance, because at the time of the loss B, as vendor, was insured under the policy sued on in respect of his own interest, the indorsement without the authority of B or C being ineffective, and C as purchaser was insured in respect of his interest. The fact that after the loss B assigned the benefit of his insurance to C did not make it a case of double insurance.

Double insurance effected without authority of assured.

If an insurance is effected in the name of or upon the interest of a third party without his authority, such person has the option of adopting the insurance, and if he does so the adoption will be retrospective so as to constitute a double insurance from the time it was effected (*x*); but if he does not elect to adopt the insurance it cannot be treated as a double insurance by his other insurers (*y*). It would require very clear language to make the clauses relating to double insurance applicable to other insurances of which the assured had no knowledge or over which he had no control.

Cannon v. Home Insurance (1897), 49 La. Ann. 1367

Cannon v. *Home Insurance.*

A mortgaged certain house property to B, and covenanted to insure in his own name loss payable to B as mortgagee, and if he did not insure B

(*x*) *Dafoe* v. *Johnston District Mut.* (1858), 7 U. C. C. P. 55; *Morrow* v. *Lancashire Insurance* (1899), 26 Ont. A. R. 173.

(*y*) *Park* v. *Phœnix Ins.* (1859), 19 U. C. Q. B. 110; *Lumber Exchange* v. *American Central* (1898), 183 Pa. 366; *Lowell Manufacturing Co.* v. *Safeguard Fire* (1882), 88 N. Y. 591.

might effect such a policy and add the premiums to his security. The property was sold under a writ of *fi. fa.* to C, who purchased it subject to the mortgage, and insured it in his own name for his own benefit. B. assigned his mortgage to D, and the latter insured in the name of C loss payable to D as mortgagee. In an action by C on the first-mentioned insurance the insurers contended that the policy was void under the clause prohibiting double insurance without consent, but it was held that as D had no authority under the mortgage deed to effect insurance on behalf of C, and as C had not ratified the insurance, there was, in fact, no double insurance.

Assured ignorant of existing insurance.

Ignorance of the assured that he is in fact covered by insurance effected by his authority or by or with the authority of his predecessor in title does not relieve him from the consequences of insuring elsewhere without consent or from the other consequences of double insurance. Thus, in a Canadian case (*z*) A, having insured his property, became insolvent, and his assignee took out another policy in ignorance of the first insurance. After loss action was brought by the assignee on the first insurance, but it was held that it was void by reason of the second insurance without consent.

Where the other insurance is voidable.

There may be other insurance within the meaning of the conditions in the policy, even although such other insurance may prove to be voidable at the option of the insurer (*a*). Sometimes the conditions are framed so as to include *nominatim* all other insurances "whether valid or invalid," but apart from such express words "other insurance" means *primâ facie* other insurance which has attached and which is on the face of the policy a subsisting insurance. The assured cannot rely on the fact that the insurers might refuse payment on the ground of misrepresentation or breach of warranty (*b*). On the other hand, if on one of these grounds the insurers had before loss repudiated liability, the assured would probably be entitled to say that there was no subsisting insurance.

Where it has not attached.

There is no double insurance unless some other company is in fact on the risk (*bb*). Even although there is a valid contract to insure, if the operation of the insurance is suspended until the performance of some condition precedent, such as the payment

(*z*) *Dickson* v. *Provincial* (1874), 24 U. C. C. P. 157.

(*a*) *Hammond* v. *Citizens* (1886), 26 N. Br. 371.

(*b*) *Carpenter* v. *Providence Washington* (1842), 16 Pet. 495, 509; *Jacobs* v. *The Equitable* (1860), 9 U. C. Q. B. 250; *Bateman* v. *Lumberman's Ins.* (1899), 189 Pa. 465.

(*bb*) *Western Assurance* v. *Temple* (1901), 31 Can. S. C. 373; *Manitoba Assurance* v. *Whitla* (1903), 34 Can. S. C. 191.

of the premium, there is no double insurance until the condition precedent has been fulfilled.

Equitable Fire and Life v. Ching Wo Hong, [1907] A. C. 96

Equitable Fire and Life v. *Ching Wo Hong.*

A floating policy upon stock-in-trade in a shop contained a condition prohibiting additional insurance except with the consent of the company. During the currency of this policy the assured took another policy from another company covering the same property. This policy recited that the assured had paid a premium for insuring against loss or damage by fire, etc., and it was subject to the condition that the insurance would not be in force, nor would the company be liable in respect of damage happening, before the premium was actually paid. The premium had not been paid, and both the insurers and assured had treated the policy as non-existing. It was held that, as this policy had never attached, there was never any double insurance.

Where the other insurance is issued by company's agent without authority.

Where before the loss there had been negotiations with the agent of another company, but no contract had been definitely concluded, and after the loss the agent without authority issued a policy which the company repudiated, it was held that this was not an insurance " valid or invalid " (*d*). It would seem that if for want of authority on the part of the person purporting to act as agent no contract was ever made the assured is entitled on this ground to say that he was not insured elsewhere, although the agent might be liable to him for breach of warranty of authority ; but in one Canadian case (*e*), where the company pleaded double insurance, and the assured replied that the *interim* receipt relied on as evidence of double insurance was issued by the agent's father without authority and the company denied liability on that ground, it was held by the Court that such questions relating to the validity of other insurance could not be tried in an action upon the policy sued on, and as the assured was himself alleging against the other company that there was a valid insurance he could not be heard to deny its validity. If the assured actually receives payment in respect of a loss he cannot, as against another company, say that it was an *ex gratiâ* payment and that there was no double insurance because there was no enforceable contract (*f*).

Form of the other

The form of the other insurance is immaterial if there is a

(*d*) *Taylor* v. *State Insurance* (1899), 107 Iowa, 275.

(*e*) *Mason* v. *Andes Ins.* (1873), 23 U. C. C. P. 37.

(*f*) *Dafoe* v. *Johnston Dist. Mut.* (1858), 7 U. C. C. P. 55.

contract to insure; it is sufficient to constitute a double insurance, whether it be contained in a policy, *interim* protection note, or otherwise (*g*). insurance not material.

Difficult questions may arise where two or more policies contain conditions prohibiting double insurance. So long as the insurers have not repudiated liability each policy must, for the purpose of the others, be deemed to be a valid and subsisting insurance, and the assured cannot treat each policy in turn as being invalid in a question with the insurers upon the others. Each policy must be deemed to be a valid insurance until repudiated by the insurers, and therefore if a loss happens before either is repudiated they destroy one another (*h*). Where two or more policies each prohibit double insurance.

Where one policy contained the condition prohibiting other insurance without notice, and the other policy contained the *pro rata* condition, and on a fire happening the first insurers repudiated liability the second insurers were held to be liable only for a proportion of the loss as the other policy was subsisting at the time of such loss (*i*).

The burden of proving another subsisting contract upon the same property and on the same interest lies upon the insurers (*k*), and it has been said that in considering the effect of another insurance the assured is not prevented by the rule against parol evidence from showing that another insurance, although *ex facie*, covering the same property was not intended by the parties to cover the particular property in question (*l*). Onus on insurers to prove other insurance.

A statement by the assured in his proofs of loss that he is insured elsewhere is not conclusive evidence against him as to the existence or as to the actual terms of such other insurance (*m*).

The majority of English fire offices do not now insert in their policies either the condition prohibiting double insurance without consent or the condition making notice of subsequent double insurance a condition precedent of liability. Such conditions Conditions prohibiting double insurance.

(*g*) *Greet* v. *Citizens* (1880), 5 Ont. A. R. 596; *Mason* v. *Andes* (1873), 23 U. C. C. P. 37; *Hatton* v. *Beacon Ins.* (1859), 16 U. C. Q. B. 316.

(*h*) *Gauthier* v. *Waterloo Mut.* (1881), 6 Ont. A. R. 231; *Hubbard* v. *Hartford Fire* (1871), 33 Iowa, 325; *Hayes* v. *Mitford Mut. Fire* (1898), 170 Mass. 492.

(*i*) *Nicols* v. *London and Provincial* (1884), 5 N. S. W. R. (Law) 333.

(*k*) *Russell* v. *Fidelity Fire* (1891), 84 Iowa, 93; *Mead* v. *American Fire* (1897), 13 Hun. App. 476.

(*l*) *McMaster* v. *North American Ins.* (1873), 55 N. Y. 222; *Lowell Manufacturing Co.* v. *Safeguard Fire* (1882), 88 N. Y. 591.

(*m*) *Mead* v. *American Fire* (1897), 13 Hun App. 476; *McMaster* v. *North American Ins.* (1873), 55 N. Y. 222.

are, however, still to be found in English policies and are very common among colonial and American insurance companies. They therefore call for some consideration.

Where any other insurance without consent is prohibited, then such insurance is a breach of warranty. It does not merely suspend the insurance during the double insurance, but discharges the insurer absolutely (*mm*). Where the condition stated that other insurance must be notified and the company's consent obtained such notice and consent was held to be a condition precedent to further liability (*n*).

Whether substituted insurance need be notified.

Where the condition required all other insurances to be notified on pain of forfeiture, it was held that the substitution of another insurance in another company instead of one already notified did not require to be notified. The clause requiring notice of "other insurance" meant additional not substituted insurance (*o*).

When there is a mistake in particulars of insurance notified.

A mistake in the particulars of the additional insurance notified is not necessarily fatal (*oo*). Where additional insurance was effected after the policy was issued and the assured gave notice that additional insurance had been effected, but stated that it was in the "Equitable" for £1200, whereas it was in the "Beacon Life and Fire" for £1000, it was held that he had given sufficient notice (*p*). But where on an application for insurance the assured stated the wrong office as his insurers upon another insurance, it was held that the policy was void under the condition that any erroneous or untrue representation in the application form would avoid the policy (*q*).

Where notified insurance lapses.

If a concurrent insurance which has been notified and endorsed subsequently lapses, or is cancelled, it is not necessary in the absence of express condition to give notice that the insurance has ceased to be effective (*r*). There is no implied warranty that the other insurance mentioned in the application will be maintained (*s*).

(*mm*) *Georgia Home Insurance* v. *Rosenfield* (1899), 95 Fed. Rep. 358.

(*n*) *McBride* v. *Gore District Mutual* (1870), 30 U. C. Q. B. 451.

(*o*) *Parsons* v. *Standard Ins.* (1880), 5 Can. S. C. 233; *Lowson* v. *Canada Farmers' Fire* (1881), 6 U. C. App. 512.

(*oo*) *Benjamin* v. *Saratoga County Mutual* (1858), 17 N. Y. 415.

(*p*) *Osser* v. *Provincial* (1862), 12 U. C. C. P. 133.

(*q*) *Parsons* v. *Standard Ins.* (1879), 4 U. C. App. 326. This decision of the Court of Appeal was not reversed by the Supreme Court on this point. See 6 U. C. App. 512, 521.

(*r*) *Moore* v. *Citizens' Fire* (1888), 14 Ont. A. R. 582; *Hordern* v. *Commercial Union* (1884), 5 N. S. W. R. (Law) 309.

(*s*) *Hoffman* v. *Manufacturers* (1889), 38 Fed. Rep. 487.

What is a sufficient notification.

The conditions requiring notice of other insurance vary considerably in detail. Sometimes the giving of notice is all that is required (*t*), and there will be no breach of the condition until, after the other insurance has been effected, a reasonable time has expired without notice being given (*tt*); but usually the consent of the company to the double insurance is made a condition precedent, and the consent must be notified by indorsement on the policy or otherwise in writing (*u*). If other insurance is effected without consent the company's liability is suspended until consent is obtained and signified in the proper manner (*x*).

Waiver.

Like other conditions in the policy the condition relating to double insurance may be waived or any breach thereof may be waived by the company or its agents having proper authority (*y*). An indorsement on the policy may expressly or impliedly sanction concurrent insurance up to a specified amount (*yy*). Generally speaking the company's officer or agent with authority to make the contract would have authority to waive the condition (*z*), The making or continuing of the contract with knowledge of other insurance would be a waiver of the breach. Thus, if the policy is issued or a renewal premium accepted with full knowledge of the other insurance, notice and consent in the prescribed form is waived (*a*), and under certain circumstances the knowledge of the agent may be the knowledge of the company (*b*). Where an agent was authorised to bind the company by *interim* receipt, but not otherwise, his issuing the receipt with knowledge of other insurance was a waiver of the condition as far as the *interim* protection was concerned, but the company's liability on

(*t*) *Hendrickson* v. *Queen Ins.* (1871), 31 U. C. Q. B. 547.

(*tt*) *Commercial Union* v. *Temple* (1898), 29 Can. S. C. 206.

(*u*) *Noad* v. *Provincial* (1859), 18 U. C. Q. B. 584; *Osser* v. *Provincial* (1862), 12 U. C. C. P. 133.

(*x*) *Weinaugh* v. *Provincial* (1870), 20 U. C. C. P. 405; *Fair* v. *Majara District* (1876), 26 U. C. C. P. 398; *McCrea* v. *Waterloo County* (1876), 26 U. C. C. P. 431.

(*y*) *Blake* v. *Exchange Mutual* (1882), 78 Mass. 265.

(*yy*) *Parsons* v. *Standard Fire* (1880), 5 Can. S. C. 233; *Union National* v. *German Insurance* (1896), 71 Fed. Rep. 473; *Palatine Insurance* v. *Ewing* (1899), 92 Fed. Rep. 111.

(*z*) *Jacobs* v. *The Equitable* (1858), 17 U. C. Q. B. 35.

(*a*) *Carroll* v. *Charter Oak* (1863), 40 Barb. 292; *McIntyre* v. *East Williams Mut.* (1889), 18 Ont. R. 79; *Klein* v. *Union Fire* (1883), 3 Ont. R. 234.

(*b*) *Erb* v. *Fidelity Ins.* (1896), 99 Iowa, 728; *Shannon* v. *Gore District Mutual* (1878), 2 U. C. App. 396; *Northern Assurance* v. *Grand View* (1901), 183 U. S. 308; *Palatine Insurance* v. *M'Elroy* (1900), 100 Fed. Rep. 391; *M'Elroy* v. *British American* (1899), 94 Fed. Rep. 990; *United Fireman's Insurance* v. *Thomas* (1897), 82 Fed. Rep. 406; *Hartford Fire* v. *Small* (1895), 66 Fed. Rep. 490; *Union National* v. *German Insurance* (1896), 71 Fed. Rep. 473.

the permanent insurance was held to be discharged because the directors, when they issued the policy, had no knowledge of the other insurance (*c*). After loss the insurers do not waive the breach of the condition against double insurance by merely investigating the claim and asking for further proof of loss after knowledge of the double insurance and without taking objection (*d*), and neither the local agent nor the inspector of the company with authority to adjust claims can be presumed to have authority to waive a breach of the condition (*e*).

Section V.—Contribution without Average (*a*)

Contribution clause.

When there are two or more insurances on any one risk the principle of contribution applies as between the different insurers. Apart from any condition in the policies, any one insurer is bound to pay to the assured the full amount for which he would be liable if his policy stood alone; but having paid he is entitled to an equitable contribution from his co-insurers on the same principle as co-sureties are bound to contribute *inter se* when any one is called upon by the creditor to pay (*b*). The contribution clause which is found in most fire policies has for its object the limitation of the primary liability of each insurer to his assured, so that he shall not be bound to pay more in the first instance than his rateable proportion as between himself and his co-insurers.

The following is an example of the modern contribution clause:—

If at the time of any loss or damage happening to any of the property hereby insured there be any other subsisting insurance or insurances effected by the Insured or by any other person or persons on his behalf covering such

(*c*) *Billington* v. *Provincial* (1877), 2 U. C. App. 158; (1879), 3 Can. S. C. 182.

(*d*) *Fair* v. *Niagara District* (1876), 26 U. C. C. P. 398.

(*e*) *Western Assurance* v. *Doull* (1886), 12 Can. S. C. 446.

(*a*) Fire Loss Apportionments, 1906 by T. J. Milnes; Fire Loss Apportionments, 1909, by John Laird and James Laird; Average and Contribution in Fire Insurance, 1911, by H. S. Bell; Remarks on the Apportionment of Fire Losses, 1869, by W. H. Hore; The Principles and Finance of Fire Insurance, 1904, by F. H. Kitchin; Policy Conditions and their Bearing upon Loss Settlements, 1895, by W. Montgomery; Journal of the Federation of Insurance Institutes, vol. i. p. 196; The Average Conditions of a Fire Insurance Policy, 1896, by S. J. Pipkin, J.F.I.I., vol. i. p. 243; Contribution in respect of Fire Losses, 1909, by H. C. Evans, J.F.I.I., vol. xii. p. 143; Law of Contribution as it affects Insurance Companies, 1909. by W. T. Watson, J.F.I.I., vol. xiii. p. 321.

(*b*) *Vide supra*, pp. 705, 706.

property, either alone or together with any other property, this Company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage.

Concurrent policies.

Where insurances are concurrent, that is to say where the contributing policies are of the same range and cover precisely the same property, it appears to be generally accepted that the proper basis of contribution is according to the amounts insured upon the property, and not according to the liabilities of the several policies for the actual loss.

Thus—

Property and valuc insured.	Insured in Office A.	Insured in Office B.	Loss.
X 300	100	150	100

$$\text{A pays } \frac{100}{250} \times \frac{100}{1} = 40$$

$$\text{B pays } \frac{150}{250} \times \frac{100}{1} = 60$$

Policies which are not concurrent.

When the insurances are not concurrent, that is to say when the contributing policies are of different range and one policy covers property not covered by another, there is great difference of opinion as to the proper basis of contribution.

Present practice following the method of mean apportionment.

The present practice among the British Offices is to adhere to the same basis as in concurrent policies—that is to say, to make each policy contribute in proportion to the amount insured by it and applicable to the common subject of insurance. Where a policy has contributed in respect of any one item it is *pro tanto* diminished as to the amount of its insurance, and is only available to contribute in respect of other items as to the balance of the sum assured, and consequently the result of the apportionment may vary according to the order in which the items of insurance are discussed. When this is the case the usual practice is to discuss them in the first instance from the item upon which there is the greatest loss down to the item upon which there is the least loss, and then to discuss them in the reverse order and take the mean of the two apportionments.

Sometimes, instead of taking only two apportionments as above, a separate apportionment is taken in each possible order of rotation of the several items. Thus where there are three items of insurance upon which loss has occurred there would be six apportionments, and contribution would be upon the mean of the six. It is more usual, however, to rely upon the mean of the two apportionments only.

The result of taking the mean of the apportionments as above indicated may be that the loss is not fully met. Now from the assured's point of view it seems clear that he is entitled to have the items discussed in that order which will give him the greatest indemnity, and if the mean of the apportionments does not give him as large an indemnity as he is thus entitled to, the usual practice is to take the balance of the assured's legal claim and apportion it among the companies in the same proportion in which they are contributing to the rest of the claim.

It has been suggested that when the mean apportionment does not give the assured the fullest indemnity to which he is entitled, the method of mean apportionment ought to be abandoned, and the whole apportionment ought to be according to the method which gives the assured the best indemnity. This, however, may work out in a very arbitrary manner, and the more equitable method as between the companies is to adhere to the mean apportionment and distribute the balance in the same proportion.

The following case will illustrate the present practice in apportioning losses :—

Property and value insured.	Insured in Office A.	Insured in Office B.	Insured in Office C.	Loss.
X 10,000 Y 5,000 Z 3,000	5000	4000 (I.) 2000 (II.)	3000	6000 4000 3000

I. Taking the losses in rotation from the largest to the least—

$$\frac{\text{Loss X}}{6000} \qquad \text{Total insurance} \left\{ \begin{matrix} \text{A } 5000 \\ \text{B } 4000 \end{matrix} \right\} 9000$$

$$\text{A } \frac{5000}{9000} \times \frac{6000}{1} = 3333\tfrac{1}{3}$$

$$\text{B } \frac{4000}{9000} \times \frac{6000}{1} = 2666\tfrac{2}{3}$$

$$\frac{\text{Loss Y}}{4000} \quad \text{Total insurance} \begin{cases} \text{B } (4000 - 2666\frac{2}{3}) \; 1333\frac{1}{3} \\ \text{C} \qquad\qquad\quad 3000 \end{cases} 4333\frac{1}{3}$$

$$\text{B } \frac{1333\frac{1}{3}}{4333\frac{1}{3}} \times \frac{4000}{1} = 1230\frac{10}{13}$$

$$\text{C } \frac{3000}{4333\frac{1}{3}} \times \frac{4000}{1} = 2769\frac{3}{13}$$

$$\frac{\text{Loss Z}}{3000} \quad \text{Total insurance} \begin{cases} \text{B} \qquad\qquad\quad 2000 \\ \text{C } (3000 - 2769\frac{3}{13}) \; 230\frac{10}{13} \end{cases} 2230\frac{10}{13}$$

B	2000
C	$230\frac{10}{13}$
Assured	$769\frac{3}{13}$

Result.—A pays $3333\frac{13}{39}$; B pays $5897\frac{7}{39}$; C pays 3000; Assured bears $769\frac{9}{39}$.

II. Taking the losses in rotation from the least to the largest—

$$\frac{\text{Loss Z}}{3000} \quad \text{Total insurance} \begin{cases} \text{B } 2000 \\ \text{C } 3000 \end{cases} 5000$$

$$\text{B } \frac{2000}{5000} \times \frac{3000}{1} = 1200$$

$$\text{C } \frac{3000}{5000} \times \frac{3000}{1} = 1800$$

$$\frac{\text{Loss Y}}{4000} \quad \text{Total insurance} \begin{cases} \text{B } 4000 \\ \text{C } (3000 - 1800) \; 1200 \end{cases} 5200$$

$$\text{B } \frac{4000}{5200} \times \frac{4000}{1} = 3076\frac{12}{13}$$

$$\text{C } \frac{1200}{5200} \times \frac{4000}{1} = 923\frac{1}{13}$$

$$\frac{\text{Loss X}}{6000} \quad \text{Total insurance} \begin{cases} \text{A } 5000 \\ \text{B } (4000 - 3076\frac{12}{13}) \; 923\frac{1}{13} \end{cases} 5923\frac{1}{13}$$

A	5000
B	$923\frac{1}{13}$
Assured	$76\frac{12}{13}$

Result.—A pays 5000; B pays 5200; C pays $2723\frac{1}{13}$; Assured bears $76\frac{12}{13}$.

III. Taking the mean of the two apportionments—

Result.—A pays $4166\frac{5}{78}$; B pays $5548\frac{56}{78}$; C pays $2861\frac{17}{78}$; Assured bears $423\frac{6}{78}$.

IV. Taking the losses in the rotation which gives the assured the greatest indemnity—

$$\frac{\text{Loss Y}}{4000} \quad \text{Total insurance} \begin{cases} \text{B } 4000 \\ \text{C } 3000 \end{cases} 7000$$

$$\text{B } \frac{4000}{7000} \times \frac{4000}{1} = 2285\frac{5}{7}$$

$$\text{C } \frac{3000}{7000} \times \frac{4000}{1} = 1714\frac{2}{7}$$

$$\frac{\text{Loss Z}}{3000} \quad \text{Total insurance} \left\{ \begin{matrix} \text{B } 2000 \\ \text{C } (3000 - 1714\frac{2}{7}) \; 1285\frac{5}{7} \end{matrix} \right\} 3{,}285\frac{5}{7}$$

$$\text{B } \frac{2000}{3285\frac{5}{7}} \times \frac{3000}{1} = 1826\frac{2}{23}$$

$$\text{C } \frac{1285\frac{5}{7}}{3285\frac{5}{7}} \times \frac{3000}{1} = 1173\frac{21}{23}$$

$$\frac{\text{Loss X}}{6000} \quad \text{Total insurance} \left\{ \begin{matrix} \text{A } 5000 \\ \text{B } (4000 - 2285\frac{5}{7}) \; 1714\frac{2}{7} \end{matrix} \right\} 6{,}714\frac{2}{7}$$

$$\text{A } \frac{5000}{6714\frac{2}{7}} \times \frac{6000}{1} = 4468\frac{4}{47}$$

$$\text{B } \frac{1714\frac{2}{7}}{6714\frac{2}{7}} \times \frac{6000}{1} = 1531\frac{43}{47}$$

Result.—A pays $4{,}468\frac{644}{7567}$; B pays $5{,}643\frac{5410}{7567}$; C pays $2{,}888\frac{1504}{7567}$.

V. It will be observed that both of the first two apportionments, and consequently the mean of the two, results in the loss not being fully paid. It is clear, however, that the assured is entitled to a full indemnity, because if the items were taken in the rotation Y, Z, X, the loss would be paid in full. The balance, therefore, amounting to $423\frac{6}{7}$, which upon the mean of the first two apportionments rests on the assured, must be divided up between A, B, and C in the same proportion as they bear the rest of the loss. This gives the following:—

Final result (discarding fractions)—

A	pays	$4167 + 140$	$= 4{,}307$
B	„	$5549 + 186$	$= 5{,}735$
C	„	$2861 + 97$	$= 2{,}958$
			$13{,}000$

Other methods of apportioning non-concurrent policies.

Other methods of apportioning non-concurrent policies have been suggested by various writers, but so far the existing practice has not been disturbed.

Mr. H. S. Bell suggests that the following method of apportionment would give a more equitable result, viz.: (1) Exhaust the specific insurances first; (2) where there are two or more non-concurrent policies and none is more specific than another, eliminate the risks covered by one insurance only. This method is in effect an application to non-average contribution of the second condition of average, and whatever practical value it may have in simplicity and equality of distribution, it does not seem to have any legal justification.

Taking the same example as before and applying to it Mr. Bell's method, the following result is obtained:—

A pays 5000 on loss X
B „ 2000 „ Z
B „ 1000 „ X
C „ 1000 „ Z

This leaves B and C to contribute to loss Y.

$$\text{Total insurance} \begin{Bmatrix} \text{B } (4000 - 1000)\ 3000 \\ \text{C } (3000 - 1000)\ 2000 \end{Bmatrix} 5000$$

$$\text{B } \frac{3000}{5000} \times \frac{4000}{1} = 2400$$

$$\text{C } \frac{2000}{5000} \times \frac{4000}{1} = 1600$$

Result.—A pays 5000; B pays 5400; C pays 2600.

Messrs. Laird suggest that in dealing with non-concurrent insurances the basis of contribution in proportion to the sums assured should be abandoned and that contribution ought to be in proportion to the liability of each insurer for the loss on each item. This method was strenuously advocated by Mr. Hore more than forty years ago, but the method of contribution in proportion to sums assured was so firmly established in practice that it successfully resisted and still resists the logic of Mr. Hore's arguments. Contribution in proportion to liability has, however, received judicial support in a recent case in the Commercial Court.

American Surety Co. v. Wrightson (1910), 16 Com. Cas. 37

American Surety Co. v. *Wrightson.*

A bank insured; Policy A, against loss of securities from fire, burglary, or dishonesty of employees in one undivided sum of $40,000; Policy B, against loss through dishonesty of employees, the sum insured in respect of each employee being specified; and employee X being covered to the amount of $2,500. A loss of $2,680 occurred owing to the defalcations of employee X. The insurers on Policy B paid $2,500, and then claimed contribution from the insurers on Policy A. They submitted that the loss should be borne between the two insurers in proportion to the total amount for which each might have been liable for a loss caused by the defalcation of the employee X, or, in other words, in proportion to the sums assured. Hamilton, J., doubted whether the equitable doctrine of contribution applied at all to such a case, but held that if it did the proper basis of apportionment was in proportion to the amounts for which the insurers were liable for the loss which had in fact occurred; that is to say, in the proportion of

$$\frac{2680}{5180} \text{ and } \frac{2500}{5180}$$

The above was a case of fidelity insurance, but the legal principle ought to be equally applicable to the case of fire insurance, and it is therefore most probable that if the question was

to be fought out in the Law Courts, contribution in proportion to liabilities would prevail over contribution in proportion to the sums assured.

Taking again the example already discussed, the contribution in proportion to liabilities would work out as follows :—

Liabilities A in X 5000
B in X $\frac{6}{10} \times 4000 = 2400$
in Y $\frac{4}{10} \times 4000 = 1600$
in Z 2000
C in Y $\frac{4}{7} \times 3000 = 1714\frac{2}{7}$
in Z $\frac{3}{7} \times 3000 = 1285\frac{5}{7}$

Loss X 6000 — Total liability { A 5000, B 2400 } 7400

A $\frac{5000}{7400} \times \frac{6000}{1} = 4054\frac{2}{37}$

B $\frac{2400}{7400} \times \frac{6000}{1} = 1945\frac{25}{37}$

Loss Y 4000 — Total liability { B 1600, C $1714\frac{2}{7}$ } $3314\frac{2}{7}$

B 1600
C $1714\frac{2}{7}$
Assured bears $685\frac{5}{7}$

Loss Z 3000 — Total liability { B 2000, C $1285\frac{5}{7}$ } $3285\frac{5}{7}$

B $\frac{2000}{3285\frac{5}{7}} \times \frac{3000}{1} = 1826\frac{2}{23}$

C $\frac{1285\frac{5}{7}}{3285\frac{5}{7}} \times \frac{3000}{1} = 1173\frac{21}{23}$

Result.—A pays $4054\frac{322}{5957}$; B pays $5372\frac{196}{5957}$; C pays $2888\frac{1184}{5957}$; Assured bears $685\frac{425}{5957}$.

Rule in *North British Co.* v. *London, Liverpool, and Globe* adhered to in commercial risks only.

In the apportionment of losses on non-commercial risks, such as private house property, the offices apportion the loss *inter se* without regard to the different interests which may be insured in the property. In other words, they disregard the legal decision in *North British Co.* v. *London, Liverpool and Globe*, and treat the insurance as a double insurance subject to contribution instead of treating it as several insurances upon separate interests, in which case there would be no contribution, but a possible right of subrogation.

In the apportionment of losses on commercial risks the decision in the North British case is adhered to, and there is no

apportionment unless there is double insurance in the strict legal sense—that is to say, double insurance on the same interest in the same property.

The following American and Canadian decisions may be referred to on the question of contribution among non-concurrent policies.

Lesure v. Lumber Co. Insurance (1897), 101 Iowa, 514

Canadian and American decisions on contribution among non-current policies.

Lesure v. *Lumber Co. Insurance.*

The policy sued on was an insurance for $10,000 on timber in any or all of three yards A, B, and C. The total insurance on the three yards was as follows:—

$14,500 blanket on A, B, and C 54,000 on yard A 46,500 on yard B	$68,500
115,000	

A loss of $74,000 occurred in yards A and C, but no loss occurred in yard B. The policy sued on contained a contribution clause providing that the insurers should not be liable for any greater proportion of the loss than "the amount hereby insured shall bear to the whole insurance covering such property." It was held that no loss having occurred in yard B, the specific insurance on that yard was not to be reckoned in estimating the total insurance on that property. Insurances affecting yards A or C were alone to be reckoned, and therefore the Company were liable for $\frac{10,000}{68,000}$ of the loss and not only $\frac{10,000}{115,000}$ of the loss.

Erb v. Fidelity (1896), 99 Iowa, 727

Erb v. *Fidelity.*

The policy sued on was for $1200 upon property worth $1400. A small part of the same property worth $162 was, together with other property, insured by other insurers for $250. The whole property covered by the policy sued on was destroyed, and it was held that that policy must pay $1200 the total sum insured.

Meigs v. London Assurance (1904), 120 Fed. Rep. 781; 134 Fed. Rep. 1021

Meigs v. *London Assurance.*

The assured insured with one set of companies $130,000 on certain school buildings. The policies contained the conditions, "Privilege granted to make additions, alterations, and repairs, and this policy to cover on and in the same," and "This company shall not be liable under this policy for a greater proportion of any loss . . . than the amount hereby insured shall bear to the whole insurance." Subsequently the assured made an extensive addition to the premises, at a cost of $60,000, and insured the additional buildings with another set of companies for $60,000 in contents. The second policies also

contained the above conditions. While all the policies were in force a fire occurred resulting in the following loss :—

On additional building	$26,000
On original building	2,000

In an action brought by the assured against the second set of companies it was held that the additional building was an " addition " within the meaning of the condition in the first policies, and was therefore covered by both sets of policies. The first policies, after paying the loss on the original building which was borne by them alone must, as to the balance of their total insurance, contribute to the loss on the additional building, that is to say, the loss of $26,000 would be borne in the proportion of $\frac{128,000}{188,000}$ by the first policies, and $\frac{60,000}{188,000}$ by the second policies, and therefore the assured could only recover against the second companies the latter proportion of the loss.

Page v. Sun Insurance (1896), 74 Fed. Rep. 203

Page v. *Sun Insurance.*

The policy sued on was on block A, and there was a comprehensive policy issued by another office on blocks A and B in one individual sum. It was held that, on a loss occurring in A, the whole amount of the comprehensive policy was to be reckoned as contributing insurance covering block A.

Ogden v. East River (1872), 50 N. Y. 388

Ogden v. *East River.*

The policy sued on was on block A, and there was a comprehensive policy issued by another office on blocks A, B, and C. The whole premises were destroyed, and it was held that the sum insured on A by the comprehensive policy must be deemed to be that proportion of the whole sum insured which the value of A bore to the total value of A, B, and C. The Court expressed an opinion that if there had been a loss on A only, or partial loss on all the premises, the double insurance upon A would probably have been such amount as could be recovered in respect of A on the comprehensive policy (*h*).

Unitarian Congregation v. Western Assurance (1866), 26 U. C. Q. B. 175

Unitarian Congregation v. *Western Assurance.*

The policy sued on insured $2000 on house, and $2000 on furniture. It contained the contribution clause, " provided that the Company should not be liable for a greater proportion of the loss than the amount hereby insured shall bear the whole insurance on the property." Insurance in another Company was $2000 on house and furniture. It was held that the company were not entitled to take the blanket policy as $2000 on each head but that as " the amount hereby insured " was $4000 and the " whole insurance covering the property described " was $6000, they were liable to two-thirds of the loss on each item.

(*h*) See also *Blake* v. *Exchange Mutual* (1858), 78 Mass. 265; *Barnes* v. *Hartford* (1882), 9 Fed. Rep. 813.

Golde v. Whipple & Co. (1896), 7 Hun. App. 48

Golde v. *Whipple & Co.*

The policy sued on was a floating policy, $3000 in goods contained in several warehouses, "not to cover a greater amount than $600 in any one building." A policy in another company was for the same sum on the same buildings, but "not to cover a greater amount than $300 in any one building." A loss of $100 occurred in one building. The majority of the Court held that the insurers on the first policy were under the usual contribution clause liable to two-thirds of the loss, the limit of risk on each building being thereby treated as constituting a separate insurance for that amount. One judge dissented, and thought that as the total insurance was unapportioned that ought to be deemed the "amount hereby insured" for the purpose of prorating the liability, and that therefore the companies should have been held liable in equal shares up to $300 on any one building beyond which sum the first company would have borne the whole loss up to $600.

Contribution where insurers have paid more than they were bound to pay.

Where a policy contains the contribution clause the insurers are not entitled to contribution from their coinsurers, and if they pay more than their proper proportion they must bear the loss. Contribution only arises out of a legal obligation to pay (*i*). On the other hand, it has been held that the coinsurers reap no benefit from an overpayment made without obligation. They must still pay their own proper proportion, even although the insured has been fully indemnified. The assured alone is entitled to the benefit of the voluntary over-payment, and is not bound to account for it to the other insurers. It is in the nature of a gift (*i*).

Section VI.—Contribution under the Average Clause

Average clause.

The average clause usually contains what are known as the two conditions of average: (1) the *pro rata* average condition, and (2) the second condition of average (contribution). The *pro rata* average condition is designed to prevent the assured obtaining an undue benefit from under-insurance. It provides that where the value of the subject matter of insurance exceeds the amount insured, the assured shall be his own insurer for the difference, and that the office and the assured shall share all losses total and partial in the same proportion that the sum assured bears to the value of the property. As a rule the *pro rata* average condition is only inserted in policies insuring commercial risks. It is seldom found in insurances upon private house property.

(*i*) *Lucas* v. *Jefferson* (1827), 6 Cowen (New York), 635.

Pro rata condition of average.

The following is a specimen of the modern *pro rata* average condition :—

> Whenever a sum insured is declared to be subject to average, if the property covered thereby shall, at the breaking out of any fire, be collectively of greater value than such sum insured, then the Assured shall be considered as being his own Insurer for the difference, and shall bear a rateable share of the loss accordingly.

Where a Lloyd's policy was expressed to be "subject to average" it was held that it was subject to the above condition, but was not subject to the second condition of average (*j*).

When non-concurrent policies are subject to the *pro rata* average condition policies covering more than one item are liable in respect of each item for the proportion which the total sum assured bears to the total value of all the items covered by that policy.

When upon any one item the total of the liabilities calculated as above is less than the loss upon that item, then the assured bears the balance of such loss.

When upon any one item the total of the liabilities is more than the loss upon that item, then the contributing policies bear the whole of such loss in proportion to such liabilities.

Pro rata condition applied without the second condition of average.

The *pro rata* average condition may be present without the second condition of average, and if the case already considered as subject to contribution without average (*k*) is now taken under the *pro rata* average condition, but without the second condition of average, the following result is obtained :—

$$\frac{\text{Loss X}}{6000} \qquad \text{Liability of A } \frac{5000}{10{,}000} \times \frac{6000}{1} = 3000$$

$$\text{,, B } \frac{4000}{15{,}000} \times \frac{6000}{1} = 1600$$

Assured bears the balance, 1400

$$\frac{\text{Loss Y}}{4000} \qquad \text{Liability of B } \frac{4000}{15{,}000} \times \frac{4000}{1} = 1066\tfrac{10}{15}$$

$$\text{,, C } \frac{3000}{8000} \times \frac{4000}{1} = 1500$$

Assured bears the balance, $1431\frac{5}{15}$

(*j*) *Acme Wood Flooring Co.* v. *Martin* (1904), 9 Com. Cas. 157.
(*k*) *Vide supra*, p. 722.

$$\frac{\text{Loss Z}}{3000}\quad \left.\begin{array}{ll}\text{Liability of B } \dfrac{2000}{3000}\times\dfrac{3000}{1}=2000\\ \text{,, C } \dfrac{3000}{8000}\times\dfrac{3000}{1}=1125\end{array}\right\}3125$$

$$\text{B pays } \frac{2000}{3125}\times\frac{3000}{1}=1920$$

$$\text{C pays } \frac{1125}{3125}\times\frac{3000}{1}=1080$$

Result.—A pays 3000; B pays $4586\frac{10}{15}$; C pays 2580; Assured bears $2833\frac{5}{15}$.

The second condition of average is designed to regulate the contribution among non-concurrent policies which are subject to average. The second condition of average.

It provides that where part of the property insured by a policy of wider range is also covered by a policy of lesser range, which covers that part of the property only, the policy of wider range shall only insure that part of the property in respect of the excess of value not covered by the policy of lesser range.

The following is a specimen of the modern second condition of average :—

> But if any of the property included in such average shall at the breaking out of any fire be also covered by any other more specific insurance, *i.e.* by an insurance which at the time of such fire applies to part only of the property actually at risk and protected by this insurance, and to no other property whatsoever, then this Policy shall not insure the same except only as regards any excess of value beyond the amount of such more specific insurance or insurances, which said excess is declared to be under the protection of this Policy, and subject to average as aforesaid.

In applying the second condition of average the range of a policy is not to be deemed restricted by reason of the fact that part of the property covered is fully insured by another policy of lesser range. Thus, in the following case :—

Property and value insured.	Insured in Office A.	Insured in Office B.	Insured in Office C.	Loss.
X 100 Y 200	100	100	50	100 50

the value of X is fully covered by the policy A, and if X were eliminated altogether from policy C, policies B and C would be concurrent insurances, and the second condition of average would not apply to their contribution *inter se*. In accordance, however,

with the above rule X cannot be altogether eliminated from policy C, and that policy is still deemed to be a policy of wider range than policy B, and the second condition of average applies, so that C insures Y only in respect of the excess of value not covered by policy B.

Application of average clause containing both conditions of average.

Now, taking again the example on p. 722 and considering it on the assumption that the policies contain both the conditions of average, the following result is obtained :—

Applying the second condition of average—

Policy B (I) applies to X only in so far as there is an excess of value over the amount covered by policy A, that is to say, it covers 5000 only of X, and the total value covered by policy B (I) is 10,000.

Policy C applies to Z only in so far as there is an excess of value over the amount covered by policy B (II), that is to say, it covers 1000 only of Z, and the total value covered by policy C is 6000.

Applying the *pro rata* average condition—

Loss X 6000

Liability of A $\frac{5000}{10{,}000} \times \frac{6000}{1} = 3000$ (leaving a loss of 3000)

„ B $\frac{4000}{10{,}000} \times \frac{3000}{1} = 1200$

Assured bears the balance, 1800

Loss Y 4000

Liability of B $\frac{4000}{10{,}000} \times \frac{4000}{1} = 1600$

„ C $\frac{2000}{6000} \times \frac{4000}{1} = 1333\frac{1}{3}$

Assured bears the balance, $1066\frac{2}{3}$

Loss Z 3000

Liability of B $\frac{2000}{3000} \times \frac{3000}{1} = 2000$ (leaving a loss of 1000)

„ C $\frac{2000}{6000} \times \frac{1000}{1} = 333\frac{1}{3}$

Assured bears the balance, $666\frac{2}{3}$

Result.—A pays 3,000; B pays 4,800; C pays $1{,}666\frac{2}{3}$; Assured bears $3{,}533\frac{1}{3}$.

The average condition.

In order to avoid the difficulty which arises when a policy subject to average falls to contribute with a policy not subject to average, it is usual to provide in a policy not primarily subject to average that where any of the property covered thereby is covered by any other policy which is subject to average, then the first policy shall be subject to average in like manner.

The following is a specimen of the clause which is used for this purpose :—

> In all cases where any other subsisting Insurance or Insurances, effected by the Insured or by any other person or persons on his behalf, covering any of the property hereby insured either alone or together with any other property in and subject to the same risk only, shall be subject to average, the Insurance on such Property under this Policy shall be subject to average in like manner.

Section VII.—Subrogation

Necessary to preserve the principle of indemnity.

The right of subrogation is the right which an insurer who has paid the insurance money has to receive the benefit of all the rights of the assured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained (*k*). The right is a corollary of the general principle that insurance is only a contract to indemnify the assured (*k*). Whenever an assured has received full indemnity in respect of his loss all remedies over against third persons must be held and exercised for the benefit of the insurer until he has been recouped the amount he has paid on the policy (*l*). In *Burnand* v. *Rodocanachi* (*m*) Lord Blackburn said :

> " The general rule of law (and it is obvious justice) is that when there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay, and if the indemnifier has already paid it then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

Arises on payment of the assured

The insurer's right of subrogation arises whenever he pays the claim (*n*), and it arises upon payment of a partial as well as upon payment of a total loss (*o*), and although the insurers are not

(*k*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380. The right of subrogation does not apply to contracts of insurance, such as life insurance which are not contracts of indemnity: *Solicitors' Life* v. *Lamb* (1864), 2 De G. J. & S. 251; *Insurance Co.* v. *Braun* (1877), 95 U. S. 754; *Connecticut Mutual* v. *New York, &c., Ry.* (1856), 25 Conn. 265.

(*l*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380; *North British and Mercantile* v. *London, Liverpool and Globe* (1877), 5 Ch. D. 569; *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560; *Randal* v. *Corkran* (1748), 1 Ves. Sen. 97.

(*m*) (1882), 7 A. C. 333, 339.

(*n*) *Liverpool Steam Co.* v. *Phœnix* (1888), 129 U. S. 397, 462; *Fidelity Co.* v. *Gas Co.* (1892), 150 Pa. 8.

(*o*) *The Potomac* (1881), 105 U. S. 630; *Over* v. *Lake Erie* (1894), 63 Fed. Rep. 34.

entitled to the benefit of what is recovered until the assured has received a full indemnity the right of subrogation as an equitable right or charge upon the assured's choses in action arises upon payment of the insurance money, although such payment by itself does not completely indemnify the assured.

to claims which will diminish the loss paid for

The insurers are entitled to be subrogated only to those claims which will diminish the loss in fact paid for. There is no subrogation in respect of loss which the insurers have not paid for. Thus where a man insured his property against fire and an explosion and consequent fire occurred, causing damage to the property, and personal injury to the assured, the insurers upon payment in respect of the damage to the property caused by fire would be entitled to be recouped from what the assured might afterwards recover under that head of damage, but would have no claim to what he might afterwards recover in respect of the personal injuries or the damage to the property by explosion (*p*). The record in the action against the party liable would be conclusive evidence of the amount in fact recovered upon each head (*p*).

without express assignment.

There is no right of subrogation before payment nor can the insurer, apart from a special condition in the policy to that effect (*pp*), demand an express assignment of the insurer's rights as a condition of payment (*q*). On the other hand, the insurer, upon making payment, does not require to make any express reservation of or claim to the assured's rights (*r*). In the absence of anything to the contrary, the right of subrogation follows from the nature of the contract without any assignment or condition.

Rights of assured against third parties shift in equity to insurers,

The right of the assured to recover compensation from third persons who are liable to him in tort or contract is not diminished by the fact that he has received indemnity from his insurer (*s*). Payment of the insurance money merely shifts the equitable right to receive such compensation *pro tanto* from the assured

(*p*) *Law Fire Assurance* v. *Oakley* (1888), 4 T. L. R. 309.

(*pp*) *Niagara Fire* v. *Fidelity Co.* (1888), 123 Pa. 516.

(*q*) *Insurance Co. of N. A.* v. *Fidelity Co.* (1889), 123 Pa. 523; *Forest Oil Co.'s Appeals* (1888), 118 Pa. 138; *King* v. *State Mutual* (1851), 61 Mass. 1.

(*r*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380; *West of England* v. *Isaacs*, [1897] 1 Q. B. 226.

(*s*) *Clark* v. *Blything* (1823), 2 B. & C. 254; *Yates* v. *Whyte* (1838), 4 Bing. N. C. 272; *Port Glasgow Sailcloth Co.* v. *Caledonian Ry.* (1892), 19 R. 608, (1893) 20 R. (H. L.) 35; *Chicago Ry.* v. *Pullman Car Co.* (1890), 139 U. S. 79; *The Propeller Monticello* v. *Mollison* (1854), 17 How. U. S. 152; *Fretz* v. *Bull* (1851), 12 How. U. S. 466; *Brown* v. *McCrae* (1889), 17 Ont. R. 712; *Merrick* v. *Brainard* (1860), 38 Barb. 574; aff. 34 N. Y. 208; *Collins* v. *New York Central* (1875), 5 Hun. 503; *Hayward* v. *Cain* (1870), 105 Mass. 213.

but legal right remains in assured.

to the insurer. The legal right to compensation remains in the assured (*t*), and therefore unless there has been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured (*u*). In Courts of Equity or of Admiralty the insurer has always been allowed to sue in his own name (*x*).

Third parties cannot question insurers' right to sue in assured's name.

As regards third persons, the insured and insurer are to be regarded as one, and where action is brought in the name of the assured it can make no difference to the defendant, whether the insurer has paid the loss or not, or whether he paid it before or after the commencement of the action (*y*). It is immaterial to the defendant that an insurer bringing an action in the assured's name has not paid or is not liable for the whole amount claimed in the action (*z*). In *Thomas & Co.* v. *Brown* (*a*) Mathew, J., thought that an insurer could not sue in the assured's name if the policy was one "without recourse," that is to say, where the right of subrogation is expressly excluded. This is no doubt true as between insurer and assured, but if he intended to say that such a defence could be pleaded to an action by the insurers in the name of the assured against the party liable, it is difficult to concur with the opinion.

Payment of insurance money without legal liability.

Where the insurer sues in his own name to enforce his equitable right he must show that he has paid the assured, but he need not show that he was legally bound to pay. Where the claim against him was one which the assured might honestly and reasonably make, and to which he, as insurer, might honestly and reasonably accede, he is subrogated upon payment, and a wrongdoer cannot raise the defence that the loss was not covered by the policy (*b*).

Subrogation to all claims arising out of tort or contract.

All claims of the assured arising out of tort or contract or any other ground of legal responsibility vest in the insurer by subrogation (*c*). The value of benefits received by the assured from claims which have been satisfied before payment ought to be

(*t*) *King* v. *Victoria Ins.*, [1896] A. C. 250; *Crandall* v. *Goodrich* (1883), 16 Fed. Rep. 75.

(*u*) *London Ass.* v. *Sainsbury* (1783), 3 Dougl. 245; *Wealleans* v. *Canada Southern* (1894), 21 Ont. A. R. 297; *Rockingham Mut. Fire* v. *Bosher* (1855), 39 Me. 253.

(*x*) *St. Louis Ry.* v. *Commercial Ins.* (1890), 139 U. S. 223; *Liverpool Steam Co.* v. *Phœnix* (1888), 129 U. S. 397, 462; *Garrison* v. *Memphis Ins.* (1856), 19 How. U. S. 312.

(*y*) *Mason* v. *Sainsbury* (1782), 3 Dougl. 61.

(*z*) *Mobile Ry. Co.* v. *Jurey* (1883), 111 U. S. 584.

(*a*) (1899), 4 Com. Cas. 186.

(*b*) *King* v. *Victoria Ins.*, [1896] A. C. 250; *Insurance Co.* v. *The "C. D. Jr."* (1870), 1 Woods, 72; *Fidelity Gas* v. *Gas Co.* (1892), 150 Pa. 8.

(*c*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380.

deducted from the indemnity at the time of payment (*d*). If, however, the insurers were ignorant of the fact that a benefit had been received, or if the value of the benefit was not readily ascertainable, the insurers having paid the full indemnity may afterwards recover back the value of the benefit (*e*). After the insurers have paid they have an equity in respect of all the assured's unsatisfied claims. When the assured receives any benefits from such claims he must account to the insurers therefor and repay to them anything which he receives beyond a complete indemnity. If the claims are not satisfied, and the assured does not take proceedings, the insurers may bring an action in the name of the assured and recoup themselves from the proceeds.

Mason v. *Sainsbury.*

In *Mason* v. *Sainsbury* (*f*) the statutory remedy against the hundred under the Riot Act for damage caused by riot was held to accrue for the benefit of the insurer and so all actions for negligence against persons responsible for the fire such as actions against gas or electric companies for defective installation, actions against railway companies for defective engines causing unnecessary danger from sparks, may be prosecuted for the insurer's benefit (*g*).

North British and Mercantile v. London, Liverpool and Globe (1877), 5 Ch. D. 589

North British and Mercantile v. *London, Liverpool and Globe.*

B. & Co., being wharfingers, held grain belonging to R. & Co., merchants, and by custom of the trade the wharfingers were liable for any loss however occurring. Both insured the grain, each firm for its own benefit, and on a loss occurring it was held that R. & Co.'s insurers upon paying the loss were entitled to be subrogated to their claim against B. & Co., the result being that B. & Co.'s insurers bore the whole loss notwithstanding the *pro rata* conditions in the policies.

Darrell v. Tibbitts (1880), 5 Q. B. D. 560

Darrell v. *Tibbitts.*

A dwelling house at Brighton was let, and the lessees covenanted to repair "except casualties by fire, demolition by storm or tempest, of the building, or any part thereof, or destruction by foreign enemies." The landlord insured against fire and damage by explosion. Owing to the negligence of the local authorities a pipe in the street was burst by a steam roller and there was a consequent escape of gas, explosion, and damage to the house. The company, in ignorance of the terms of the lease, paid the loss to the landlord. Subsequently the local authority paid compensation to the lessees, who reinstated the premises. It was held that the company were entitled to recover from the landlord the amount they had paid to him. The judges in the Court

(*d*) *West of England* v. *Isaacs*, [1897] 1 Q. B. 226; *Connecticut Fire* v. *Erie* (1878), 73 N. Y. 399.

(*e*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380.

(*f*) (1872), 3 Dougl. 61.

(*g*) *Commercial Union* v. *Lister* (1874), L. R. 9 Ch. 483.

of Appeal suggested three different ways in which the company's claim might be put: (1) as an action at law upon an implied promise by the assured when he received payment to repay in so far as he should be subsequently compensated; (2) as an action at law for money had and received to recover the sum which they had paid upon the ground that that money was paid upon the condition that the person to whom it was paid had sustained a loss, that in point of fact no loss had been sustained, and, therefore, that the money paid by the company ought in justice to be returned to them; (3) as a kind of suit in equity founded upon the principle that as the assured had received from other sources compensation for his loss he ought to put the company in the same position which they would have held if the house had been repaired before they were called upon to pay the amount of the damage.

Andrews v. Patriotic (1886), 15 L. R. Ir. 355

Andrews v. *Patriotic.*

A landlord and tenant having insured independently each to cover his own interest the landlord was held entitled to recover the full amount of a fire loss, notwithstanding the *pro rata* clause, and the Court were of opinion that the landlord's insurers could, by subrogation to the landlord's claim against his tenant on the covenant to repair, recover the loss against the tenant. The tenant could in turn recover the loss against his insurers, and the tenant's insurers would ultimately bear the whole loss.

The right of the insurer to be subrogated is not confined to claims which the assured may make in respect of the loss, but extends to all claims which if satisfied will diminish the loss.

Castellain v. Preston (1883), 11 Q. B. D. 380

Castellain v. *Preston.*

The owner of a house having insured it, contracted to sell it. Before completion of the purchase the house was destroyed by fire. The insurers paid the vendor the amount of the loss, and the purchase was thereafter completed, the vendor receiving the full contract price from the vendee. It was held that the insurers were entitled to recover the price from their assured, the vendor. Brett, L.J., said, "It seems to me that in order to carry out the fundamental rule of insurance law this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract fulfilled or unfulfilled, or in a remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercising or acquiring which right or condition the loss against which the assured is insured can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition I must have omitted to state something which ought to have been stated." The fundamental condition referred to by the Lord Justice in the above passage is that the contract of insurance is one of indemnity

and indemnity only, and it is upon that alone that he bases the right of subrogation. He repudiates the suggestion that the right of subrogation arises from the position of an insurer as a surety. "Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the insured from recovering from them more than a full indemnity." Bowen, L.J., said, "It is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid, and it is established by the case of *Darrell* v. *Tibbitts* (*h*) that the insurance company is entitled to that benefit whether or not before they pay the money they insist upon a calculation being made, and if it afterwards turns out that in consequence of something which ought to have been taken into account in estimating the loss a sum of money or even a benefit not being a sum of money is received, then the office, notwithstanding the payment made, is entitled to say that the insured is to hold that for its benefit, and although it was not taken into account in ascertaining the sum which was paid yet when it has been received it must be brought into account, and if it is not a sum of money but a benefit that has been received its value must be estimated in money."

The dictum of Bowen, L.J., in the above case to the effect that the insurer is not only entitled to cash payments but also to the value of all benefits received by the assured otherwise than in cash, is well illustrated by the following case.

West of England Fire v. Isaacs, [1897] 1 Q. B. 226

West of England Fire v. *Isaacs.*

A let his house to B. The latter covenanted to repair, and to insure in the Royal Exchange Assurance in the joint names of A and B. B did so insure and afterwards sublet to C. By the sublease B covenanted to insure and lay out the insurance money in rebuilding, and C covenanted to repair. C insured in his own name and solely for his own benefit in the West of England Assurance. A loss by fire happened which was agreed as between the insurance companies and their assured at £100. The West of England paid that amount to C and thereafter the lease expired. A sued B for breach of covenant to repair and recovered £250; B sued C, and settled for £140, C undertaking not to make any claim in respect of B's covenant. The Royal Exchange paid B £100. The West of England Assurance then brought this action against C to recover the £100 paid by them to him, and it was held that they were entitled to do so. It was held that in settling B's claim for less than the actual cost of repair C had received a benefit in diminution of his loss, and that for that benefit he must account to his insurers. The benefit might be valued at £100, and therefore the insurers were entitled to recover that amount. Alternatively C had released B from his liability to expend the insurance money on reinstatement or to pay damages for breach of his covenant, and C's insurers were entitled to compensation for the loss of a right to which they were subrogated.

Phœnix Assurance v. Spooner, [1905] 2 K. B. 753

Phœnix Assurance v. *Spooner.*

Mrs. Spooner owned a house and two shops. These premises were insured by her against fire by the insurance company. During the currency of the

(*h*) (1880), 5 Q. B. D. 560.

policy the Plymouth Corporation determined to acquire the property and served Mrs. Spooner with a notice to treat under the Lands Clauses Consolidation Act, 1845. Before anything further had been done in pursuance of the notice the premises were destroyed by fire, and the insurance company paid Mrs. Spooner £925 the agreed amount of the loss. Mrs. Spooner then agreed with the Corporation to accept compensation from them on the basis of crediting them with the sum received by her from the insurance company. The insurance company then sued Mrs. Spooner for £925 as money received for their use or alternatively as the value of the benefit which she had received from the Corporation in diminution of her loss or might have received from them if she had not renounced her claim. It was held that the insurance company were entitled to recover. The insurance was one of personal indemnity of Mrs. Spooner and she could not by any arrangement with the Corporation secure to them the benefit of the insurance as against the insurance company.

Gifts to assured.

The insurer is not subrogated to, and therefore the assured is not bound to account for money or benefits received by way of gift for the sole benefit of the assured (*i*).

Insurer entitled to full indemnity as to loss and costs before insurers can participate in compensation.

The insurer is not entitled to be recouped until the assured has received what is in fact a full indemnity as to his loss, including the cost of recovering compensation from third parties (*k*). Even where the policy is a valued policy or where the insurer and assured have agreed the loss for the purpose of settlement, neither figure is conclusive on the question of subrogation, and the assured is entitled to prove that the value was more than the agreed value, or that the loss was greater than the agreed loss, and to decline to make repayment until he has been satisfied as to the difference (*l*). It has been said that the damages which the assured recovers from a wrongdoer must *primâ facie* be deemed to be a full indemnity (*m*); but such damages do not necessarily represent the actual damage, and the assured is entitled to retain both damages and insurance money, if together they do not in fact give him more than a complete indemnity for his loss and costs (*n*).

When insurer is recouped he holds balance for assured.

In fire insurance cases the insurer is only entitled to be subrogated to so much of the assured's rights as is sufficient to recoup him for his actual payment and costs (*o*). Even where he has

(*i*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380; *Burnand* v. *Rodocanachi* (1882), 7 A. C. 333.

(*k*) *National Fire* v. *McLaren* (1886), 12 Ont. R. 682; *Eddy* v. *London Assurance* (1892), 65 Hun. 307.

(*l*) *Burnand* v. *Rodocanachi* (1882), 7 A. C. 333.

(*m*) *Stoughton* v. *Gas Co.* (1895), 165 Pa. 428.

(*n*) *National Fire* v. *McLaren* (1886), 12 Ont. R. 682.

(*o*) *Mobile Ry. Co.* v. *Jurey* (1883), 111 U. S. 584.

paid upon a total loss there is not necessarily any such abandonment of the *spes recuperandi* as would entitle the insurer, upon recovering from a wrongdoer more than the amount which he had paid to the assured, to retain the balance for his own benefit. If goods are damaged and the insurers agree to pay a total loss upon the assured surrendering the salvage, there would probably be an abandonment which would carry with it the right to the full benefit of the *spes recuperandi* (*p*). The same would not apply to a case of total loss upon a building where the assured receives the sum insured upon the terms of surrendering the salvage to the insurers because there is no abandonment of the property, that is the site, and the surrender of the salvage would not necessarily import a surrender of all claims in respect of the damage done.

Assured is *dominus litis* until he has a complete indemnity.

The assured is entitled to control any proceedings brought in his name until he has received complete indemnity, that is to say, if the insurer has not paid what is in fact a complete indemnity for all damage insured or uninsured arising from the same cause of action as the damage in respect of which payment has been made the assured remains *dominus litis* until he has recovered a complete indemnity, and if he undertakes to prosecute his claim for the whole damage the insurers cannot interfere (*q*). The assured must conduct the litigation with proper regard for the insurer's interest, and will be liable in damages for any misconduct or for any abandonment of rights (*r*). If the assured recovers judgment the insurers have a lien thereon for the amount to which they are entitled to be subrogated (*s*).

When the assured refuses to take proceedings.

There is probably no duty on the part of the assured to take any active steps to prosecute his claim. If there is any danger of a claim being lost by lapse of time, loss of evidence or other cause, the insurers have the remedy in their own hands by paying the loss and then commencing proceedings in the assured's name. If the assured upon tender of a proper indemnity as to costs refuses the use of his name the insurer can, by proceedings in equity, compel him to give the use of his name and probably, instead of taking double proceedings, the same purpose can now be effected by joining the assured as

(*p*) *Comegys* v. *Vasse* (1828), 1 Pet. 193.

(*q*) *Commercial Union* v. *Lister* (1874), L. R. 9 Ch. 483; *Law Fire Ass.* v. *Oakley* (1888), 4 T. L. R. 309.

(*r*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355; *Commercial Union* v. *Lister* (1874), L. R. 9 Ch. 483; *West of England Fire* v. *Isaacs*, [1897] 10 Q. B. 226.

(*s*) *White* v. *Dobinson* (1844), 14 Sim. 273.

defendant to an action brought in the name of the insurers against the parties liable. The insurers cannot repudiate the assured's claim against them, and at the same time insist upon his taking steps to enforce his claim against third parties so as to preserve their right of subrogation (*t*).

Insurer is *dominus litis* after complete indemnity.

After the assured has received complete indemnity the insurer is *dominus litis* in respect of future proceedings, and in America it was held that where an assured, having been completely indemnified by the insurers, nevertheless prosecuted an action on his own behalf against third parties he was bound to hand over to the insurers the entire sum recovered without making any deduction in respect of his costs (*u*).

Settlement of claims against third parties.

On the principle that as far as third persons are concerned the insurer and assured are one, any settlement or abandonment of a claim by the assured *primâ facie* binds the insurers (*x*).

Release of liability before loss.

When before loss the assured has contracted with a third party that such third party shall not be liable to him in case of loss, or that his liability shall be limited, the insurer is bound by such contract (*y*). The concealment of such contract at the time the insurance was effected, or the making of such contract during the risk, might, according to the conditions of the policy, be good ground for avoiding the contract of insurance (*z*), but the insurer is bound by the contract as regards third parties, because he cannot be subrogated to any claim which the assured himself could not have enforced (*a*). A contract between the assured and a third party, otherwise liable to him in case of loss, that the third party shall have the benefit of any insurance is a bar to the insurers exercising their right of subrogation (*b*). Thus, where a carrier contracted with the owner of goods that in case of loss for which the carrier was liable he should have the benefit of the owner's insurance and the owner insured in his own name it was held that the owner's insurers could not recover from the carrier (*b*). And this would seem to be so even where the contract between the insurer and assured is one to indemnify the assured only. Thus, if a vendor of property

(*t*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355.

(*u*) *Hardman* v. *Brett* (1889), 37 Fed. Rep. 803.

(*x*) *West of England Fire* v. *Isaacs*, [1897] 1 Q. B. 226.

(*y*) *Phœnix Co.* v. *Erie Transportation* (1886), 117 U. S. 312, 322.

(*z*) See p. 309.

(*a*) *Germania Fire* v. *Memphis Ry. Co.* (1878), 72 N. Y. 90; *Savannah Fire* v. *Pelzer Manufacturing Co.* (1894), 60 Fed. Rep. 39; *Hartford Fire* v. *Chicago Ry. Co.* (1894), 62 Fed. Rep. 904.

(*b*) *Phœnix Co.* v. *Erie Transportation Co.* (1886), 117 U. S. 312.

being insured agreed with the purchaser that he should have the benefit of the insurance, there would be no subrogation to the vendor's claim for the purchase money. In one American (*c*) case, where a railway company carried goods on the terms that they should have the benefit of the owner's insurance, and the owner had insured on the terms that no carrier should have the benefit of the policy, but that the insurers should be subrogated to all rights against them, it was held that the insurers, having paid the loss to the owner were entitled to be subrogated and to recover damages against the railway company for a loss by negligence. Two reasons were given for the decision (1) that the owners only contracted to give the railway company the benefit of any policy which was in fact available for their benefit; but they did not contract to effect a policy which was so available; the policy they did effect was not available for the railway company's benefit, and there was no breach of contract in effecting such a policy; (2) the railway company being common carriers could not contract themselves out of liability for negligence. On the second point the American law differs from English law, and the case is therefore of no value as an authority in England. On the first point the decision is at least very doubtful and in an English Court the case would probably have been decided in favour of the railway company.

After loss but before payment.

After a loss has occurred but before the insurers have made payment, any release or settlement made by the assured with third parties to the prejudice of the insurers will free the insurers from liability upon the policy (*d*). The insurers are in the same position as sureties where the creditor has released or given time to the principal debtor (*e*). The assured is not, however, precluded in the case of a doubtful claim from making a reasonable settlement for the benefit of himself and the insurers, and such a settlement is no defence to the assured's claim on the policy. If the insurer desires to have the question of settlement in his own hands he must either make an express condition to that effect, or pay a full indemnity to the assured so as to become *dominus litis*. If the assured does release a third party before payment has been made by the insurers, the release is good and as effective against the insurers as it would be against the assured (*f*). But

(*c*) *Inman* v. *South Carolina Ry. Co.* (1889), 129 U. S. 128.

(*d*) *Fidelity Co.* v. *Gas Co.* (1892), 150 Pa. 8.

(*e*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355.

(*f*) *Fidelity Co.* v. *Gas Co.* (1892), 150 Pa. 8; *Connecticut Fire* v. *Erie Rail Co.* (1878), 73 N. Y. 399.

where the release of the third party was not made unconditionally, but subject to the express condition that it should be without prejudice to the assured's claim against the company it was held that the release was only operative as between the assured and the third party, and that it did not prevent the assured recovering from the insurers or the insurers recovering by subrogation from the third party (*g*).

After payment.

After payment of the assured by the insurers a release or settlement made by the assured against the interests of the insurer is good ground for a claim for damages against the assured (*h*). The equitable right to the assured's claim against third parties being vested in the insurers after payment of the insurance money a release of such rights is inoperative against the insurers if the party liable had notice of the insurer's right to subrogation (*i*). If the party liable accepts the release of the assured and gives good consideration therefor in ignorance of the rights of the insurers the release is apparently a good answer to the insurers' claim against him, and the insurers' only recourse is for damages against the assured (*k*). Even although the assured has been paid the insurance money, if he has not received a complete indemnity he is probably entitled as *dominus litis* to make a *bonâ fide* settlement in the joint interests of himself and the insurers of all claims arising out of the same cause of action.

Insurers have no greater right than assured.

The insurers cannot by way of subrogation become entitled to any claim which the assured himself could not have made (*l*). Subrogation is to the rights of the assured only. The insurers are not subrogated to the rights of a mere payee who is entitled to receive the money but whose interest is not separately insured (*m*).

No right to claim compensation from assured for negligence, etc.,

When the insurers have paid a loss brought about by the negligence of the assured or his servants they have no claim against him for damages. So where two ships owned by the same person came into collision by the fault of the master and crew of the one ship and to the injury of the other an underwriter who

(*g*) *Connecticut Fire* v. *Erie Rail Co.* (1878), 73 N. Y. 399 ; *Fidelity Co.* v. *Gas Co.* (1892), 150 Pa. 8.

(*h*) *West of England Fire* v. *Isaacs*, [1897] 1 Q. B. 226 ; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753.

(*i*) *Smidmore* v. *Australian Gas Light Co.* (1881), 2 N. S. W. R. (Law) 219 ; *Hart* v. *Western Railway Co.* (1847), 54 Mass. 99 ; *Connecticut Fire* v. *Erie* (1878), 73 N. Y. 399.

(*k*) *West of England Fire* v. *Isaacs*, [1897] 1 Q. B. 226.

(*l*) *St. Louis* v. *Commercial Insurance* (1890), 139 U. S. 223 ; *Phœnix Ins.* v. *Erie Transportation* (1886), 117 U. S. 312, 322.

(*m*) *Wager* v. *Providence Ins.* (1893), 150 U. S. 99 ; *Anderson* v. *Saugeen Mut.* (1899), 18 Ont. R. 355.

had insured the injured ship and accepted abandonment from the owner paid him the amount of the insurance, and then claimed to recover it back as damages for which as owner of the negligent ship he was alleged to be responsible, the Court held that the insurers could not recover, because to do so they must show some right of their assured to do so, and as their assured had no right of action against himself the claim failed (*n*).

or for wilful damage by his wife.

For the same reason, where the insurance was against fire and the premises were wilfully destroyed by the felonious act of the assured's wife, it was held that the insurers, having paid the loss, could not recover damages either against the assured or his wife, because the assured could not sue himself and he could not sue his wife (*o*).

Damage by one part owner.

In an American case, where an insurance company had insured A and B part owners, and a loss occurred caused by the negligent act of A, it was held that, although the insurers could not recover from A what they had paid him in respect of his share of the loss, they were subrogated to B's claim against A, and could therefore recover from A what they had paid to B (*p*).

Subrogation to mortgagee's debt and security.

In America there is a conflict of authority as to whether the right of a mortgagee to the security and to payment of his debt is a right to which the mortgagee's insurers are entitled to be subrogated upon payment of the loss to the mortgagee (*q*). The decisions against the right of subrogation seem, however, to be based on the theory that the insurers are only subrogated to rights of the assured to recover satisfaction for the loss (*r*). *Castellain* v. *Preston* (*s*), by recognising the right of the insurers to be subrogated to a vendor's right to the purchase money on an agreement to sell the property insured, shows that the right of subrogation is not limited to the right of the assured to recover satisfaction, but include all rights of the assured which will diminish the loss. The right of a mortgagee to have the debt repaid is undoubtedly such a right, and on principle there can be no doubt that the mortgagee's insurer is *primâ facie* entitled to be subrogated to the mortgagee's right against the mortgagor. There seems to

(*n*) *Simpson* v. *Thomson* (1887), 3 A. C. 279.

(*o*) *Midland Insurance* v. *Smith* (1881), 6 Q. B. D. 561.

(*p*) *Williams* v. *Hays* (1892), 64 Hun. 202.

(*q*) *King* v. *State Mutual Fire* (1851), 61 Mass. 1; *Suffolk Fire* v. *Boyden* (1864), 91 Mass. 123; *Carpenter* v. *Providence Washington* (1842), 16 Pet. 495, 501; *Excelsior Fire* v. *The Royal* (1873), 55 N. Y. 343, 359.

(*r*) *Provincial Insurance* v. *Reesor* (1874), 21 Grant, 296.

(*s*) (1883), 11 Q. B. D. 380.

be no English decision directly in point, but in *North British and Mercantile* v. *London, Liverpool and Globe* (*t*), Mellish, L.J., cites the case of mortgagor and mortgagee as an illustration of the principle that, where two persons are each interested in the same property to the full value, each is entitled to insure and recover the full value from their respective insurers; but in order that the insurers may not ultimately pay more than the total value of the property between them one of them must be subrogated to the right of their assured against the other party interested in the property. And in *Westminster Fire* v. *Glasgow Provident* (*u*), the majority of the consulted judges in the Court of Session expressed the opinion that when a bondholder's insurers paid the loss to the bondholder he was bound to assign to them his rights against the debtor.

Cases where there is no subrogation to mortgagee's rights.

Whether or not there is a right of subrogation in the case of a mortgagee's insurance depends partly on the terms of the mortgage and partly on the terms of the insurance policy. There is no subrogation (1) where the mortgagee is merely payee of the insurance money payable upon the interest of the mortgagor, and is not separately insured in respect of his own interest; (2) where the mortgagee is insured but the insurers have also agreed to indemnify the mortgagor as well as the mortgagee and such agreement is enforceable by the mortgagor; (3) where the mortgagee has contracted to insure the mortgagor or to give him the benefit of his insurance by applying the insurance money in reduction of the mortgage debt.

Where mortgagee is merely payee.

A policy expressed to be payable "to mortgagee in case of loss" is not *primâ facie* an insurance of the mortgagee's interest (*x*). The mortgagee is merely in the position of having a charge upon the mortgagor's policy effected upon the mortgagor's interest. Payment to the mortgagee *primâ facie* extinguishes the debt *pro tanto*, and if the payment exceeds the debt the mortgagee will hold the balance in trust for the mortgagor (*y*). Clearly in such a case there is no subrogation (*z*). But where the mortgagor wilfully burned the premises insured and the insurers voluntarily paid the loss to the mortgagee, and took an assignment of the mortgage, it

(*t*) (1877), 5 Ch. D. 569.
(*u*) (1887), 14 R. 947, 966.
(*x*) *Livingstone* v. *Western Insurance* (1869), 16 Grants Ch. U. C. 9; *Anderson* v. *Saugeen Mutual* (1899), 18 Ont. 355.
(*y*) *Graves* v. *Hampden Insurance* (1865), 92 Mass. 281.
(*z*) *Imperial Fire* v. *Bull* (1889), 18 Can. S. C. 697; *Klein* v. *Union Fire* (1883), 3 Ont. R. 234.

was held that they were entitled to enforce the whole debt against the mortgagor without giving credit for the sum paid to the mortgagee (*a*).

Mortgage clause.

If a policy "payable to mortgagee in case of loss" contains a condition that the mortgagee's right shall not be affected by the acts or deeds of the mortgagor, this is probably not in itself a separate insurance of the mortgagee upon his own interest, but only a derivative contract to pay upon the mortgagor's interest without reference to the mortgagor's acts and deeds which might as between the mortgagor and the insurers invalidate the policy (*b*). If so, there is no subrogation on payment to the mortgagee unless it is expressly stipulated for in the policy (*c*). Such a stipulation is frequently contained in a mortgage clause. The ordinary form of this clause entitles the insurers to be subrogated to the rights of the mortgagee against the mortgagor if by reason of double insurance, alienation of property, or other breach of a condition, the policy is unenforceable in the hands of the mortgagor (*d*). And if as against the mortgagor who has insured elsewhere the insurers are only bound to pay a rateable proportion of the loss, they are upon payment of the whole loss to the mortgagee entitled to be subrogated to his rights against the mortgagor to the extent of the difference between the sum which would have been payable by them to the mortgagor and the sum in fact paid by them to the mortgagee (*e*). If before payment the mortgagee has released any of the securities for the debt, and so is unable to comply with the provisions of the clause, the insurers are discharged from liability (*f*). Where the policy contained the mortgage clause, and the insurers paid the amount of the loss to the mortgagee, which amount was insufficient to extinguish the mortgage debt, it was held that they were not entitled to rank *pari passu* with the mortgagee, but that the mortgagee was entitled to repayment of his debt in full before the insurers were entitled to any benefit from the debt or securities (*g*). In a Canadian case (*h*) where the policy

(*a*) *Westmacott* v. *Hanly* (1875), 22 Grants Ch. U. C. 382.

(*b*) *Anderson* v. *Saugeen Mutual* (1899), 18 Ont. R. 355; but see *Hastings* v. *Westchester Fire* (1878), 73 N. Y. 141; *Ulster Co. Savings* v. *Leake* (1878), 73 N. Y. 161.

(*c*) *Allen* v. *Watertown Fire* (1882), 132 Mass. 480.

(*d*) *Ulster Co. Savings* v. *Leake* (1878), 73 N. Y. 1861; *Howes* v. *Dominion Fire* (1883), 8 Ont. A. R. 644.

(*e*) *Phœnix Ins.* v. *Floyd* (1879), 19 Hun. 287.

(*f*) *Attleborough Bank* v. *Security Co.* (1897), 168 Mass. 147.

(*g*) *Eddy* v. *London Assurance* (1892), 64 Hun. 307.

(*h*) *Anderson* v. *Saugeen Mutual* (1899), 18 Ont. R. 355.

was issued to a mortgagor "loss, if any, payable to mortgagee" and contained the mortgage clause and the company had a good defence against the mortgagor on the ground that proofs of loss had not been delivered, it was held that as proofs of loss were made a condition precedent to action, but not a condition precedent to liability there was a subsisting liability to the mortgagor although he could not sue. The insurers were not therefore on payment to the mortgagee entitled to be subrogated to his rights against the mortgagor.

Where mortgagor's policy is assigned to mortgagee.

Where the mortgagor's policy is assigned absolutely to the mortgagee with consent of the insurers, that is *primâ facie* a separate insurance of the mortgagee on his own interest, and not merely an assignment of the chose in action. The mortgagor ceases to be the assured and consequently the insurers, on payment to the mortgagees, are subrogated to the rights against the mortgagor (*i*).

Where mortgagor and mortgagee are both insured.

Where the policy insures both mortgagor and mortgagee there is clearly no right of subrogation on payment to the mortgagee, that is to say, the right of subrogation is extinguished by the obligation to indemnify the mortgagor (*k*).

Where mortgagee alone is insured.

Where a policy is granted to a mortgagee in his own name it may be intended to cover both his own and the mortgagor's interests, or it may be intended to cover the interest of the mortgagee only. If the mortgagor is not named, then, except in the case of an insurance upon goods, the policy in so far as it is for the benefit of the mortgagor is void under the statute 14 Geo. 3, c. 48. Thus, if the policy is intended to insure the mortgagee only, or if the mortgagor is not mentioned, and therefore not in law insured, the right of subrogation does arise upon payment of the mortgagee subject to this, that if as between mortgagor and mortgagee the mortgagee was bound to insure for the benefit of the mortgagor, or to apply the insurance money in discharge of the debt, there is no claim by the mortgagee against the mortgagor to which the insurers can be subrogated. Where a mortgagee insures on his own interest and on his own behalf without any obligation to the mortgagor, he is not bound to account to the mortgagor in case of loss (*l*) The mortgagee is not a trustee of the property mortgaged in the sense that he cannot use his position for his own profit, and he is therefore entitled to receive the insurance money and

(*i*) *Burton* v. *Gore District Mutual* (1865), 12 Grants Ch. U. C. 157.

(*k*) *Kernochan* v. *New York Bowery* (1858), 17 N. Y. 428.

(*l*) *Dobson* v. *Land* (1850), 8 Hare, 216.

subsequently recover the full debt from the mortgagor (*m*). If the mortgage contains a covenant by the mortgagor to insure and, failing such insurance, power to the mortgagee to insure and add the premium to the debt, and, on failure of the mortgagor to insure, the mortgagee insures in his own name and charges the premiums in account with the mortgagor such insurance is *primâ facie* deemed to be made for the benefit of the mortgagor as well as the mortgagee, and the mortgagee is bound to apply the insurance moneys in discharge of the debt (*n*). But the power to make such insurance does not bind the mortgagee to insure for the benefit of both, and he may effect insurance on his own interest only with a proviso that in case of payment the insurers shall be subrogated to his rights under the mortgage (*o*).

When mortgagor and mortgagee insure in different offices.

When mortgagor and mortgagee insure independently in different offices, each solely on his own interest, each is primarily entitled to a full indemnity, that is the total loss up to the value of his interest which in each case may be the total value of the property.

If the mortgagee was bound to apply his insurance money towards the extinction of the debt, that is a benefit which the mortgagor can claim, and consequently the mortgagor's insurers can recover from him the value of that benefit, that is the amount of the debt, the ultimate result being, if the mortgagee insured for the amount of his debt and the mortgagor for the full value of his property, that the mortgagee's insurers pay the amount of the debt, and the mortgagor's insurers the difference between that amount and the total loss if the latter exceeds the former. On the other hand, if the mortgagor was not bound to apply his insurance money towards the extinction of the debt, he has his debt which he can still enforce, and to that claim his insurers are subrogated, the ultimate result then being that the mortgagor's insurers pay the total loss and the mortgagee's insurers pay nothing. In the above cases, as the policies are hypothetically on different interests there is no double insurance and therefore no place for the application of the *pro rata* clause. A more difficult case is where the mortgagee has insured for the full value of the subject matter and for the benefit of both mortgagor and mortgagee, and at the same time the mortgagor has insured in another office for the full value and

(*m*) *Concord Union Mutual* v. *Woodbury* (1858), 45 Me. 447; *White* v. *Brown* (1848), 56 Mass. 412; *Excelsior Fire* v. *The Royal* (1873), 55 N. Y. 343, 359.

(*n*) *Howes* v. *Dominion Fire* (1883), 8 Ont. A. R. 644; *Provincial Insurance* v. *Reesor* (1874), 21 Grant, 296.

(*o*) *Foster* v. *Van Reed* (1877), 70 N. Y. 19.

solely for his own benefit. Here, as far as the mortgagor is concerned, there is a double insurance, and primarily each office is liable to pay half of the loss to him. The mortgagor, however, is entitled as against the mortgagee to demand that the mortgagee shall apply the whole of the insurance money in reduction of the debt. The mortgagor's insurers are entitled to this benefit, and therefore the ultimate result ought to be, notwithstanding the *pro rata* clause, that the mortgagee's insurers bear the total loss. In *Nicholls* v. *Scottish Union* (*p*) the facts presented in substance the above problem, the action being brought by the mortgagor against his insurers. It was held that as his interest was also insured by the mortgagee's policy there was double insurance, and under the *pro rata* clause he could only recover half the loss from his insurers. It is doubtful whether the mortgagee's policy in this case did in fact insure the mortgagor, but at any rate the mortgagee was bound to apply the insurance money on his policy towards extinction of the debt, and therefore as between the insurers the ultimate result ought to have been that the mortgagee's insurers bore the whole loss. The question of subrogation and its ultimate result was not, however, discussed or decided.

Subrogation to vendor's rights against purchaser.

Some of the American Courts have decided that where a vendor has insured the property contracted to be sold his insurers have no right to be subrogated to the right to receive the purchase money, and they point out the distinction between insuring receipt of the purchase money, in which case it is stated there would be subrogation, and insuring the property, in which case it is stated there is no subrogation because there is no claim arising out of the loss (*q*). *Castellain* v. *Preston* (*r*) disposes of this distinction as far as English law is concerned by deciding that the vendor's insurer is entitled to be subrogated to the benefit of the purchase price even although the liability to pay it does not arise out of the loss. The Court were of opinion that the vendor's insurers are not only entitled to have the purchase price applied in reduction of the money paid by them as an indemnity to the vendor, but are also entitled to exercise the vendor's lien as against the purchaser to enforce payment. They were doubtful as to whether the vendor's insurers could bring a

(*p*) (1885), 2 T. L. R. 190; 14 R. 1094.

(*q*) *Aetna Fire* v. *Tyler* (1836), 16 Wend. 397, 399; *Washington Fire* v. *Kelly* (1870), 32 Md. 421, 443, 458; *Insurance Co.* v. *Updegraff* (1853), 21 Pa. 519.

(*r*) (1883), 11 Q. B. D. 380; see also *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753.

suit for specific performance in the vendor's name, but on general principles there seems to be no reason why they should not be entitled to exercise this right, which might be their only chance of obtaining repayment. There is, however, no subrogation to the vendor's claim for the purchase money where the vendor has contracted with the vendee, that he shall have the benefit of the insurance (*s*), or where the policy does, in fact, insure both vendor and vendee (*t*).

Rights of landlord and tenant *inter se*.

The insurers of landlord and tenant are also entitled to subrogation, and the ultimate loss falls upon the insurer of the party who, but for the insurance, would have ultimately suffered damage. The landlord's insurer who has paid him the loss is entitled to the benefit of the tenant's covenant to repair (*u*), or if the tenant has reinstated the premises the landlord must account to his insurer for the value of the reinstatement (*x*). If the landlord has reserved a rent payable even in case of loss by fire, he cannot, having been paid a complete indemnity in respect of the damage to the premises, continue to receive the rent without accounting to the insurers. Obviously, if the assured has the insurance money which can be profitably employed elsewhere, and does not employ it to reinstate the premises the receipt of rent would be something in excess of an indemnity (*y*).

Liability of tenant for accidental loss by fire.

The liability of a tenant to his landlord for the destruction of the premises by fire has never been very satisfactorily expounded. The Statute 14 Geo. 3, c 78, s. 86, provides that no action shall be brought against any person in whose building or on whose estate any fire should accidentally begin, but "no contract or agreement made between landlord and tenant shall be hereby defeated or made void." It seems to be generally assumed that this relieves a tenant from liability unless (1) he has covenanted to repair; (2) the fire is caused by his wilful act or negligence (*z*). The further question, however, does arise whether a tenant may not, in the absence of any express covenant, be liable for an entirely accidental fire on the ground that it is a permissive waste, and if so, whether the statute exempts him from that liability.

Tenant's liability for waste.

The question of a tenant's liability for waste is one that has been

(*s*) *Washington Fire* v. *Kelly* (1870), 32 Md. 421.

(*t*) *Benjamin* v. *Saratoga Mutual* (1858), 17 N. Y. 415.

(*u*) *Andrews* v. *Patriotic* (1886), 18 L. R. Ir. 355.

(*x*) *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560.

(*y*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 406.

(*z*) Fawcett's Landlord and Tenant (2nd edition), p. 309.

much discussed, but the decided cases are very conflicting. Liability for waste apart from express covenant was imposed upon tenants by the statutes of Marlbridge (52 Hen. 3) and Gloucester (6 Edw. 1, c. 8). It has been held that the statutes do not apply to tenancies at will or yearly tenancies (*a*). Such tenants are liable for wilful damage, for the wilful act terminates their tenancy, and they can be sued in a common law action for damages in the nature of waste or for trespass (*b*), but they are not liable for negligence or permissive waste (*c*). Tenancies for years and life tenancies are clearly within the statutes, but with regard to them the question arises what is the meaning of waste. Does it include permissive as well as voluntary waste, and, if so, is damage caused by the Act of God and without negligence permissive waste, or is it confined to dilapidation as the result of negligence? In *Davies* v. *Davies* (*d*), Kekewich, J., held that a tenant for years was liable for permissive waste, which he defines as waste which has not come about by his own acts, but comes about by a revolution or by wear and tear, or by the action of the elements, or in any other way, not being his own act. In the case of *In re Cartwright* (*e*), Kay, J., held that a tenant for life was not liable for permissive waste, but only for voluntary waste or acts of wilful destruction. In *Saner* v. *Bilton* (*f*) and *Manchester Bonded Warehouse* v. *Carr* (*g*), it is said in the case of tenancies for years that the tenant is not liable for waste in the case of damage arising from an apparently proper use of the premises, and that waste is confined to the result of wilful or negligent acts. In view of this conflict of authority it is impossible to state definitely whether a tenant is ever, in the absence of a covenant to repair, liable for damage not caused by his wilful act. All that can be said is that he may be liable for permissive waste which may include not only damage caused by his negligent act or omission, but damage done by causes over which he has no control. If under the statutes of Marlbridge and Gloucester he is liable for such damage, it may be argued that the Statute 14 Geo. 3, c. 78, s. 86, does not exempt him from liability, since the liability arises from a contract or

(*a*) Fawcett's Landlord and Tenant (3rd edition), p. 352; Woodfall's Landlord and Tenant (18th edition), p. 702.

(*b*) *Countess of Shrewsbury* (1601), 5 Co. Rep. 13A; *Burchell* v. *Hornsby* (1808), 1 Campb. 360.

(*c*) *Harnett* v. *Maitland* (1847), 16 M. & W. 257; *Torriano* v. *Young* (1833), 6 Car. & P. 8.

(*d*) (1888), 38 Ch. D. 499.

(*e*) (1889), 41 Ch. D. 532; followed by North, J., in *Parry and Hopkin*, [1900] 1 Ch. 160.

(*f*) (1878), 7 Ch. D. 815.

(*g*) (1880), 5 C. P. D. 507.

agreement between landlord and tenant, and although not the subject of express covenant may be within the proviso, saving such contracts or agreements from being defeated.

Tenant's liability for negligence.

Where the fire is caused by the negligence of the tenant or his servants an action may lie for permissive waste as indicated in the last paragraph, and if so, the Statute 14 Geo. 3, c. 78, s. 86, will not afford any defence because a fire caused by negligence does not begin accidentally within the meaning of the statute (*h*). If, however, for the reasons already indicated, no action for waste lies in respect of the fire caused by the tenant's negligence, the landlord cannot sue him for the damage done as if it were the negligent act of a stranger (*i*). Thus, where six stables were let to different tenants and they were all burned down through the negligent keeping of a fire by one of them who was a tenant at will, the landlord was not entitled to recover from the tenant in respect of the stable demised to him, but was entitled to recover in respect of the five other stables, because as to them they were as strangers to one another (*i*).

Tenant's covenant to repair.

Under a general covenant to repair without any exception of damage by fire a tenant is liable to reinstate the premises if accidentally destroyed by fire (*k*), and even where the tenant has covenanted to insure the premises for a specific sum, his liability under the covenant to repair is not limited to that amount (*l*). The measure of damages for breach of the covenant to repair is the pecuniary loss to the landlord arising from the fact that the repairs have not been done (*m*). It is not necessarily the cost of doing the repairs. Thus, where the premises were old and worn at the time of the demise and were burned down, the landlord was not entitled to the whole cost of erecting new premises, but damages for breach of the covenant to repair were assessed at such cost less the increased value of the new premises over the old (*n*). Where the premises are left in disrepair at the end of the term, the landlord is entitled to compensation for loss of user during the execution of repairs (*o*). The breach of the covenant to

(*h*) *Filliter* v. *Phippard* (1847), 11 Q. B. 347 ; *infra*, p. 696.

(*i*) *Panton* v. *Isham* (1694), 3 Levinz, 359.

(*k*) *Bullock* v. *Dommitt* (1796), 6 T. R. 650 ; *Pym* v. *Blackburn* (1796), 3 Ves. 34 ; *Chesterfield* v. *Bolton* (1739), Comyn, 627 ; *Clarke* v. *Glasgow Assurance* (1854), 1 Macq. 668.

(*l*) *Digby* v. *Atkinson* (1815), 4 Camp. 275.

(*m*) *Wigsell* v. *School for Indigent Blind* (1882), 8 Q. B. D. 357.

(*n*) *Yates* v. *Dunster* (1855), 11 Ex. 15.

(*o*) *Woods* v. *Pope* (1835), 6 C. & P. 782 ; *Birch* v. *Clifford* (1891), 8 T. L. R. 103.

repair is continuous until the repairs have been executed, and therefore receipt of rent although a waiver as to the past is not a waiver as to the future, and if the covenant was to repair within a reasonable time the time does not begin to run afresh from the receipt of the rent (*p*).

Landlord's liability to repair.

A lessor is not bound to repair the premises during the tenancy unless he has expressly covenanted to do so (*q*), and therefore if they are burned down he is not bound to reinstate them (*r*).

Tenant's covenant to insure.

Where a lease contains a covenant on the part of the tenant to insure, the tenant usually covenants to insure and keep insured in the name of the lessor or in the joint names of lessor and lessee for a specified sum either in a named office or generally in some substantial fire office. The tenant must insure within a reasonable time after the execution of the lease (*s*). If afterwards the policy is allowed to lapse for however short a time there is a breach of the covenant (*t*). But the tenant is not bound to keep up the original policy. If some effective policy is always in force that is sufficient (*u*). A covenant to insure in the joint names of lessor and lessee is fulfilled by an insurance in the name of the lessor alone (*x*); but a covenant to insure in the name of the lessor is not fulfilled by an insurance in the joint names of lessor and lessee (*y*). Where a tenant having covenanted to insure in joint names insured in his own name and showed the policy to the landlord, who approved of it and afterwards received rent, it was held that there was a breach of the covenant, and although the breach was waived up to the time the last rent was received, there was a continuing breach after that date, for which the tenant was liable (*z*). Apparently, if a policy is effected and kept in force, the fact that for some reason it is avoidable at the option of the company does not constitute a breach of the covenant to insure if in fact the company does not avoid it (*a*). Where the covenant in a lease provided that the lessees should " at all times during the said term keep insured against loss or damage by fire all buildings,

(*p*) *Baker* v. *Jones* (1850), 5 Ex. 498.
(*q*) *Gott* v. *Gandy* (1853), 2 E. & B. 845; *Arden* v. *Pullen* (1842), 10 M. & W. 321.
(*r*) *Bayne* v. *Walker* (1815), 3 Dow. 233.
(*s*) *Darlington* v. *Ulph* (1849), 13 Q. B. 204.
(*t*) *Pitt* v. *Shewin* (1811), 3 Camp. 134; *Wilson* v. *Wilson* (1854), 14 C. B. 616; *Job* v. *Banister* (1857), 26 L. J. Ch. 125.
(*u*) *Flower* v. *Peck* (1830), 1 B. & Ad. 428.
(*x*) *Havens* v. *Middleton* (1853), 10 Hare, 641.
(*y*) *Penniall* v. *Harborne* (1848), 11 Q. B. 368.
(*z*) *Martin* v. *Gladwin* (1845), 6 Q. B. 953; *Flower* v. *Peck* (1830), 1 B. & Ad. 428.
(*a*) *Pitt* v. *Laming* (1814), 4 Camp. 73.

erections, and fixtures of an insurable character, which at any time during the said term may be erected or placed upon or fixed upon the demised premises," it was held that the covenant applied to buildings erected at the time of the demise as well as to those erected during the term (*b*).

A covenant to insure in the case of a lease within the Bills of Mortality was held to be a covenant which ran with the land, and was therefore enforceable by and against assignees although not mentioned in the lease (*c*). It was so decided because by 14 Geo. 3, c. 78, s. 83, the landlord could compel the insurance money to be applied in reinstatement, and therefore the covenant to insure was a covenant which affected the land (*c*). If section 83 is applicable beyond the Bills of Mortality, and it was so decided in *Ex parte Gorely* (*d*), then in England all covenants to insure run with the land without reference to the place where the premises are situated.

Where the covenant to insure is broken and the premises are burned the landlord is entitled to recover from the tenant, as damages for breach of the covenant, the amount of the loss which but for the breach would have been recovered from the insurers (*e*). In the event of the tenant failing to insure the landlord cannot charge him with the premiums of an insurance effected by himself unless the lease gives him authority to do so; but, on the other hand, he is entitled to recover from the tenant damages for breach of the contract to insure even although there has been no fire, and a jury may give more than nominal damages (*f*).

Hey v. Wyche (1842), 2 G. & D. 569

Hey v. *Wyche.*

A lessee having covenanted to insure in the joint names of lessor and lessee assigned his leasehold interest, and the assignee covenanted with him to observe the covenants in the lease. The assignee did not insure, and the lessee insured in his own name, and brought an action on the covenant against the assignee. The jury found in his favour for the amount of the premiums, and the Court refused to disturb the verdict. They held that, although the lessee was not entitled to recover specifically an indemnification in respect of the premiums, he was entitled to more than nominal damages in respect of the risk which he ran.

(*b*) *Sims* v. *Castiglione*, [1905] W. N. 112.
(*c*) *Vernon* v. *Smith* (1821), 5 B. & Ald. 1.
(*d*) And see *ante*, p. 696.
(*e*) *Newman* v. *Maxwell* (1899), 80 L. T. 681; *Williams* v. *Lassell and Sharman* (1906), 22 T. L. R. 443.
(*f*) *Hey* v. *Wyche* (1842), 2 G. & D. 569.

Logan v. Hall (1847), 4 C. B. 598

Logan v. *Hall.*

A let to B, who covenanted to insure, and B sublet to C, who covenanted to insure in the same terms as the head lease. Neither B nor C insured, and A brought ejectment against B. It was held in an action by B against C on the covenant in the sub-lease that B could not recover damages in respect of the loss of his reversion because that was lost in consequence of B's breach of the covenant in the head lease, and not directly in consequence of C's breach of the covenant in the sub-lease.

Leather Cloth Co. v. Bressey (1862), 3 Giff. 474

Leather Cloth Co. v. *Bressey.*

A, a lessee, covenanted to keep the premises insured in the Alliance or such other office as the lessors should appoint. A sublet to B, who covenanted to pay "any sums of money expended on fire insurance." A, thinking although erroneously, that B was using the premises for a hazardous purpose insured at a high premium in an office, not the Alliance, and not appointed by the lessors. It was held that he could only recover from B such sum as he should have paid in the Alliance for the actual non-hazardous risk.

Tenant's liability for rent pending reinstatement.

Unless there is an express term in the lease suspending the payment of rent in the event of the premises being destroyed by fire, the tenant is liable for the rent although the premises are unfit for occupation (*g*). And this is so even although the tenant is not bound to repair (*h*), and the landlord having insured has received the insurance money and refuses to expend it in reinstatement (*i*). In such a case, however, if the tenant offered to surrender the lease the landlord might in equity be bound either to accept the surrender or remit the rent (*k*). Even if the landlord has covenanted to repair, the destruction of the premises is no answer to the landlord's claim for rent (*l*), nor is the tenant entitled to any damages for non-user of the premises during reinstatement or for unreasonable delay in executing the work (*m*). Where there is no demise of the premises but merely an agreement for use and occupation on the implied or express understanding that the agreement shall subsist only so long as the premises are fit for occupation as in the case of letting furnished apartments the contract comes to an end if the premises are

(*g*) *Marshall* v. *Schofield* (1882), 52 L. J. Q. B. 58; *Izon* v. *Gorton* (1839), 5 Bing. N. C. 501; *Baker* v. *Holtpzaffell* (1811), 4 Taunt. 45; *Monk* v. *Cooper* (1727), 2 Strange, 763.

(*h*) *Hare* v. *Groves* (1796), 3 Anstr. 687; *Belfour* v. *Weston* (1786), 1 T. R. 310; *Holtzapffel* v. *Baker* (1811), 18 Ves. 115.

(*i*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; *Lofft* v. *Dennis* (1859), 1 E. & E. 474.

(*k*) *Brown* v. *Quilter* (1764), Amb. 620.

(*l*) *Surplice* v. *Farnsworth* (1844), 7 M. & Gr. 576; *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507.

(*m*) *Green* v. *Eales* (1841), 2 Q. B. 225.

destroyed by fire (*n*), and the rent will be apportioned and be payable up to the date of the fire, but no longer (*o*).

Where an agreement for a lease is made on condition that the landlord will execute certain repairs within a specified time, and a fire prevents the landlord from doing so, the landlord cannot obtain specific performance of the agreement because he has not performed the condition precedent and the tenant is therefore released from his liability (*p*).

A covenant to pay the rent reserved "damage by fire excepted" means that, in case of fire, there shall be an abatement in respect of the portion of the premises rendered unfit for use and for the period during which the unfitness lasts (*q*).

In an agreement for the lease of a mill it was agreed that the tenant should covenant to repair and that the lease should contain all usual and necessary covenants. It was held that an exception of "damage by fire" ought not to be inserted in the covenant to repair (*r*).

Subrogation to claims of owners against carriers and other bailees.

Where the owner of goods is insured the insurers are subrogated to his remedy against carriers, warehousemen, and other bailees responsible for the safety of the goods (*s*). Where a common carrier or wharfinger is absolutely responsible for the safety of the goods and is liable for their loss, whether caused by his negligence or otherwise, he is commonly called an insurer of the goods, but he is not, strictly speaking, an insurer, and is not therefore entitled to claim contribution from insurers (*t*). The insurers who have paid the owner are entitled to recover the whole loss from the carrier or wharfinger who is liable to the owner. The owner's insurers are only deprived of the right of subrogation when they have in fact insured both owner and bailee (*u*), or where the owner has so contracted with the bailee as to deprive himself of the right of recourse, as where he has contracted that the bailee shall have the benefit of insurance (*x*), or that the bailee shall not be liable

(*n*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.

(*o*) *Packer* v. *Gibbins* (1841), 1 Q. B. 421.

(*p*) *Counter* v. *Macpherson* (1845), 5 Moo. P. C. 83.

(*q*) *Bennett* v. *Ireland* (1858), E. B. & E. 326.

(*r*) *Sharp* v. *Milligan* (1857), 23 Beav. 419.

(*s*) *North British and Mercantile* v. *London, Liverpool and Globe* (1877), 5 Ch. D. 569; *Mobile Ry. Co.* v. *Jurey* (1883), 111 U. S. 584; *London and Lancashire Fire* v. *The Rome Ry.* (1894), 144 N. Y. 200; *Liverpool, London and Globe* v. *McNeill* (1898), 89 Fed. Rep. 131.

(*t*) *Hall and Long* v. *Railroad Co.* (1871), 13 Wall. 367.

(*u*) *Wager* v. *Providence Insurance* (1893), 150 U. S. 99.

(*x*) *Phœnix Co.* v. *Erie Transportation Co.* (1886), 117 U. S. 312.

for loss by fire (*y*), or that he shall not be liable for any loss even although caused by the negligence of himself or his servants (*z*).

In America it is held to be against public policy for a common carrier to contract himself out of liability for negligence (*a*), but in English law a carrier as well as any other bailee may within certain limits contract himself out of liability for negligence if he does so in express terms. A contract with a bailee on the terms that he shall not be liable for loss by fire does not exempt him from liability if the fire is caused by the negligence of himself or his servants (*b*). If a bailee is to be relieved from liability for negligence, such liability must as a rule be excluded specifically (*c*). But where it was known that there were two recognised rates of carriage, one involving common law liability and the other on the terms that the carrier should not be liable for any loss, even although caused by negligence, a contract on the latter terms was implied from the fact that the lower rate was charged, and that the owner insured on a policy expressed to be "without recourse against lighterman" (*d*). The owner of goods lost in transit is entitled to recover from the carrier the value at the place of delivery, and although the consignor has paid freight in advance and could not recover it on non-delivery, the owner can recover as the value of the goods a sum representing cost, freight, and insurance (*e*).

Where a bailee has contracted to insure for the benefit of the bailor, but has omitted to do so, he is liable in case of loss by fire to pay as damages for breach of contract such sum as the owner would have recovered on the policy if it had been effected (*f*).

Subrogation of reinsurers to rights of insurers.

Reinsurers are entitled to be subrogated to all the rights of the original insurers, including the rights of the assured to which the original insurers are subrogated (*g*).

Assicurazioni Generali v. Empress Assurance, [1907] 2 K. B. 814

Assicurazioni Generali v. *Empress Assurance.*

The Empress Assurance gave an open cover to C. T. Bowring and Co., under which the latter could declare interests by certain boats other than vessels

(*y*) *Germania Fire* v. *Memphis Ry. Co.* (1878), 72 N. Y. 90; *Savannah Fire* v. *Pelzer Manufacturing Co.* (1894), 60 Fed. Rep. 39.

(*z*) *Thomas and Co.* v. *Brown* (1899), 4 Com. Cas. 186; *Hartford Fire* v. *Chicago Ry.* (1894), 62 Fed. Rep. 904.

(*a*) *Liverpool Steam Co.* v. *Phœnix* (1888), 129 U. S. 397; *Inman* v. *South Carolina Ry.* (1888), 129 U. S. 128.

(*b*) *Liverpool, London & Globe* v. *McNeill* (1898), 89 Fed. Rep. 131; *Germania Fire* v. *Memphis Ry.* (1878), 72 N. Y. 90.

(*c*) *The Xantho* (1887), 12 A. C. 503, 515.

(*d*) *Thomas and Co.* v. *Brown* (1899), 4 Com. Cas. 186.

(*e*) *Dufourcet* v. *Bishop* (1886), 18 Q. B. D. 373.

(*f*) *Bateman, Ex parte* (1856), 8 De G. M. & G. 263.

(*g*) *Hatch Mansfield* v. *Weingott*

belonging to Martin Taylor. Bowring and Co. put forward two shipments by Martin Taylor's boats, and these were accepted by the Empress in ignorance of the fact that the boats were Martin Taylor's. The Empress reinsured with the plaintiffs to the extent of half their interest in the two shipments. On the loss of the cargoes the Empress settled the loss and were paid by the plaintiffs one half in respect of the reinsurance. The Empress subsequently recovered from Bowring and Co the amount of the loss which they had paid as damages for the fraudulent misrepresentation of their servant as to the fact that the shipments were by Martin Taylor's boats. It was held that the plaintiffs were entitled to recover half of the damages from the Empress less the reasonable costs incurred by them in recovering the damages from Bowring and Co.

Subrogation in guarantee policies.

In the case of a guarantee policy where the contract is one of insurance and not suretyship, the insurers, on paying the debt to the insured creditor, are entitled to be subrogated to his claims against the debtors and sureties, and the insurers and sureties do not stand in the relation of co-sureties (*h*). The result is that the insurers, instead of being merely entitled to contribution from the sureties, may recover from them in the name of the creditor the whole debt (*h*).

Liability of persons causing fire by negligence.

Where a fire is caused by the negligence of any person or his servant, such person is liable for all the natural consequences of the fire, however widely it may spread (*i*). Every person making use of dangerous elements, such as fire, gas, and gunpowder owes a duty to all neighbours and passers-by to use proper care in handling them, and therefore, where damage is done through want of such proper care, the person responsible for the negligence is liable to indemnify the person who has suffered the damage (*k*).

Statutory powers do not excuse.

Statutory power granted to a corporation, such as a railway company, does not free them from responsibility for the consequence of negligent acts done in the execution of their power (*l*). Thus, a railway company may be liable for fire caused by sparks from their engines if the engines were defective in construction or negligently used. The question of whether or not there has been negligence is one of fact. The fact that sparks from an engine have set fire to property adjoining the line is *primâ facie*

(1906), 22 T. L. R. 366; *The Ocean Wave* (1873), 5 Biss. 378.

(*h*) *Parr's Bank* v. *Albert Mines Syndicate* (1900), 5 Com. Cas. 116.

(*i*) *Tuberville* v. *Stamp* (1697), 1 Comyn, 32; *Vaughan* v. *Menlove* (1837), 3 Bing. N. C. 468; *Filliter* v. *Phippard* (1847), 11 Q. B. 347; *Commercial Union* v. *Lister* (1874), L. R. 9 Ch. 483; *Fidelity Co.* v. *Gas Co.* (1892), 150 Pa. 8; *Crandall* v. *Goodrich* (1883), 16 Fed. Rep. 75.

(*k*) *Parry* v. *Smith* (1879), 4 C. P. D. 325; *Crook* v. *Midland Great Western*, [1909] A. C. 229.

(*l*) *Radley* v. *L. & N.-W. Ry.* (1876), 1 A. C. 755.

proof of negligence (*m*), but not conclusive proof (*n*). The fact that the company used engines of the usual type and construction in the ordinary manner and for authorised purposes does not necessarily negative negligence (*n*). The use of a higher power engine of greater efficiency may increase the danger from sparks, but such use alone is not negligence if the best known and practicable means available, in engines of the type used, for preventing the emission of sparks have been employed (*o*). In a Scottish case the negligence alleged against a railway company was the fact that they did not use a contrivance then in common use called a "spark arrester." There was evidence to show that it was not suitable for modern high-power engines. It reduced their efficiency, and other means alleged to be equally good were adopted for the prevention of sparks. It was held that the absence of the "spark arrester" was not conclusive evidence of negligence (*o*).

Where the wrongful act amounts to felony.

Where fire is caused not by negligence, but by the wilful act of a third person, the burning is felonious, and the wrongdoer is liable both to a civil action for damages and to criminal prosecution for the felony (*p*). The civil right to damages arises on the commission of the offence, but the policy of the law is said not to allow the person injured to pursue his civil right by action if he has failed in his duty of bringing or endeavouring to bring the felon to justice in a criminal court (*p*). The person injured has a duty to the State which must not be evaded, and he should perform this duty before he will be allowed to satisfy his personal claim (*p*). At the same time the prosecution of the felon is not a condition precedent to the civil cause of action, and if the offender has been brought to justice by some other person, or if he is dead or has fled from justice and the person injured has done all that can be reasonably expected of him to satisfy the criminal law he may pursue his civil remedy (*q*).

Absolute responsibility for fire as a dangerous element.

In the case of certain dangerous things the common law imposed not only a duty of strict diligence on the persons dealing with them, but an absolute duty of insuring the safety of all persons who might be injured by their use (*r*). A liability therefore

(*m*) *Piggot* v. *The Eastern Counties Ry.* (1846), 3 C. B. 229.

(*n*) *Aldridge* v. *G. W. Ry.* (1841), 3 Man. & Gr. 515.

(*o*) *Port Glasgow Sailcloth Co.* v. *Caledonian Ry.* (1892), 19 R. 608.

(*p*) *Ball, Ex parte* (1879), 10 Ch. D. 667; *Midland Insurance* v. *Smith* (1881), 6 Q. B. D. 561.

(*q*) *Ball, Ex parte* (1879), 10 Ch. D 667; *Midland Insurance* v. *Smith* (1881), 6 Q. B. D. 561.

(*r*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330.

attaches in respect of damage done even although the utmost care has been exercised in the use of the article in question (*r*).

Where fire is used for driving engines or for purposes of manufacture or trade under conditions which involve a substantial risk to neighbouring property, such fire is undoubtedly a dangerous element in this sense, and there is an absolute duty upon the person using it to indemnify neighbouring proprietors against damage (*s*). In the case of fire used for ordinary domestic purposes, it may be doubted whether the Common Law did impose an absolute duty of insuring safety (*t*); but where fire broke out on the premises of any person there was a presumption that that person was responsible, and that it was caused by the negligence of him or his servants (*u*). The presumption might be rebutted by proof of inevitable accident, such as impetuous and sudden winds or earthquake shock, or the act of trespassers, such as burglars, and apparently, if such cause were proved, these would be a good defence (*u*).

Statutory powers relieve grantee from absolute responsibility.

Where a corporation, such as a railway company, has statutory power to use fire for the purposes of its undertaking, such authority frees it from the common-law liability of insuring safety, and it is liable only for negligence (*x*), but apart from express statutory power to run locomotive engines a railway company would be absolutely liable for all damage done by such engines (*y*).

Railway Fires Act, 1905.

By the Railway Fires Act, 1905 (*z*), a railway company can no longer plead its statutory powers as a defence to an action for damage done by sparks from locomotive engines to agricultural land or agricultural crops where the claim does not exceed £100. As regards claims under that amount the company is placed on the same footing as if the engines were run without statutory powers (*a*), that is to say, there is absolute liability for damage without proof of negligence, provided notice of claim is given within seven days, and particulars of damage within fourteen

(*r*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330.

(*s*) *Jones* v. *Festiniog Ry.* (1868), L. R. 3 Q. B. 733; *Furlong* v. *Carroll* (1881), 7 Ont. A. R. 145.

(*t*) *Canterbury* v. *A.-G.* (1842), 1 Phillip, 306, and authorities there cited.

(*u*) *Tuberville* v. *Stamp* (1697), 1 Comyn, 32.

(*x*) *Hammersmith Ry.* v. *Brand* 1868), L. R. 4 H. L. 171; *Michigan Central Ry.* v. *Weallans* (1894), 24 Can. S. C. 309.

(*y*) *Jones* v. *Festiniog Ry.* (1868), L. R. 3 Q. B. 733; *Weallans* v. *Canada Southern* (1894), 21 Ont. A. R. 297; reversed 24 Can. S. C. 309.

(*z*) 5 Edw. 7, c. 11; see similar provison in Canada, 3 Edw. 7, c. 58, s. 239, considered in *Blue and Deschamps* v. *Red Mountain Ry.*, [1909] A. C. 361.

(*a*) Sec. 1.

days of the occurrence of the damage (*b*). When damage is caused by an engine used by one company on a line worked by another, the party injured may proceed against either company, but if the company working the line pays the damage the company using the engine is bound to indemnify it (*c*). A railway company has under this Act power to enter upon any land for the purpose of extinguishing any fire caused by sparks, and is liable for damage done by the exercise of this power, such damage to be settled in manner provided by the Lands Clauses Consolidation Act, 1845 (*d*).

Liability of occupier for accidental fires, 14 Geo. 3, c. 78, sec. 86.

In 1707 an Act for the better preventing of mischiefs that may happen by fire provided that no action should be brought against any person in whose house or chamber any fire should accidentally begin (*e*), and in 1774, this provision was incorporated in the London Building Act of that year, and the immunity extended to any person in whose house, chamber, stable, or barn, other building, or on whose estate any fire shall accidentally begin (*f*). This provision applies to the whole of England, and not merely to the metropolis (*g*). It does not apply to Ireland, and in the opinion of Lord Watson it does not apply to Scotland (*h*). The effect of the provision in England is to modify the common-law liability of the person upon whose property a fire arises. Where before he might have been absolutely liable as the keeper of a dangerous thing, he is now only liable for negligence, and in no case is negligence presumed; some special act of negligence on the part of himself or his servant must be averred and proved before he can be rendered liable. Sir William Blackstone, in his Commentaries, expressed an opinion that the statute exempted the owner of property from liability even where the fire was caused by his own negligence (*i*). The statute can certainly be construed in that sense, since "accidentally" may, as in an accident policy, include incidents directly caused by the negligence of the party in whose favour the provision is made. The point has never been definitely decided. In *Canterbury* v. *A.-G.* (*k*) it was considered by Lord Lyndhurst, who expressed no decided opinion either way, and in *Filliter* v. *Phippard* (*l*) it was argued before the Court of Queen's Bench, who expressed a strong

(*b*) Sec. 3.
(*c*) Sec. 1 (2).
(*d*) Sec. 2.
(*e*) 6 Anne, c. 31, s. 6, made perpetual by 10 Anne, c. 14, s. 1.
(*f*) 14 Geo. 3, c. 78, s. 86.
(*g*) *Richards* v. *Easto* (1846), 15 M. & W. 244, 251. See *ante*, p. 696.
(*h*) *Westminster Fire* v. *Glasgow Provident* (1888), 13 A. C. 699, 716.
(*i*) 1 Bla. Com. 431.
(*k*) (1842), 1 Phillip, 306.
(*l*) (1847), 11 Q. B. 347.

opinion that the statute did not free the owner of property from liability for his own or his servant's negligence. Although the case before them was one where the fire had been caused by the wilful act of the owner, and the opinion of the Court was therefore *obiter*, it has now stood so long without contradiction that it may probably be safely accepted as rendering the true construction of the statute.

Liability for damage done by riot.

The community being collectively responsible for the keeping of the peace, the city, town, or hundred were at an early date rendered liable to the individual for damage done by any riotous assembly of the people. This liability was defined in the Riot Act, 1714 (*m*). That Act applied to England and Scotland, and gave compensation for damage done to places of worship, houses, barns, and outhouses by felonious and riotous acts. This provision for compensation was extended by a series of acts in the reign of George 3, so as to include damage to other kinds of property not specified in the Act of 1714. Thus, in 1801, damage to wind and water mills (*n*), in 1811, to trade buildings and machinery (*o*), in 1815, to colliery plant (*p*), and in 1816, damage to all buildings and all furniture goods and commodities therein (*q*) were provided for. These statutes gave compensation only for damage caused by acts which were felonious as well as riotous (*r*), and where the intention of the rioters was to wholly destroy and not merely to damage the property attacked (*s*). They gave compensation in respect of property damaged or destroyed, but not in respect of property which had been stolen (*t*), and there was no provision whereby insurers who had paid an indemnity on an insurance policy might recover compensation otherwise than in the name of their assured (*u*).

Riot (Damages) Act, 1886.

In 1827 (*x*) all the above-mentioned Acts were repealed in so far as they related to compensation for damage done by riot in England, and they were replaced by a consolidating Act of that year which was amended by an act of 1832 (*y*), and finally, these last-mentioned acts were repealed and replaced by the Riot (Damages) Act, 1886 (*z*), which now contains the whole law of compensation

(*m*) 1 Geo. 1, c. 22, s. 7.
(*n*) 41 Geo 3, c. 24.
(*o*) 52 Geo. 3, c. 130.
(*p*) 56 Geo. 3, c. 125.
(*q*) 57 Geo. 3, c. 19, s. 38.
(*r*) *Reid* v. *Clarke* (1798), 7 T. R. 496.
(*s*) *Drake* v. *Footitt* (1881), 7 Q. B. D. 201.
(*t*) *Smith* v. *Bolton* (1816), Holt, 201.
(*u*) *London Assurance* v. *Sainsbury* (1783), 3 Dougl. 246.
(*x*) 7 & 8 Geo. 4, c. 31.
(*y*) 2 & 3 Will. 4, c. 72.
(*z*) 49 & 50 Vict. c. 38.

for riot as far as England is concerned. This Act applies to all buildings and the property therein and to all trade, agricultural and mining machinery, and gives compensation in respect of all property stolen or destroyed by any persons riotously and tumultuously assembled together (*a*). Compensation is payable by the police authority of the district as indicated in the schedule to the Act, and the police authority are empowered to raise the money on the police rate (*b*). Where a person injured is insured, and has been paid compensation by his insurers, the Act shifts the right to compensation *pro tanto* to the insurers, so that they to the extent to which they have indemnified their assured may proceed against the police authority in their own name (*c*).

Essential elements of a riot.

A wall may be a building within the meaning of the Act (*d*). The act causing the damage need not now be felonious, but it must be caused by a riotous assembly (*d*). There are five necessary elements of a riot: (1) number of persons, three at least; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another by force if necessary, against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. Thus, in the following circumstances there was held to be no riot. Seven or eight youths of ages from fourteen to eighteen were collected upon a pavement, shouting and using rough language, some of them standing with their backs against a wall, others running against them or against the wall with their hands extended, and after they had gone backwards and forwards in this way for about a quarter of an hour the wall fell with a "splash." As soon as the wall fell the caretaker of the premises came out into the street and the youths cleared off in different directions. The Court held that there was no evidence of elements 4 and 5 above mentioned, and therefore the damage was not one for which the owner of the premises could recover against the police authority under the Riot (Damages) Act (*e*).

Compensation for riot in Scotland.

Compensation for riot in Scotland still depends upon the earlier statutes which were repealed as to England in 1827. Except

(*a*) Ss. 2, 6.
(*b*) S. 4.
(*c*) S. 3.
(*d*) *Field* v. *Receiver of Metropolitan Police*, [1907] 2 K. B. 853.
(*e*) *Field* v. *Receiver of Metropolitan Police*, [1907] 2 K. B. 853.

the statute relating to wind and water mills which has been repealed as being superfluous (*f*), these statutes are still in force in Scotland (*g*). The right therefore in Scotland is still subject to the same defects and limitations which existed in England before 1827. The right is enforceable by action against the town clerk of the city or burgh, or the clerk of supply of the county, or stewartry as the case may be (*h*). If less than £20 damage is concluded for the action is to be brought in the Sheriff Court (*i*). Action must be commenced within one calendar month, and on judgment being obtained the final decree is to be extracted and lodged with the clerk who shall convene the magistrates, or the commissioners of supply as the case may be, who shall make an assessment to be paid out of the Burgh General Assessment or the County General Assessment (*k*).

Compensation for malicious injury to property in Ireland.

In Ireland compensation may be obtained for any malicious injury to property of any description, whether real or personal, provided the party aggrieved is examined on oath before a Justice of the Peace within three days, and within six days a notice in writing is served on the High Constable of the Barony and the Churchwardens of the Parish, or at the nearest police station (*l*). The claim is preferred against the County Council, and proceedings are brought in the County Court (*m*). The compensation money is raised by means of the poor rate as a separate item thereof (*n*).

Section VIII.—Third Party Claims

Assignees.

The right of action upon fire, accident, and all similar policies is assignable in equity so as to enable the assignee to sue in the name of the assured, and, under the Judicature Act, so as to enable the assignee to sue in his own name (*o*). When it is said that fire policies are not assignable, that only means that if the assured parts with his interest in the property he cannot assign the policy to the purchaser so as to give him the right of claiming an indemnity

(*f*) S. L. R. 50 & 51 Vict. c. 59.
(*g*) That is 1 Geo. 1, c. 22, s. 7; 52 Geo. 3, c. 130; 56 Geo. 3, c. 125.
(*h*) 3 Geo. 4, c. 33.
(*i*) 7 Will. 4 and 1 Vict. c. 41, s. 22; 7 Edw. 7, c. 51, s. 42.
(*k*) 31 & 32 Vict. c. 82, s. 3; 55 & 56 Vict. c. 55, s. 341.
(*l*) 6 & 7 Will. 4, c. 116, s. 135; 11 & 12 Vict. c. 69; 16 & 17 Vict. c. 38.
(*m*) Local Government (Ireland) Act, 1898, s. 5.
(*n*) Local Government (Ireland) Act, 1898, s. 56.
(*o*) *McPhillips* v. *London Mutual* (1896), 23 Ont. A. R. 524.

from the company. But that would be more than assigning the chose in action, it would be creating an entirely new right and an entirely new liability. The policy promises to indemnify A against loss by fire. He can assign his right of action against the company to B, so that if A suffers a loss B may recover in respect of it, but he cannot, without the company's consent, convert their promise to indemnify A into a promise to indemnify B, because that would not be an assignment, but an attempted novation. And even although the promise is to pay the executors, administrators, and assigns of A, that does not mean that the company will indemnify an assignee upon a loss suffered by him, but only that they will pay the indemnity due to A upon his own loss to an assignee if A has assigned the chose in action (*p*). The contract of fire insurance is *primâ facie* one of purely personal indemnity, and if all interest, both legal and equitable, has passed from the assured himself, neither he nor the person who has acquired the interest can sue upon the policy.

Ecclesiastical Commissioners v. The Royal Exchange (1895), 11 T. L. R. 476

Ecclesiastical Commissioners v. *The Royal Exchange.*

The Dean and Chapter of Canterbury insured certain farm buildings in the Royal Exchange Office. On August 17, 1894, an Order in Council was published ratifying a scheme under 31 & 32 Vict. c. 114, by which Order the land and farm buildings in question were transferred to the Ecclesiastical Commissioners. On August 19, the premises were destroyed by fire, and it was held that neither the Dean and Chapter nor the Commissioners could recover on the policy.

Personal representatives and trustee in bankruptcy.

Unless the policy expressly or impliedly promises to indemnify them as well as the assured himself it is not available even in the hands of persons to whom the property has passed by operation of law on death or bankruptcy. Thus, in *Mildmay* v. *Folgham* (*r*) it was held that where the promise was to pay the assured, his executors, administrators, and assigns, the heir at law of the assured to whom the premises had passed on his death could not recover in respect of a fire happening after the death (*s*).

But the conditions of a fire policy are now usually framed so as to make the policy available to indemnify the assured, and all

(*p*) *Sadlers Co.* v. *Badcock* (1743), 2 Atk. 554; *Lynch* v. *Dalzell* (1729), 4 Bro. P. C. 431.

(*r*) (1797), 3 Ves. 471.

(*s*) In America a policy effected in the name of a receiver thus, "E. S. K. receiver for H. and H.," was held to be available to his successor in the receivership (*Steel* v. *Phœnix Insurance* (1892), 51 Fed. Rep. 715).

persons to whom the property may pass by his will or by operation of law. It will thus be available in the hands of a trustee in bankruptcy or the executors or administrators of the assured (*t*). Under the Land Transfer Act, 1897 (*u*), real property as well as personal now devolves upon a deceased person's executors or administrators, and is available in their hands to pay his creditors, and the heir or devisee can obtain a legal title only by deed of conveyance from, or assent by, them. The heir or devisee has, however, the equitable title which passes to him on death, subject to the claim of the executor or administrator for the benefit of creditors, and the equitable title would no doubt be sufficient to entitle him to recover as the person to whom the property had passed by will or operation of law.

Condition in favour of purchaser.

A fire policy usually provides that it shall be available in the hands of purchasers or incumbrancers if notice of the new interest is given to and accepted by the company. The notice and acceptance amounts to a new contract to indemnify the purchaser or incumbrancer upon his own interest.

Assignment of marine policies.

A marine policy differs from a fire policy in that it is assignable unless it contains terms expressly prohibiting assignment (*x*), but in order to make the policy available to indemnify a person to whom the interest in the property has passed, the assured must at or before the time of parting with the interest have agreed to assign the policy to the purchaser (*y*), and no agreement to assign is implied from the mere sale of the interest in the property insured (*z*).

Assured's right to recover for benefit of others.

It has already been stated that a fire, burglary, or other similar policy is not necessarily a contract of mere indemnity, and therefore the insurance may be effected in such terms as to enable the assured to recover for the benefit of the person who has really suffered the loss, although such person is not a party to the insurance. The assured may also have insured not only on his own interest and his own behalf, but on the interest and behalf of others, and he or the persons for whom he has insured may thus recover more than the loss of the nominal assured. This subject has already been discussed under the head of insurable interest (*a*).

(*t*) See *Pitt* v. *Laming* (1814), 4 Camp. 73.
(*u*) 60 & 61 Vict. c. 65, s. 1.
(*x*) Marine Insurance Act, 1906, 6 Edw. 7, c. 41, s. 50.
(*y*) Marine Insurance Act, s. 51; *Powles* v. *Innes* (1843), 11 M. & W. 10.
(*z*) Marine Insurance Act, s. 15; *North of England Oil Cake Co.* v. *Archangel* (1875), L. R. 10 Q. B. 249.
(*a*) *Supra*, p. 150.

Vendor and purchaser.

Primâ facie the purchaser of real property is not entitled to the benefit of any insurance effected by the vendor on the property (*b*).

Although the legal estate does not pass until there has been a formal conveyance, yet in equity the purchaser of real property is the owner from the time a binding contract is made between him and the vendor (*c*). The consequence is that the purchaser *primâ facie* takes the benefit of any increase and bears the burden of any decrease in the value of the premises happening between the date of the contract and the date of completion (*c*). Thus, unless there are any special terms to the contrary, the purchaser of a building which is destroyed or damaged by fire before the date of completion is not entitled to withdraw from the bargain or to deduct anything from the purchase price on that account. If the vendor has agreed to do anything to the premises in the way of alteration or repair before completion, that places the risk of fire upon him until the work has been done (*d*), but in the ordinary case the purchaser takes all risk.

Rayner v. Preston (1881), 18 Ch. D. 1

Rayner v. *Preston.*

R purchased from P a workshop which had been insured by P against fire. Between the date of the contract and the date of completion a fire took place and the property was damaged. The loss was paid to P, and R claimed the benefit of it. The Court of Appeal held that he was not entitled to any benefit from it, and based their decision on the following grounds: (1) The contract for the purchase of real property passed the benefit of contracts necessarily connected with the use and enjoyment of the property but not of collateral contracts. A contract to reinstate the buildings might be so connected, but a contract to pay an indemnity was not. Here the only liability of the company was to pay the money, and there was no liability to rebuild, although the company might elect to do so. (2) The vendor could not be considered as a trustee for the purchaser in respect of the insurance. He was only a trustee in respect of the actual subject matter of the contract; he was not a trustee even of the rents accruing before the time for completion. (3) The statute 14 Geo. 3, c. 78, may have given R a right to insist on the company rebuilding, but it gave him no right to claim the purchase money from P after it was paid over. (4) Even if R was induced to refrain from insisting on his rights under the statute by a misrepresentation on a point of law by P's solicitors he could have no claim on that ground against P, since he was not entitled to rely upon what was merely a statement of opinion.

When vendor is bound to insure.

The vendor of property is not bound to insure pending com-

(*b*) *Paine* v. *Mellor* (1801), 6 Ves. 349; *Poole* v. *Adams* (1864), 33 L. J. Ch. 639.

(*c*) *Dowson* v. *Solomon* (1839), 1 Dr. & Sm. 1.

(*d*) *Counter* v. *Macpherson* (1845), 5 Moo. P. C. 83.

pletion unless he has contracted to do so (*e*). But since the vendor contracts to give the purchaser a good title he must keep up the insurance if the title depends upon it (*f*). Thus, where the property is leasehold subject to forfeiture for breach of the covenant to insure, the vendor must insure up to the day fixed for completion (*f*). A single day's non-insurance will incur forfeiture, and although the lessor has not taken advantage of it he may do so if he has not waived the forfeiture (*g*). Non-insurance is a continuing breach, and therefore acceptance of rent or other waiver of the breach is only a waiver as to the past and not as to the future. By the Conveyancing Act, 1881 (*h*), section 3 (4) and (5), the purchaser of a leasehold shall, on the production of the receipt for the last payment due for rent under the lease, assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion. Production of the receipt is therefore *primâ facie* evidence that the covenants have been performed, but if the purchaser has knowledge of a breach that has not been waived he may decline to accept the title (*i*). Sometimes it is an express condition of the sale that possession under the lease shall be deemed conclusive evidence of the due performance or sufficient waiver of the covenants up to the date of completion, but such a condition only operates up to the date of the contract, and if a breach incurring liability to forfeiture is committed or continued after that date the purchaser may object to the title (*k*). Under the Conveyancing Act, 1881, section 14, a lessor cannot now enforce a forfeiture for breach of any covenant, except the covenant to pay rent, until after service of a notice, and a demand that the breach be remedied and compensation made, and a reasonable time has elapsed without the notice being complied with. And in any action for forfeiture the Court may give relief on such terms as it thinks fit. But although the effect of a breach of covenant involving forfeiture has thus been greatly mitigated, the vendor

Sale of leaseholds subject to forfeiture.

(*e*) *Paine* v. *Mellor* (1801), 6 Ves. 349.

(*f*) *Palmer* v. *Gorm* (1856), 25 L. J. Ch. 841; *Dowson* v. *Solomon* (1839), 1 Dr. & Sm. 1.

(*g*) *Wilson* v. *Wilson* (1854), 14 C. B. 616.

(*h*) 44 & 45 Vict. c. 41.

(*i*) Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35, s. 7), protected a *bonâ fide* purchaser of a leasehold against forfeiture for breach of the covenant to insure provided there was an insurance on foot at the time of completion and he had obtained the receipt for the last rent due. This is now repealed by the Conveyancing Act, 1881, under which the purchaser gets only the same right to relief as any other lessee.

(*k*) *Howell* v. *Kightley* (1856), 21 Beav. 331.

of a leasehold is still bound to give a title which cannot be defeated, and therefore if there has been a breach of the covenant to insure which at the date fixed for completion has not been waived or compensated, the purchaser may undoubtedly refuse the title. If the purchase is not completed on or before the day fixed, the vendor is not bound to insure up to the actual date of completion unless the delay was solely due to his default; but he ought to inform the purchaser when the insurance expires so as to give him the opportunity of insuring on his own account. The vendor of a leasehold having insured in pursuance of the covenant to insure is no doubt bound to do all that he can to give the purchaser the benefit of the insurance money, since it is paid under a contract necessarily connected with the use and enjoyment of the property sold. Thus, if the insurance were in the joint names of the vendor and his lessor, it would be the vendor's duty not to sign the receipt for the insurance money without obtaining from the lessor reasonable security that it would be expended in reinstatement for the benefit of his purchaser.

Lessee with option to purchase.

Where a lessee has an option to purchase the premises and the buildings are insured under the lease in the joint names of the parties, the lessee on exercising the option is entitled to the full benefit of the insurance.

Reynard v. Arnold (1875), L. R. 10 Ch. 386

Reynard v. *Arnold.*

A let premises to R with an option to purchase within a certain time at £800. R covenanted to insure the premises in their joint names for £800, the policy moneys to be applied towards reinstatement. R insured accordingly in their joint names for £1080. A without R's knowledge insured in another company in his own name for £600. Damage by fire occurred to the amount of £600, and the two offices apportioned the loss, A's insurers paying £220 4*s.* and the other insurers being ready to pay £379 16*s.* R then gave notice to exercise his option, and demanded that all the policy moneys should be applied in part payment of the price. A insisted that the whole moneys should be applied in reinstatement, and gave notice to the insurers accordingly. R took proceedings, and it was held that he was entitled to a declaration that all the policy moneys belonged to him absolutely, without any obligation to expend them in rebuilding. On exercising the option he was entitled to the full benefit of the joint policy, but that had become to a great extent unproductve in consequence of the existence of the other policy of which he had no notice. He therefore had a right to say that A must account for what he received under that other policy.

Edwards v. West (1878), 7 Ch. D. 858

Edwards v. *West.*

A let premises to B for a term of years, with an option to purchase for £15,200 on or before a certain date. A covenanted to insure the premises for £14,000, and if damage should be done less in extent than £4000 should apply the money in reinstating the premises, but if greater damage than £4000 should be done the lease and obligations thereunder should terminate. The premises were almost completely destroyed by fire, and the company paid to A £12,000 in respect of the damage. B then elected to purchase, and claimed that the £12,000 should be treated as part of the purchase money. The Court held that B had no claim to the benefit of the insurance money. The exercise of the option did not make the lessor a trustee for the lessee from the date of the lease, and the only contract in respect of the insurance was to reinstate if the damage was less than £4000. Otherwise the lessee was not entitled to any benefit from the policy.

Purchaser's right under 14 Geo. 3, c. 78, sec. 83.

Whether apart from any contractual right to the benefit of the vendor's policy a purchaser has any right to call upon the vendor's insurers under 14 Geo. 3, c. 78, s. 83, to apply the insurance money in reinstatement has already been discussed, the author's conclusion being that the purchaser has that right unless it is contrary to the express terms of the contract, as where the conditions of sale provide that the purchaser shall take all risks, or, as in the case of *Edwards* v. *West* (*l*), where there is an express covenant by the vendor to give the purchaser the benefit of his insurance in certain specified circumstances with the necessary implication that he is not to have the benefit of it in other circumstances (*m*).

Purchaser's insurance.

When a purchaser insures he insures *primâ facie* entirely for his own benefit, and at his own cost, and if the sale is afterwards set aside the vendor cannot claim the benefit of the insurance, nor can the purchaser charge the vendor with the premiums.

Fry v. Lane (1888), 40 Ch. D. 312

Fry v. *Lane.*

The purchaser of a contingent reversionary interest insured the vendor's life to provide against the failure of the contingency. The sale was set aside on the ground of unfair dealing, and it was held that the purchaser was not entitled to charge the premiums on accounting with the vendor.

Foster v. Roberts (1861), 7 Jur. N. S. 400

Foster v. *Roberts.*

A was entitled to a vested reversionary interest in a trust fund of £1000. He obtained a loan of £300 from an insurance company, and to secure the repayment he effected in the same office policies on his life for £600, and mortgaged the policies, and the reversionary interest to the company. B bought

(*l*) (1878), L. R. 10 Ch, 386. (*m*) *Vide supra*, p. 702,

the reversionary interest for £370, that is on payment of £70 to A he took an assignment of the policies and the reversionary interest subject to the company's mortgage. B paid the premiums on the policies during the life of A. A died, and subsequently the reversion fell into possession. A's widow brought an action against B to have the sale of the reversion set aside on the ground of inadequate consideration, and for a declaration that B should hold it and the policies merely as security for the sums paid by him. The Court set aside the sale and held that the widow was entitled to the reversion less the sums paid by B; but that B was entitled to the policies as he had voluntarily paid the premiums and taken the risk.

Buyer and seller of goods.

The buyer of goods is not entitled to claim from the seller the benefit of the seller's insurance unless the seller has contracted to give the buyer such benefit.

Martineau v. Kitching (1872), L. R. 7 Q. B. 426

Martineau v. *Kitching.*

Sugar refiners sold an entire filling at a provisional price to be paid in a month, and the sugar to be two months at the seller's risk, the buyer to receive the sugar as required, when it would be weighed, and the actual price ascertained. The sellers had floating policies covering goods, *inter alia*, "sold and paid for but not removed." A fire occurred after the two months had expired and destroyed some of the sugar which had not yet been removed or weighed. The sellers recovered on their policy, but not sufficient to cover the loss on their own goods. The buyers claimed that the sellers were bound to apply the policy moneys so as to indemnify the buyers or otherwise to make good to them the loss of the sugar. The Court held that they were not entitled to any relief, and (1) that the property in the sugar had passed to the buyers, and that it was no longer at seller's risk; (2) that there was no obligation to insure on behalf of the buyers; (3) that the insurance was effected by the sellers to cover their own risk only. The Court expressed a doubt as to whether if the sellers had insured expressly on goods for which they were not responsible they would have been bound to hand over the proceeds to the buyers. Cockburn, C.J., said, "Now, supposing that the vendors are not under an agreement, and no consideration is given to keep up an insurance on these goods, and that they had effected an insurance which covered the goods at the time of the loss, would they be bound to hand over the proceeds to the party whose goods they had insured? I doubt it extremely, but it is not necessary to decide it. No doubt if they had received an amount covering the goods they would have received it, or at all events would have kept it, wrongfully as against some one, but in my view the wrongful detention of any of the moneys so received would be as against the insurance company, because it is perfectly clear that the contract of insurance against loss by fire is a contract of indemnity."

If seller contracts to insure.

But when sellers have contracted with the buyers to insure or to give the buyers the benefit of existing insurances the buyers are entitled to the whole of the policy moneys recovered in respect of the goods sold, and the sellers are not entitled as against the

buyers to any surplus over the contract price or the actual value of the goods.

Landauer v. Asser, [1905] 2 K. B. 184

Landauer v. *Asser.*

Goods were sold on a c.i.f. contract "insurance 5 per cent. over net invoice amount." The sellers insured for more than that amount, and delivered the policy to the buyers with the shipping documents. Upon a loss happening the underwriters paid the whole amount insured. It was held that the buyers were entitled to the whole moneys, and were not trustees for the sellers for the difference between their actual loss and the amount recovered.

Ralli v. Universal Marine (1862), 31 L. J. Ch. 313

Ralli v. *Universal Marine.*

A policy was effected by the owners upon a cargo of wheat, valued at £7000. Afterwards the market fell, and they sold it for £5358, including all shipping documents, freight, and insurance. The buyers were held entitled to the whole £7000 paid by the underwriters in respect of a total loss.

Where the assured made a gift of certain personal property, which he had insured, and undertook to hold the policy in trust for the donee, it was held that if the insurers paid a loss to the assured the donee could recover the moneys from him or his personal representative (*ll*).

Mortgagor and mortgagee.

Formerly, in the absence of covenant a mortgagee was not entitled to insure the mortgaged premises and charge the premiums in account against the mortgagor (*m*). Any insurance therefore which he effected was at his own cost and for his own benefit. If the mortgagor covenanted to insure and failed to do so the mortgagee had probably the right to insure at the mortgagor's expense, in which case he could charge the cost in account with the mortgagee and would hold the proceeds subject to the mortgage debt for the mortgagor's benefit. But unless the mortgage deed gave the mortgagee express power to insure and add the cost of insurance to the mortgage debt he could not tack it so as to obtain priority over subsequent mortgagees (*n*). Where there was express power to insure and add the cost of insurance to the mortgage debt the mortgagee was not entitled to charge premiums for insurance unless he did in fact insure (*o*). And where an insurance company, being mortgagees and having express power

(*ll*) *Payne* v. *Payne* (1908), The Times, Nov. 5.

(*m*) *Dobson* v. *Laud* (1850), 8 Hun. 216; *Bellamy* v. *Brickenden* (1861), 2 John & H. 137.

(*n*) *Brook* v. *Stone* (1865), 13 W. R. 401.

(*o*) *Lawley* v. *Hooper* (1745), 3 Atk. 278; *Hutchinson* v. *Wilson* (1794), 4 Br. C. C. 488.

to insure and charge the premiums on their security, went through the form of insuring in their own office, it was held they were not entitled to charge such premiums (*p*).

Conveyancing Act, 1881, sec. 19; statutory power to insure.

By the Conveyancing Act, 1881 (*q*), where a mortgage is made by deed, the mortgagee has power at any time after the date of the mortgage deed to insure and keep insured against loss or damage by fire any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money and with the same priority, and with interest at the same rate as the mortgage money.

The amount of an insurance effected by a mortgagee under the power conferred by the Conveyancing Act, shall not exceed the amount specified in the mortgage deed or if no amount is therein specified then shall not exceed two thirds of the amount that would be required in case of total destruction to restore the property insured (*r*).

The mortgagee has no power under the Act to effect an insurance in any of the following cases (namely) (*s*) :—

(i) Where there is a declaration in the mortgage deed that no insurance is required :

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed :

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is by the Act authorised to insure.

Benefit of mortgagor's insurance.

Apart from statute the mortgagee is not *primâ facie* entitled to the benefit of an insurance effected on the property by the mortgagor (*t*). And even where a mortgagor of chattels covenanted to insure and did so in his own name, it was held that the mortgagee had no claim to the insurance moneys as against the mortgagor's trustee in bankruptcy (*u*). In order to entitle the mortgagee to any claim on the policy there must be a covenant not only to insure but to insure for the benefit of the mortgagee or to apply the policy moneys in reinstatement or otherwise for the benefit

(*p*) *Grey* v. *Ellison* (1856), 1 Giff. 438; but see *Fitzwilliam* v. *Price* (1858), 4 Jur. (N. S.) 889.
(*q*) 44 & 45 Vict. c. 41, s. 19 (1) ii.
(*r*) 44 & 45 Vict. c. 41, s. 23 (1).
(*s*) 44 & 45 Vict. c. 41, s. 23 (2).
(*t*) *Farmers' Loan Co.* v. *Penn* (1900), 103 Fed. Rep. 132.
(*u*) *Lees* v. *Whiteley* (1866), L. R. 2 Eq. 143.

of the mortgagee (*x*). In the case, however, of a mortgage of leaseholds where the mortgagor has insured in pursuance of his covenant in the lease the mortgagor is bound to keep up the insurance in order to preserve the leasehold from forfeiture and the mortgagee is apparently entitled to the benefit of such insurance (*y*).

Benefit of mortgagee's insurance.

Similarly apart from statute the mortgagor cannot claim the benefit of a policy effected by the mortgagee unless it has been effected on behalf of both mortgagor and mortgagee, or the mortgagee has covenanted to apply the policy moneys in reinstatement or in extinction of the debt or otherwise for the benefit of the mortgagor (*z*). If the security is in the form of a conveyance to the creditor in trust to pay himself and hold the balance in trust for the debtor, the creditor is then in the position of any other trustee and bound not to take advantage of the trust for his own benefit except is no far as he may be a beneficiary under the trust, and therefore if he insures he must apply the insurance money to the trust (*a*).

Conveyancing Act, 1881, sec. 23 (3).

By the Conveyancing Act, 1881 (*b*), all money received on an insurance effected under the mortgage deed or under the Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received, and without prejudice to any obligation to the contrary imposed by law or by special contract a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under the mortgage.

What insurances are within the section.

The third sub-section of section 23 of the Conveyancing Act, which gives the mortgagee power to enforce reinstatement, is limited to insurances effected under the mortgage deed or under the Act. There is some doubt as to what is the meaning of a

(*x*) But see *Wheeler* v. *Insurance Co.* (1879), 101 U. S. 439.

(*y*) *Garden* v. *Ingram* (1852), 23 L. J. Ch. 478.

(*z*) On the same principle by which a creditor who insures his debtor's life is, apart from agreement, entitled to the policy absolutely. In an Irish case (*Kenny* v. *Employers' Liability Assurance*, [1901] 1 Ir. R. 301) the mortgagee having appointed a receiver in pursuance of his powers under the Conveyancing Act, 1881, insured, in his own name only, the fidelity of the receiver. The receiver made default, and the mortgagee satisfied his debt out of the mortgaged estate. In an action brought in the joint names of mortgagor and mortgagee, it was held that the plaintiffs were entitled to recover for the benefit of the mortgagor. Apparently the ground of the decision was that the mortgagee's insurance was not merely a personal indemnity, but an insurance intended to cover the interests of mortgagor and mortgagee.

(*a*) *Andrews*, *Ex parte* (1816), 2 Rose, 410.

(*b*) 44 & 45 Vict. c. 41, s. 23 (3), (4).

mortgage effected " under this Act." If there is no provision for insurance in the deed, but the mortgagor has insured in a sum exceeding two-thirds of the value, the mortgagee has no power under the Act to insure and it is difficult to resist the conclusion that the intention of the Legislature was that the mortgagee should have the benefit of the mortgagor's insurance, and that it is an insurance " under this Act." In the fourth sub-section of section 23, where the mortgagee is given power to require money received on a policy to be applied in discharge of the debt, the enactment is applied generally to all money received " on an insurance." Clearly some limitation must be implied as otherwise the words of the sub-section would apply to an insurance effected by the mortgagor on his life or by some stranger with a separate interest on the property. It is conceived that the limitation from sub-section 3 must be read into sub-section 4. It is submitted therefore that both sub-sections are limited to insurances effected on the mortgaged property under the provisions of the mortgage deed or " under this Act," and that the latter expression includes any policy kept up by or on behalf of the mortgagor if the amount of the insurance is at least two-thirds of the value of the property. In this connexion it should be remembered that under Lord St. Leonards' Act, 1859 (*c*), a person entitled to the benefit of a covenant to insure on the part of a mortgagor was entitled to the benefit of any subsisting insurance not effected in terms of the covenant. This is now repealed by the Conveyancing Act, 1881, and the Court would not readily hold that the mortgagee has under the Conveyancing Act less right to the mortgagor's insurances than he had under Lord St. Leonards' Act.

Meaning of " without prejudice to any obligation to the contrary " in section 23 (4).

The right of the mortgagee to demand that the insurance money shall be applied towards discharge of the mortgage debt is subject to any statutory or contractual rights which the mortgagor or any other person may have in respect of the insurance money. The right of the mortgagee is in effect an implied term in the contract between mortgagor and mortgagee, and as such must yield to any statutory or contractual obligation towards third parties or to any express term in the contract between mortgagor and mortgagee. Where the insurance company exercises its option under a reinstatement clause in the policy, there is a contractual obligation towards the company which prevents the

(*c*) 22 & 23 Vict. c. 35, s. 7.

sub-section coming into operation, and it seems reasonably clear that the mortgagee would have no right as against the company to make it pay in cash when it had elected to reinstate. Where the provisions of section 83 of the Metropolitan Building Act, 1774, are applicable (*d*), it is submitted that the mortgagor could not demand reinstatement under that section because the Conveyancing Act imports an implied term into his contract with his mortgagee that the insurance money shall be applied in discharge of the mortgage debt, and the statutory right to call upon the insurers to expend the insurance money in reinstatement cannot be exercised to the prejudice of contractual obligations (*e*). It seems to follow that any third parties taking their title from the mortgagor subsequent to the date of the mortgage are equally bound by this section in the Conveyancing Act, and cannot take advantage of section 83 of the Metropolitan Building Act. This category would include subsequent mortgagees and others becoming entitled to or interested in the equity of redemption. On the other hand, third parties whose interests are independent of the mortgagor, or who have acquired title from him before the date of the mortgage would be entitled to demand reinstatement notwithstanding the provisions of the Conveyancing Act, which would thus become ineffective. This category would include ground landlords in the case of leaseholds and prior mortgagees.

Policy effected by receiver.

When a mortgagee has appointed a receiver under the Conveyancing Act to receive the income of the property the receiver shall, if so directed by the mortgagee, insure and keep insured against loss or damage by fire out of the money received by him, any building effects or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature (*ee*). A policy thus effected is the property of the mortgagor subject to the right of the mortgagee to have the policy moneys applied in reinstatement or in discharge of his debt.

Tenant for life and remainderman.

A tenant for life is not liable to the remainderman for permissive waste. That is to say, unless the terms of the settlement expressly lay the obligation upon him he is not bound to execute any repairs to the premises during his life tenancy. This was held by Kay, J., in the case of *In re Cartwright* (*f*), where the subject of the settlement was a freehold estate. And in *In re Parry* (*g*)

Obligation to repair.

(*d*) *Ante*, p. 696.
(*e*) *Reynard* v. *Arnold* (1875), L. R. 10 Ch. 386.
(*ee*) 44 & 45 Vict. c. 41, s. 24 (1), (2), (7).
(*f*) (1889), 41 Ch. D. 532.
(*g*) [1900] 1 Ch. 160.

this decision was followed by North, J., who applied it to the case of a settlement of a leasehold estate, and held that, even although there was a covenant by the lessee to repair, where the tenant for life allowed the premises to fall into disrepair the remainderman on coming into possession could not recover the cost of necessary repairs from the estate of the tenant for life.

Obligation to insure.

The tenant for life who is not bound to repair is not bound to insure the premises unless that obligation is laid upon him by the terms of the settlement.

A statutory exception to the two rules just mentioned is created by the Settled Land Act, 1882 (*h*), which lays upon a tenant for life the obligation at his own expense to maintain and insure improvements made under the provisions of the Act in such manner and in such amount as the Board of Agriculture (*hh*) may in any case prescribe.

Benefit of insurance by tenant for life.

If a tenant for life does insure without any obligation to do so he is *primâ facie* entitled to the proceeds of the policy for his own benefit (*i*).

Seymour v. Vernon (1852), 21 L. J. Ch. 433

Seymour v. *Vernon.*

A receiver was appointed in an administration suit, and the receiver insured the property out of the rents of the estate. Certain stables on the estate were burned down, and no one desired them to be rebuilt. It was held that the person who was ultimately held to be tenant in tail in possession of the estates, was entitled to the insurance money as his personal property free from the settlement.

Warwicker v. Bretnall (1882), 23 Ch. D. 188

Warwicker v. *Bretnall.*

The guardian of an infant tenant in tail in possession kept up insurance on a mill which stood on the property. The insurance premiums were paid out of the rents of the estate. On the mill being burned down it was not deemed to be for the interest of any person to rebuild it, and the policy moneys were held to belong absolutely to the infant as his personal property.

Gaussen v. Whatman (1905), 93 L. T. 101

Gaussen v. *Whatman.*

A tenant for life directed the trustees of the settlement to keep up insurances out of his income. The mansion house was damaged by fire, and it was held that the policy moneys were the absolute property of the tenant for life.

(*h*) 45 & 46 Vict. c. 38, s. 28.

(*hh*) The powers and duties of the Land Commissioners were transferred to this department on its creation in 1889 (52 & 53 Vict. c. 30).

(*i*) *Seymour* v. *Vernon* (1852), 21 L. J. Ch. 433 ; *Warwicker* v. *Bretnall* (1882), 23 Ch. D. 188 ; *Gaussen* v. *Whatman* (1905), 93 L. T. 101 ; *contra* *Welsh* v. *London Ass.* (1892), 151 Pa. 607.

Insurance moneys treated as part of settled estate.

If the tenant for life having insured does during his life treat the insurance or the policy moneys as part of the settled estate, it will follow the settlement instead of passing as his personal property (*k*). But in *Gaussen* v *Whatman* it was held that the fact that the tenant for life, having recovered on the policy, had invested it in the names of the trustees, and allowed it to remain so invested for fourteen years pending his decision as to whether or not he would rebuild, was not an abandonment of it for the benefit of the settlement.

Remainderman's statutory rights under 14 Geo. 3, c. 78, s. 88.

But although not otherwise entitled to the benefit of the insurance of the tenant for life the remainderman may obtain the benefit of it by exercising his right under 14 Geo. 3, c. 78, s. 83, and calling on the insurers to apply the policy moneys in rebuilding the premises destroyed (*l*).

Tenant for life bound to insure.

The terms of the settlement may lay upon the tenant for life an obligation to repair, and if so he would be liable to reinstate the premises if burned down (*m*), but the remainderman would not necessarily have any lien on the policy moneys. If, however, the tenant for life was by the terms of the settlement bound to insure and did insure in pursuance of this obligation the moneys would belong to the estate (*n*).

Whether insurance by trustees should fall on capital or income.

Where property is placed in the hands of trustees to pay the income of the whole or part of it to a beneficiary for his life the question as to whether the burden of insurance ought to be laid on the capital, or whether it ought to be paid out of the income of the equitable tenant for life, depends upon the terms of the will or trust deed under which the trust is created (*o*). *Primâ facie* the obligation of an equitable tenant for life of freeholds is the same as that of a legal tenant for life, and he is not liable for permissive waste or to have the burden of insurance placed upon him. But where an onerous property such as a leasehold is placed in trust with a direction to the trustees to pay the income to an equitable tenant for life, that means that he is to receive not the gross income, but the net income, and all payments which are necessarily incidental to the production of the income must be deducted from it. Thus, where leaseholds are

(*k*) *Norris* v. *Harrison* (1817), 2 Madd. 268.
(*l*) *Quicke's Trusts, In re*, [1908] 1 Ch. 887.
(*m*) *Gregg* v. *Coates* (1856), 23 Beav. 33.
(*n*) *Quicke's Trusts, In re*, [1908] 1 Ch. 887.
(*o*) *Pinfold* v. *Shillingford* (1877), 46 L. J. Ch. 491.

left in trust the equitable tenant for life must bear the burden of all the current obligations under the lease, and if there is a covenant to insure he must pay the insurance premiums (*p*). The equitable tenant for life is not, however, bound to make good breaches of covenant committed before his title vested in possession. This was decided by the Court of Appeal in *In re Courtier* (*q*), and in *In re Baring* (*r*) Kekewich, J., took the view that the judgment of the Court of Appeal was based on the theory that the tenant for life ought not to bear the burden of any of the covenants in the lease, and therefore was not bound to permit the cost of current repairs and insurance to be deducted from his income. In *In re Redding* (*s*), *In re Betty* (*t*), and *In re Kingham* (*u*), Stirling, J., North, J., and the Vice-Chancellor of Ireland respectively dissented from Kekewich, J., and refused to follow *In re Baring* (*r*). Finally, in *In re Gjers* (*x*), Kekewich, J., in deference to the other decisions, followed them in preference to his own view. All the previous cases are summed up by North, J., in *In re Betty* (*t*).

Betty, In re, [1899] 1 Ch. 821

Betty, In re.

A testator left his estate consisting of house, gardens, furniture and household effects to trustees in trust to permit his adopted daughter to have the personal use and enjoyment of them during her life and after her decease upon trust to sell and convert the same into money to form part of the testator's residuary estate. The house and gardens were leasehold property. North, J., held that the adopted daughter was equitable tenant for life, and that in the absence of any indication in the will as to what charges should be borne by the tenant for life and what by the estate, she ought to perform the covenants incident to the relation of landlord and tenant, that is, she must pay the rent and perform current repairs, and insure if there was a covenant to insure, but not otherwise. She was not bound as tenant for life to pay for insurance on the furniture, but as she was also trustee and executrix the learned judge thought she ought to insure the furniture at the expense, and for the benefit, of the estate.

Duty of trustees to insure.

Trustees and executors are not bound to insure trust property unless they are directed to do so and are supplied with funds for the purpose, and they are not even bound to inform their beneficiaries when existing insurances expire unless they have acted so as to induce the beneficiaries to rely on them for the insurances being kept on foot (*y*).

(*p*) *Fowler, In re* (1881), 16 Ch. D. 723; *Debney* v. *Eckett* (1894), 43 W. R. 54; *In re Waldron*, [1904] 1 Ir. R. 240.
(*q*) (1886), 34 Ch. D. 136; *Brereton* v. *Day*, [1895] 1 Ir. R. 518.
(*r*) [1893] 1 Ch. 61.
(*s*) [1897] 1 Ch. 876.
(*t*) [1899] 1 Ch. 821.
(*u*) [1897] 1 Ir. R. 170.
(*x*) [1899] 2 Ch. 54.
(*y*) *Dowson* v. *Solomon* (1859), 1

But trustees are bound to see that obligations upon which the existence of the trust property depends are duly performed (*z*). And therefore in the case of leaseholds with a covenant to insure and repair they are bound to see that these covenants are performed and, if necessary, to perform them themselves in so far as the funds at their disposal will permit (*z*). If the tenant for life is in possession the Court will, at the instance of the trustees, appoint a receiver of the rents, who will apply them as far as is necessary for that purpose (*z*).

Trustees must account for proceeds of insurance.

If persons in a fiduciary position do insure trust property they must hold the insurance for the benefit of the trust, and will not be allowed to allege that they made the insurance on their own interest, and for their own benefit (*a*). The general rule that persons in a fiduciary position cannot use it to obtain a benefit for themselves applies so as to compel trustees to give the trust the benefit of all insurance on the property which is the subject matter of the trust even although such insurance has been effected entirely from their own private funds (*b*).

Trustees' authority to insure out of trust funds.

Trustees have authority to insure trust property out of trust funds (1) at Common Law; (2) if authorised by the trustee; (3) by Statute.

At Common Law.

At Common Law and without any express authority conferred upon them by the trust, trustees may insure the trust property out of capital. The policy moneys received on such insurance is part of the trust estate, and follows the same trusts as the property destroyed.

By terms of trust.

The trustees may be authorised expressly or impliedly from the other terms of the trust (as in the case of a bequest of leaseholds with a covenant to insure) to insure the trust property out of the income of the trust estate. Where power is thus given by the terms of the trust to insure out of income the power is presumably to insure for the benefit of the estate and not solely for the benefit of the person entitled to the income for the time being, and therefore the policy moneys, if not applied in reinstatement, are to be applied as capital subject to the same trust which affected the property destroyed.

By statute.

Trustees have statutory power to insure the trust property

Dr. & Sm. 1; *Fry* v. *Fry* (1859), 27 Beav. 146; *Garner* v. *Moore* (1855), 3 Drew, 277.

(*z*) *Fowler, In re* (1881), 16 Ch. D. 723.

(*a*) *Parry* v. *Ashley* (1829), 3 Sim. 97.

(*b*) *Andrews, Ex parte* (1816), 2 Rose, 410.

out of income (1) under the Conveyancing Act, 1881 ; (2) under the Trustee Act, 1893.

Conveyancing Act, 1881.

The Conveyancing Act (*c*) provides that if and so long as any person who is beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees may insure against fire and pay the premiums out of the income of the land.

Trustee Act, 1893.

The Trustee Act, 1893 (*d*), re-enacting a similar provision in the Trustee Act, 1888 (*e*), provides that any trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot), not exceeding three quarters of the full value of such building or property, and pay the premiums for such insurance out of the income thereof, or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.

Earl of Egmont's Trust, In re, [1908] 1 Ch. 821

Earl of Egmont's Trust, In re.

It was held by Warrington, J., that chattels such as jewels, and family portraits settled as heirlooms to follow the same trusts as the land were "insurable property" (notwithstanding the fact that a heirloom once destroyed can never be replaced) and that, therefore, the trustees had power to insure them and pay the insurance out of the income from the lands.

Benefit of insurance effected by trustees out of income.

According to the decision of Swinfen Eady, J., in the case of *Quicke's Trustees* the tenant for life is *primâ facie* entitled to the sole benefit of a policy effected by trustees out of income in pursuance of their statutory powers under the Trustee Act, and the remaindermen can only acquire the benefit of such insurance in cases where they are in a position to enforce the provisions of 14 Geo. 3, c. 78, and require the policy moneys to be applied in reinstatement. This case, however, may require to be reconsidered, for it is certainly somewhat startling to find that the power given to trustees to insure out of income is a power which can only be exercised for the benefit of the tenant for life and which cannot be exercised for the benefit of the estate except indirectly by reason of the remainderman's statutory rights under 14 Geo. 3, c. 78.

(*c*) 44 & 45 Vict. c. 41, s. 42 (1), (2), (3).

(*d*) 56 & 57 Vict. c. 53, s. 18.

(*e*) 51 & 52 Vict. c. 59, s. 7.

Quicke's Trustees, In re, [1908] 1 Ch. 887

Quicke's Trustees, In re.

The trustees of settled land insured during the minority of the infant tenant for life, the mansion house, and certain furniture, and other chattels settled with it. The tenant for life was not bound to insure, but the trustees exercised their powers under the provisions of the Conveyancing Act and Trustee Act, and paid the premiums out of the income from the land. The mansion house and chattels were destroyed by fire and the insurance company admitted liability. The infant tenant for life claimed the policy moneys as his absolute property. The trustees and remaindermen contended that it should be applied in reinstatement. The trustees took out a summons to have the question decided, and it was heard by Swinfen Eady, J. Counsel for the trustees stated the case to the Court, and counsel for the tenant for life argued in support of his claim, but the case was not argued for the remaindermen. Swinfen Eady, J., pointed out that the remaindermen were entitled to reinstatement of the mansion house under 14 Geo. 3, c. 78, sec. 83, and held that the mansion house policy moneys should be so applied, and that the tenant for life was not entitled to any charge thereon. As to the chattels policy moneys, he held that, as the statute did not apply, the tenant for life was entitled to such moneys absolutely.

The trustees of a settlement have, under section 40 of the Settled Land Act, 1882, power to give the insurance company a complete discharge for moneys paid to them in respect of insurances on property comprised in the settlement.

Settled Land Act, 1882, sec. 40

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee for any money or securities paid or transferred to trustees, trustee, representatives or representative, as the case may be, effectually discharges the payee or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and in case of a mortgagee or other person advancing money from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

Landlord and tenant.

Unless the landlord has agreed to insure for the benefit of the tenant or to apply the insurance money in reinstatement, the tenant has no claim to the proceeds of an insurance policy effected by the landlord for his own benefit. Apart from express contract and his rights, if any, under 14 Geo. 3, c. 78, s. 83, he cannot compel the landlord to apply the policy moneys in reinstatement (*f*)

Benefit of landlord's insurance.

(*f*) *Lofft* v. *Dennis* (1859), 1 El. & El. 474; see *Langelier* v. *Charlebois* (1903), 34 Can. S. C. 1, where the lessor insured "in trust" for the lessee, and the latter was held entitled to the policy money as against the lessor's creditors.

or in discharge of rent payable during the time the premises are unfit for occupation (*g*) or otherwise to apply them for his benefit.

Benefit of tenant's insurance.

The landlord is in a similar position as regards his tenant's insurance. If the insurance is effected by the tenant for his own benefit the landlord has no right to the proceeds. He can claim benefit only by reason of the covenants in the lease or the Statute 14 Geo. 3, c. 78, s. 83. Formerly by Lord St. Leonards' Act, 1859 (*h*), a person entitled to the benefit of a covenant to insure on the part of a lessee was entitled to the benefit of any subsisting insurance not effected in terms of the covenant. This provision is now repealed by the Conveyancing Act, 1881, section 14 (7), and therefore if a lessee has covenanted to insure in the joint names of lessor and lessee, or otherwise for the benefit of the landlord, and instead of doing so insures in his own name for his own benefit, the landlord would apparently have no right to the insurance moneys and apart from his right under 14 Geo. 3, c. 78, s. 83, it would seem that his only remedy would be an action against his tenant for breach of covenant.

Policy in joint names.

When under the terms of a lease an insurance is effected either by landlord or tenant in their joint names, it is impliedly for the benefit of both parties and the tenant might properly refuse to sign the receipt for the policy moneys until the landlord gave proper security for the application of the moneys in reinstatement.

The right of landlord or tenant who has otherwise no claim on a policy effected by the other for his own benefit to call upon the insurers to reinstate in terms of 14 Geo. 3, c. 87, s. 83, has already been discussed, and in the author's opinion the landlord or tenant has such a right (*i*). If so the repeal of the provision in Lord St. Leonards' Act is of no consequence, for the landlord has, by 14 Geo. 3, a right to the benefit of any policy effected by the tenant, and it is submitted that it was because it was thus superfluous that the provision was repealed.

(*g*) *Leeds* v. *Cheetham* (1829), 1 Sim. 146.

(*h*) 22 & 23 Vict. c. 35, s. 7.

(*i*) *Vide supra*, pp. 700, 701.

CHAPTER VIII

Claims for Premiums

Section I.—Insurer's Claim for Premium

Premium payable if binding contract to insure is made.

An insurance company can sue the assured for the premium only if there is a complete binding contract to insure the risk in respect of which the premium is claimed. It has already been observed that the " acceptance " of a proposal does not necessarily conclude a binding contract (*a*). It may be merely an intimation by the insurers that they are prepared to make a contract by the issue of a policy against cash, and in life insurance the *primâ facie* inference is that no binding contract is intended before the policy is issued. In fire, accident, and other risks, a preliminary binding contract is more readily inferred than it is in life, and if there is a definite agreement to insure the assured is not at liberty to withdraw from the bargain any more than the company is, and if he fails to pay the premium the company may recover it.

General Accident v. Cronk (1901), 17 T. L. R. 233

General Accident v. *Cronk.*

In this case the defendant, who was a farrier, filled in and sent to the company a proposal form for a policy of indemnity against claims in respect of driver's accidents. In the form it was stated that the proposal and declaration should be the basis of a contract between himself and the company, and that if the risk was accepted he would pay the premium. A policy was executed three days afterwards, and was expressed to cover the risk from the date of the proposal, and for a period of a year from that date. Some days afterwards the agent called with the policy, but the assured did not accept it and wrote to the company saying that he did not desire to proceed with the insurance. It was held that there was a binding contract, and that the company was entitled to sue for the premiums. The issue of the policy was not a counter-offer. If the wrong form of policy was tendered the defendant might have refused it, and insisted on receiving the right one, but he could not withdraw from the contract, which was complete when his proposal was accepted.

(*a*) *Vide supra*, p. 206,

Star Fire and Burglary v. Davidson (1902), 5 F. 83

Star Fire and Burglary v. *Davidson.*

The defendants inquired whether the company were prepared to insure their paper works, and the company wrote that they were prepared to take £5000 at the same rate as the other offices, and asked for a specification of the risk. The defendants wrote back that they would be glad to give the company the business, and suggested where a specification of the risk could be obtained. The company then sent a completed policy insuring the premises for £5000, and asked for the amount of the first premium. The policy recited that the defendants (hereinafter styled the member) had by a proposal and declaration applied to be admitted a member of the company, and whereas the member had paid the sum of £43 as the premium for the policy the company agreed with the insured (subject to the conditions on the back thereof, and to the Memorandum and Articles of Association of the company which were to be taken as part of the policy), that if the property should be destroyed they would pay the loss. The Articles of Association provided that every member of the company should be liable to contribute to the assets of the company in the event of the company being wound up. The defendants declined to accept the policy or pay the premium. The Court held that the company were not entitled to recover the premium. There was no contract except in the letters. These contained a proposal for insurance and no more. There was no agreement by the defendants to become members of a mutual company. There was a complete misapprehension by the defendants as to the fact that the company was a mutual company. There was, therefore, no *consensus in idem placitum*, and no contract upon which the company could sue for the premium.

Premium in workmen's compensation insurance.

In workmen's compensation insurance the premium is usually calculated by taking a percentage of the total wages paid by the employer during the year of risk. The exact amount of the premium payable cannot therefore be ascertained until the year of risk has expired, and the usual course is to accept at the commencement of the risk a payment on account of premiums based on an estimate of the amount of wages. The employer is required to keep a wages book, and to supply the company with a correct account of all wages paid during any year of insurance, and the difference between the actual premium and estimated premium is to be met by a further payment by the assured or refund by the company as the case may be. In one case where the assured, after the expiration of the insurance declined to render an account of wages, alleging that they were less than the estimated amount, the company brought an action against the assured in the Chancery Division, and the Court ordered the assured to render an account and pay the costs of the action (*b*).

(*b*) *General Accident* v. *Day* (1905), 21 T. L. R. 88. See *Bradley* v. *Essex and Suffolk Accident* (1911), 27 T. L. R. 455.

Option to renew policy.

In an American case a company agreed in consideration of one dollar " on the expiration of the present insurance policy of W. P. to renew the same for three years," at a specified rate. It was held that this agreement gave the assured an option to demand such renewal, but that he was not bound to accept the renewal policy, and an action for the premium failed (*c*).

Section II.—Return of Premium

No risk no premium.

The general rule applicable to claims for the return of premium is that if the insurers have never been on the risk they have not earned the premium, and ought to return it. Thus, if a contract of insurance is set aside on the ground of misrepresentation or mistake, or for some other reason the policy is held to have been void *ab initio*, or to have been avoided before the risk began to run, the assured is, in the absence of any express condition to the contrary, entitled to claim repayment of any premiums which he may have paid (*d*). " Equity," said Lord Mansfield, " implies a condition that the insurer shall not receive the price of running a risk if he runs none " (*e*).

Entire premium earned when risk attaches.

If, however, the risk has once commenced to run under a valid policy the whole of the premium for that risk is immediately deemed to be earned, and even although the insurer should shortly afterwards be relieved of the risk for the remainder of the term the assured is not entitled to a return of any part of the premium (*f*). Thus if the day after a risk has attached there is a breach of warranty or the interest of the assured ceases the whole premium is earned, and there can be no return.

Divisibility of risks.

Where for some reason the risk does not attach as to part of the insurance, but does attach as to the remainder, the assured cannot recover any part of the premium (*g*), unless the risk is clearly divisible into separate distinct risks (*h*).

In respect of time.

In respect of time the insurance is usually divisible into the periods for which the premiums are payable. Thus an insurance

(*c*) *Barker* v. *Pullman Co.* (1904), 134 Fed. Rep. 70.

(*d*) *Bermon* v. *Woodbridge* (1781), 2 Dougl. 781; *Stevenson* v. *Snow* (1761), 3 Burr. 1238.

(*e*) *Stevenson* v. *Snow* (1761), 3 Burr. 1238, at p. 1240.

(*f*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484, 508; *Bermon* v. *Woodbridge* (1781), 2 Dougl. 781; *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666; *Stone* v. *Marine Insurance* (1876), 1 Ex. Div. 81; *Provident Savings Life* v. *Bellew* (1904), 35 Can. S. C. 35.

(*g*) *Canadian Pacific* v. *Ottawa Fire* (1907), 39 Can. S. C. 405.

(*h*) *Stevenson* v. *Snow* (1761), 3 Burr. 1238.

on condition that a premium is paid every week is *primâ facie* divisible into separate weekly insurances; but, on the other hand, the policy may be framed as an annual insurance with an annual premium payable in instalments, in which case the risk for the year would be indivisible (*i*), and the whole premium would be earned immediately the year began to run.

Contract set aside by insurers for innocent misrepresentation, concealment, error in essentials, or absence of consent.

There is no doubt that when the insurers set aside the contract on the ground of innocent misrepresentation (*k*), concealment (*l*), or mistake (*m*), the assured is, apart from special condition, entitled to a return of premium. So also if there never was any contract, as where there never was in fact mutual consent (*n*); where the assured withdrew his proposal before final acceptance (*o*); or where the agent who had no power to contract submitted to the directors terms different from those in fact proposed, and the risk was accepted, and the policy issued upon a proposal which was never in fact made (*p*).

Ultra vires.

If a contract of insurance is made *ultra vires* of the company the assured can recover any premiums which the company has in fact received or which have been applied by the directors for the company's benefit (*q*). Where however the agent or officer of a company receives premiums on an *ultra vires* policy the company is not bound to refund such premiums unless they have been applied for its benefit (*r*).

Fraud: early Chancery decisions

There is some conflict of authority as to whether premiums are returnable when the insurers prove fraud on the part of the assured. In an early case of life insurance (*s*), where at the suit of the insurers the Court of Chancery ordered the policy to be delivered up on the ground of fraud with full costs to the plaintiffs, the reporter states that the moneys received by way of

(*i*) See *Loraine* v. *Thomlinson* (1781), 2 Dougl. 585.

(*k*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484, 507; *Feise* v. *Parkinson* (1812), 4 Taunt. 640; *Chapman* v. *Fraser* (1793), 1 Park, 8th Ed. p. 456; *New York Insurance* v. *Fletcher* (1886), 117 U. S. 519.

(*l*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 431, 440; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 372.

(*m*) *Hemming* v. *Sceptre Life*, [1905] 1 Ch. 365; *Pritchards* v. *Merchant Life* (1858), 3 C. B. N. S. 622; *Stone* v. *Marine Insurance* (1876), 1 Ex. Div. 81, 86; *Prentice* v. *Knickerbocker Life* (1879), 77 N. Y. 483.

(*n*) *Mowat* v. *Provincial Savings Life* (1900), 27 Ont. A. R. 675.

(*o*) *Henderson* v. *State Life* (1905), 9 Ont. L. R. 540.

(*p*) *Fowler* v. *Scottish Equitable* (1858), 4 Jur. N. S. 1169; *Harnickell* v. *New York Life* (1888), 111 N. Y. 390; *Key* v. *National Life* (1889), 107 Iowa, 446.

(*q*) *Arthur Average Association, In re* (1876), 34 L. T. 942.

(*r*) *Phœnix Life, In re* (1862), 2 J. & H. 441.

(*s*) *Whittingham* v. *Thornburgh* (1690), 2 Vern. 206.

premium were ordered to be applied in part payment of the costs. The actual decree, however, in this case is silent as to the premium. In a marine insurance case (*t*) Lord Macclesfield set aside the policy on the ground that the assured had not disclosed the fact that he had, at the time he proposed the insurance, information which induced him to have grave doubts as to the safety of his vessel. The decree was that the policy be delivered up with costs, and that the premium be paid back and allowed out of the costs. Lord Macclesfield said in this case that the assured had not dealt fairly with the insurers, and that "the concealing of the intelligence was a fraud," but it is not clear that he used the word "fraud" here in the moral sense, or that he actually found the assured guilty of a deliberate intention to deceive. These two Chancery cases, neither of which as reported is satisfactory, were apparently accepted in the Court of Chancery as binding authority for the proposition that where the insurers came to a Court of equity for cancellation the premium should be returned even if the policy were cancelled on the ground of the fraud of the assured.

followed at law,

except in case of gross fraud.

In an early case at common law (*u*), where a marine policy was found by a jury to have been obtained by fraud, the underwriters having been induced to subscribe the policy by the signature of a "decoy duck," heading the subscriptions, Lord Mansfield ordered a return of premiums, but in a later case (*x*), where the assured had insured knowing that his ship was lost, the same judge held that "the fraud was so gross that the premium should not be recovered from the underwriter." This was followed by a decision of the whole Court of King's Bench (*y*), to the effect that in all cases where there was actual fraud on the part either of the assured or of his agent, the assured should not recover the premiums which he had paid, and this decision appears to have been consistently followed by Courts of law in marine cases (*z*).

Definite rule in marine risks, no return in cases of fraud.

No definite rule laid down in life cases.

Apparently, however, the Court of Chancery did not adopt a similar rule, and there has been a considerable variation in the method of dealing with premiums in cases of fraud.

(*t*) *Da Costa* v. *Scandret* (1723), 2 P. Wms. 170.

(*u*) *Wilson* v. *Ducket* (1762), 3 Burr. 1361.

(*x*) *Tyler* v. *Horne* (1785), Park, 8th Ed. 455.

(*y*) *Chapman* v. *Fraser* (1793), Park, 8th Ed. 456.

(*z*) *Feise* v. *Parkinson* (1812), 4 Taunt. 640; *Anderson* v. *Thornton* (1853), 8 Ex. 425; see Blackburn, J., in *Fowkes* v. *Manchester* (1863), 3 B. & S. 917, at p. 929.

Prince of Wales Insurance v. Palmer (1858), 25 Beav. 605

Prince of Wales Insurance v. *Palmer.*

Lord Romilly, M.R., having set aside a life policy on the ground of fraud and no insurable interest and fraud, in that the assured, in pursuance of a preconceived scheme, had insured another's life and subsequently murdered him, decreed in a suit against the assured's representatives that the premiums should be applied in payment of the costs of all parties, and that the balance should be brought into Court with liberty to apply. What eventually became of the balance does not appear from the report, but at any rate the insurers were apparently not allowed to retain the premiums for their own use.

British Equitable v. Musgrave (1887), 3 T. L. R. 630

British Equitable v. *Musgrave.*

This was an action by the company against the assured for cancellation and delivery up of a life policy on the ground of wilful concealment of serious symptoms. The Court found the case proved, ordered the policy to be cancelled and delivered up, and declared the premiums to be forfeited to the company. The case is very briefly reported, and the policy may have contained an express proviso that the premiums should be forfeited in case of fraud.

Duckett v. Williams (1834), 2 C. & M. 348

Duckett v. *Williams.*

This was an action in the Court of Exchequer to recover premiums in respect of a policy of insurance which, in a previous action brought to recover the insurance money the Court had cancelled on the ground of breach of warranty. The Court held that by the express terms of the policy no premiums could be recovered; but Lord Lyndhurst, in his judgment, appears to have assumed that, in the absence of such terms, the assured would be entitled to a return of premium even where the contract was set aside on the ground of fraud.

Desborough v. Curlewis (1838), 3 Y. & Coll. 175

Desborough v. *Curlewis.*

This was a claim in equity by the insurers for cancellation of a life policy on the ground of illegality. Lord Abinger refused the claim because there was no equity to have the contract set aside on that ground, and that at any rate the insurers seeking relief in equity must offer to repay the premiums received.

Biggar v. Rock Life, [1902] 1 K. B. 516

Biggar v. *Rock Life.*

The local agent of a company wilfully inserted false answers in the proposal form. Wright, J., held that in so doing he acted as the agent of the assured, and the claim for the insurance money failed. "If," said Wright, J., "the plaintiff is entitled to anything, I think that the most he could ask for would be that the Court should say that the contract is void on the ground of either fraud or mistake with the consequence perhaps that he may be entitled to recover back the premiums he paid."

General principles derived from above decisions.

Probably the principle upon which premiums are returnable in the case of fraud is equally applicable to all classes of insurance, and is as follows. If an action is brought at law to recover the insurance moneys, the insurers may defend on the ground of

fraud, and are not bound to tender a return of premiums (*d*). The assured cannot bring a separate action or counter-claim for a return of premiums because in order to do so he would have to allege his own fraud (*e*). If, however, an insurer seeks relief which is purely equitable, and which could in former days have been obtained only in a Court of equity, he must offer to return the premiums in respect of which he has never been on the risk. The insurer cannot therefore, even on the ground of fraud, bring an action for rescission and delivery up of the policy without offering to return the premiums received (*f*).

Where insurer is guilty of fraud premiums only recoverable when insurer seeks purely equitable relief.

Where there is an express proviso that the premiums shall be forfeited to the company the latter may obtain equitable relief without offering to return the premiums (*g*).

Express condition forfeiting premiums.

Where misrepresentation or breach of warranty is caused by the mistake, or fraud of the company's agent in misleading the assured or inserting false particulars in the proposal, the company may, under certain circumstances avoid the policy (*h*), but if they do so and the assured himself has been innocent in the matter, the insurers must, apart from special conditions, return the premium (*i*). If the assured has been guilty of fraudulent collusion with the agent it is clear that he cannot have a return of premiums unless the insurers are asking for purely equitable relief (*k*). If the assured has been merely negligent in the matter he is entitled to a return of premiums if the insurers cancel the policy (*i*), but he is not entitled to rescind on his own motion (*l*). In such a case the option to avoid the contract lies with the insurers (*l*). If, however, the conduct of the assured has been entirely free even from negligence, and the fault has been solely that of the company's agent, the assured may claim rescission (*m*). Thus, in an American

Misrepresentation or breach of warranty induced by act of insurer's agent.

(*d*) *Joel* v. *Law Union and Crown*, [1908] 2 K. B. 431, 440; *Hoyt* v. *Gilman* (1811), 8 Mass. 336.

(*e*) *Fisher* v. *Metropolitan Life* (1894), 160 Mass. 386; *Palmer* v. *Metropolitan Life* (1897), 21 Hun. App. 287.

(*f*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 372; see *Lodge* v. *National Union*, [1907] 1 Ch. 301; *Chapman* v. *Michaelson*, [1908] 2 Ch. 612, 620.

(*g*) *Barker* v. *Walters* (1844), 8 Beav. 96; *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484; *Thomson* v. *Weems* (1884), 9 A. C. 671, 682; *Duckett* v. *Williams* (1834), 2 C. & M. 348; *Sparenborg* v. *Edinburgh Life* (1911), Bray J., Nov. 7; *Venner* v. *Sun Life* (1890), 17 Can. S. C. 394.

(*h*) *Vide supra*, p. 355.

(*i*) *New York Life* v. *Fletcher* (1886), 117 U. S. 519; *Fisher* v. *Metropolitan Life* (1894), 160 Mass. 386.

(*k*) *Lewis* v. *Phœnix Mutual* (1872), 39 Conn. 100; *Palmer* v. *Metropolitan Life* (1897), 21 Hun. App. 287.

(*l*) *Mailhoit* v. *Metropolitan Life* (1895), 87 Me. 374; *Wakeman* v. *Metropolitan Life* (1899), 30 Ont. R. 705.

(*m*) *Rohrschneider* v. *Knickerbocker Life* (1879), 76 N. Y. 216; *Carter* v. *Boehm* (1766) 3 Burr. 1905, 1909; *Dufell* v. *Wilson* (1808), 1 Camp. 401.

case the agent wilfully inserted erroneous answers in order to secure the company's acceptance and his own commission. The Court held that the misrepresentation was entirely the fault of the agent, and that the assured was not responsible. Under the circumstances as proved they were of opinion that the company would be liable on the policy ; but, on the other hand, the policy on the face of it was void, and the insured could not be expected to continue paying the premiums, and so leave the legacy of a law suit to his representatives who would be deprived of the assured's testimony in the matter (*n*).

Contract induced by misrepresentation of insurers or their agent.

If the assured has been induced to effect an insurance by reason of fraudulent misrepresentations of fact made by the insurers or their agent to the assured, the latter can claim rescission and return of premiums.

Kettlewell v. Refuge, [1907] 2 K. B. 242; [1909] A. C. 243 (*o*)

Kettlewell v. *Refuge.*

The assured was induced to continue paying her premiums on a life policy on the false representation of the agent that in five years she would become entitled to a paid-up policy. After paying the premiums for four years she discovered the fraud, and sued the insurers for a return of the premiums paid. The Court of Appeal held that she was entitled to have the premiums returned. Two of the judges based their decision on the ground that she was entitled to have the contract rescinded. Buckley, L.J., on the other hand, thought that it was too late to rescind after the insurers had been on the risk, but he agreed with the decision on the ground that money obtained by the fraud of the company's agent could not be retained by the company against the person defrauded. The House of Lords affirmed the decision of the Court of Appeal without comment upon the difference of opinion in that Court.

If the opinion expressed by Buckley, L.J., in the above case is right, that is to say, that there can be no rescission after the company has been on the risk, then it would seem to follow that an assured cannot recover premiums paid upon a policy induced by the innocent misrepresentation of the insurer or their agent (*p*). It has already been submitted that the view taken by the majority of the Court of Appeal is to be preferred, and, if so, a claim for return of premiums can be made on the ground of the insurer's misrepresentation, whether innocent or fraudulent, and this view is supported by other decisions, and particularly by the decision of the House of Lords in *Foster* v. *Mutual Reserve Life* (*q*).

(*n*) *Miller* v. *Union Central* (1895), 86 Hun. 6.

(*o*) Affirmed in the House of Lords without opinion.

(*p*) And it has been so held by the Supreme Court in Canada, *Angers* v. *Mutual Reserve Life* (1904), 35 Can. S. C. 330.

(*q*) (1904) 20 T. L. R. 715 ; followed in *Cross* v. *Mutual Reserve Life* (1905),

Assured cannot rescind on the ground of his own misrepresentation.

As misrepresentation or concealment does not make a contract void, but merely voidable at the option of the other party, the assured cannot claim rescission and return of premiums where he himself is at fault but the insurer elects to treat the insurance as valid and subsisting (*r*).

Policy avoided by breach of warranty.

Where the insurance is avoided by the insurers on the ground of breach of warranty the premium can be recovered if there was a breach *ab initio*, so that the risk never attached (*s*), as, for instance, where there is a warranty of temperate habits, and the assured was in fact intemperate (*t*). But if the risk attaches and there is a subsequent breach of warranty, no premiums paid in respect of that risk can be recovered (*u*), as, for instance, if it was warranted that the assured should not go beyond the limits of Europe, and he did so during the currency of the risk (*x*). But as the risk is divisible into periods corresponding to the dates when the premium is payable, premiums paid after a breach of warranty may be recovered because no part of the risk for the future periods was ever run by the insurers (*y*). On principle it would seem that the assured cannot of his own motion claim a rescission of the policy and return of premium on the ground that he has broken his own warranty and that accordingly the risk has never attached. Even although the policy is declared to be null and void in the event of a breach the insurer may always waive the breach, and if he does so he earns the premium. In America, however, it was held that where the assured had an interest in property as mortgagee, but was not sole and unconditional owner as warranted, he could, after the period of risk had expired without loss, claim a return of premium on the ground that the insurance was void *ab initio* (*z*).

21 T. L. R. 15; *Merino* v. *Mutual Reserve Life* (1905), 21 T. L. R. 167; *Molloy* v. *Mutual Reserve Life* (1905), 22 T. L. R. 59.

(*r*) Bunyon on Life Insurance, 2nd Ed. 96; *Malhoit* v. *Metropolitan Life* (1895), 87 Me. 374; *Wakeman* v. *Metropolitan Life* (1899), 30 Ont. R. 705; *Fisher* v. *Metropolitan Life* (1894), 160 Mass. 386; *Palmer* v. *Metropolitan Life* (1897), 21 Hun. App. 287.

(*s*) *Macdonald* v. *Law Union* (1874), L. R. 9 Q. B. 328; *Feise* v. *Parkinson* (1812), 4 Taunt. 640; *Colby* v. *Hunter* (1827), 3 C. & P. 7; *Henkle* v. *Royal Exchange* (1749), 1 Ves. Sen. 317; *Waller* v. *Northern Insurance* (1884), 64 Iowa, 101.

(*t*) *Thomson* v. *Weems* (1884), 9 A. C. 671.

(*u*) *Annen* v. *Woodman* (1810), 3 Taunt. 299; *Langhorn* v. *Cologan* (1812), 4 Taunt. 330; *Hawke* v. *Niagara District* (1876), 23 Grant, 139; *Colby* v. *Cedar Rapids* (1885), 66 Iowa, 577; *Kentucky Vermillion Co.* v. *Norwich Union Fire* (1906), 146 Fed. Rep. 695.

(*x*) *Douglas* v. *Knickerbocker Life* (1881), 83 N. Y. 492.

(*y*) Bunyon on Life Insurance, 2nd Ed. 96; *Imperial Bank* v. *Royal Insurance* (1906), 12 Ont. L. R. 519.

(*z*) *Waller* v. *Northern Insurance* (1884), 64 Iowa, 101.

Where the loss arises from an excepted peril it is clear that no premium can be recovered if the risk has attached. As where the assured on a life policy paid the premium for a year and committed suicide next day (*a*).

Agent of assured effecting insurance without authority.

Where a policy is effected by an agent without the authority of the person for whose benefit it is made, and the agent pays the premium, he cannot afterwards recover it back on the ground that his principal has refused to ratify the contract (*b*).

Illegal insurances.

In the case of insurances which are illegal whether by statute (*c*), such as insurances without interest, or by common law (*d*), such as insurances on the property of an alien enemy, the general rule is that the assured can recover neither the policy moneys nor the premiums which he may have already paid (*e*). It will not avail the assured to plead that he was ignorant of the law and thought there was an insurable interest where in fact there was none (*f*), and even where the mistake in law has been induced by the innocent misrepresentation of the insurer or his agent the assured cannot recover his premium (*g*).

Ignorance of law gives no claim.

Even although induced by innocent misrepresentation of insurer.

Under certain circumstances, however, the assured may recover premiums notwithstanding the illegality of the insurance. These may be summarised as follows—

When premium paid on illegal insurance is returnable.

1. Where the insured has been induced to contract by the fraud of the insurer or his agent.
2. Where the illegality arises from the form of the policy as issued by the insurers.
3. Where the assured was ignorant of the facts which made the insurance illegal.
4. Where the assured claims rescission of the contract before the risk has attached.

Fraud of insurer.

Where the insurer or his agent induces the assured to effect the insurance by a fraudulent misrepresentation as to the law, as

(*a*) *Bermon* v. *Woodbridge* (1781), 2 Dougl. 781, 789; *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666, 669.

(*b*) *Routh* v. *Thompson* (1811), 13 East, 274; *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485.

(*c*) *Vide supra*, p. 103.

(*d*) *Vide supra*, p. 169.

(*e*) *Harse* v. *Pearl Life*, [1904] 1 K. B. 558; *Forgan* v. *Pearl Life* (1907), 51 Sol. Jo. 230; *Howard* v. *Refuge Friendly* (1886), 54 L. T. 644; *Paterson* v. *Powell* (1832), 9 Bingh. 320, 333; *Lowry* v. *Bourdieu* (1780), 2 Dougl. 468; *Andree* v. *Fletcher* (1789), 3 T. R. 266; *Allkins* v. *Jupe* (1877), 2 C. P. D. 375, 388, 390; *Oom* v. *Bruce* (1810), 12 East, 225; *Hentig* v. *Staniforth* (1816), 5 M. & S. 122; *Mork* v. *Abel* (1802), 3 B. & P. 35; *Brophy* v. *North American Life* (1902), 32 Can. S. C. 261.

(*f*) *Lubbock* v. *Potts* (1806), 7 East, 449; *Lowry* v. *Bourdieu* (1780), 2 Dougl. 468.

(*g*) *Harse* v. *Pearl Life*, [1904] 1 K. B. 558; *Lewis* v. *Phœnix Mutual* (1872), 39 Conn. 100.

where they know the insurance is illegal, but say it is not, the premiums paid on the faith of such fraudulent misrepresentation must be returned (*h*), and it has been said that although both parties knew that the insurance was illegal if the insurer or his agent declared that notwithstanding the illegality the policy money would be paid, and the assured on the faith of that declaration paid the premium he would be entitled to a return (*i*).

Form of policy illegal.

In a Canadian case it was held that where a life policy was void by reason of the name of the person for whose benefit it was made not being inserted in the policy the assured was entitled to recover the premiums paid. The parties, said the Court, were not *in pari delicto* since there was no improper conduct on the part of the assured who had fully disclosed the facts, and the sole fault was on the part of the company in issuing an irregular policy (*k*).

Assured ignorant of facts.

Where the assured contracted in ignorance of the facts which made the insurance illegal he is entitled to a return of premium if the insurers repudiate the policy on the ground of the illegality (*l*), as for instance if the assured believed he was the owner of the property insured, whereas in fact he had no title to it (*m*). Probably he could recover at any time during the risk if immediately he discovered the facts he gave notice to the insurers to rescind the insurance. But after the period of risk has expired without loss it is not open to the assured to say that he has just discovered that the policy was illegal for want of interest, and claim a return of premium on the ground that the insurers were never on the risk (*n*).

Contract wholly executory.

The general rule applicable to illegal contracts is that if either party desires to cancel the contract while it is still executory, that is when nothing has been done to carry out the illegal purpose, he may do so and claim a return of any consideration paid by him. The soundness of the rule has been doubted (*o*), and it is, perhaps not very logical, but it offers an inducement to the wrongdoer to repent before it is too late, and a long series of decisions have

(*h*) *British Workman's and General* v. *Cunliffe* (1902), 18 T. L. R. 502; *Harse* v. *Pearl Life*, [1904] 1 K. B. 558, 563; *Beer* v. *Prudential Assurance* (1902), 66 J. P. 729.

(*i*) *British Workman's and General* v. *Cunliffe* (1902), 18 T. L. R. 502.

(*k*) *Dowker* v. *Canada Life* (1865), 24 U. C. Q. B. 591.

(*l*) *Oom* v. *Bruce* (1810), 12 East, 225; *Hentig* v. *Staniforth* (1816), 5 M. & S. 122.

(*m*) *Routh* v. *Thompson* (1809), 11 East, 428.

(*n*) *McCullock* v. *Royal Exchange* (1813), 3 Camp. 406.

(*o*) *Palyart* v. *Leckie* (1817), 6 M. & S. 290; *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742.

placed the recognition of the rule beyond dispute (*p*). In the majority of insurances which are illegal for want of insurable interest, the rule has no application, since those insurances are not only illegal under the insurance statutes, but are void under the Gaming Acts as wagers, and any claim for the return of money paid in respect of a wager is expressly disallowed by these Acts (*q*). But in other classes of illegal insurances the rule applies, and it therefore becomes necessary to consider when the contract of insurance ceases to be executory, and becomes partly performed so as to bar the assured's claim to recovery of the premium. In one sense it might be said that the contract to insure is executed when the policy is issued (*r*), and in another sense it might be said that the contract of insurance is not executed until either an event insured against happens or the risk has expired (*s*). There is no very direct decision upon this point, but it is submitted that the contract is executory so long as the risk has not begun to run, but whenever the risk attaches or would have attached but for the illegality the contract is at least partly performed, and if the parties are *in pari delicto* the assured can no longer demand a return of premium on the ground of illegality (*t*).

Lawful insurance subsequently becoming unlawful.

Where the insurance is legal in its inception, but subsequently becomes illegal, as when war breaks out between the states of which the insurers and assured are respectively subjects, the insurer is probably not liable to return any part of the premium because he has been on the risk, and according to the general rule has thereby earned the whole premium (*u*). In an American case, however, it was held that where the policy was forfeited owing to non-payment of premium during the civil war, the parties being on opposite sides, the assured was, on the restoration of peace, entitled to a return of the premiums already paid by him less the actual cost of insurance for the period during which the insurers were on the risk (*x*).

(*p*) *Lowry* v. *Bourdieu* (1780), 2 Dougl. 468,471; *Tappenden* v. *Randall* (1901), 2 B. & P. 467; *Aubert* v. *Walsh* (1810), 3 Taunt. 277; *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291.

(*q*) 8 & 9 Vict. c. 109; 55 Vict. c. 9. The provisions in the statutes against contracts "by way of gaming or wagering," will not touch insurances made by the assured in the belief, although a mistaken belief, that he has in fact an interest in the subject matter.

(*r*) *Palyart* v. *Leckie* (1817), 6 M. & S. 290, 294.

(*s*) *Lowry* v. *Bourdieu* (1780), 2 Dougl. 468, 471.

(*t*) *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561; and see *Kettlewell* v. *Refuge*, [1907] 2 K. B. 242.

(*u*) *Furtado* v. *Rogers* (1802), 3 B. & P. 191.

(*x*) *Abell* v. *Penn. Mutual* (1881), 18 W. Va. 400.

Application by company for cancellation on ground of illegality.

It has been held in Canada that where the company has insured in the belief that the assured has in fact an interest which is an insurable interest, and subsequently during the currency of the risk discovers that there is no interest, it may apply to the Court for cancellation of the contract, and is not bound to return the premium (*y*).

Return of premiums paid to collecting societies.

Members of collecting societies and industrial assurance companies having claims for insurance moneys under the value of £20 may apply to the County Court or to a Court of Summary Jurisdiction, and such Court may settle the dispute by arbitration (*z*). This provision does not apply to a claim for return of premium on the ground of want of insurable interest because such a claim is based on the allegation that there never was any contract between the parties (*a*). A claim of this kind must be enforced by action in the usual way (*a*).

Where insurer wrongfully repudiates the risk.

If while the risk is still current the insurers wrongfully repudiate the validity of the contract the assured may either enforce the contract in due course or treat the repudiation as a final breach and sue for a return of premiums as damages for breach of contract (*b*).

Equity, however, requires that an assured shall not snatch unfairly at a chance of being relieved from a contract which has turned out to his disadvantage, and so when the company's superintendent said to the assured that the policy was void on the ground of misrepresentation as to health, it was held that the assured could not treat the policy as repudiated unless he first explained the whole circumstances and the superintendent nevertheless persisted in his charge of misrepresentation (*c*).

If the assured intends to treat the repudiation as a final breach he must give notice within a reasonable time after the act of repudiation, and where the assured did nothing for eleven months after the insurers refused to accept a renewal premium it was held that it was too late for the assured to sue for a return of premiums (*d*).

(*y*) *Brophy* v. *North American Life* (1902), 32 Can. S. C. 261.

(*z*) Coll. Soc. and Ind. Ass. Co. Act, 1896, 59 & 60 Vict. c. 26, s. 7.

(*a*) *London, Edinburgh, and Glasgow Assurance* v. *Partington* (1903), 88 L. T. 732.

(*b*) *Brewster* v. *National Life* (1892), 8 T. L. R. 648; *M'Call* v. *Phœnix Mutual* (1876), 9 W. Va. 237; *Fischer* v. *Hope Mutual* (1877), 69 N. Y. 161; *American Life* v. *M'Aden* (1885), 109 Pa. 399; *Van Werden* v. *Assurance* (1896), 99 Iowa, 621.

(*c*) *Palmer* v. *Metropolitan Life* (1897), 21 Hun. App. 287.

(*d*) *Howland* v. *Continental Life* (1877), 121 Mass. 499.

Repudiation of collateral agreements.

The repudiation by the company of collateral agreements may be sufficient to entitle the assured to cancel the policy. Where the contract of insurance and the collateral contract form part of one entire transaction, the company cannot repudiate the one and insist on the validity of the other. Thus, where the agent of an insurance company promised to lend money to an intending borrower and he insured his life with the company as part security for the loan, it was held that if the company afterwards refused to advance the money the assured might cancel the policy and recover the premiums paid (*e*). And so where an agent promised that the company would pay the surrender value of old policies if the assured took out a new one, which the assured did, it was held that if the company repudiated the agent's promise the assured might rescind the policy (*f*). But where a collateral agreement is wholly independent of the insurance, as where the assured was appointed medical officer of the company the cancellation of his appointment as such did not entitle him to rescind the insurance and recover the premiums (*g*).

Beneficiary no right to recover premiums.

Primâ facie the person who has paid the premiums, or his representative, has the right to recover them when the policy is set aside in circumstances which make the premiums recoverable. A mere beneficiary or payee of the insurance moneys who has not paid any premiums cannot recover the premium in an action against the insurers which the latter have successfully defended on the ground of breach of warranty *ab initio* (*h*).

Return of premiums for short interest, over-valuation, or double insurance.

In marine insurance the underwriter is bound to return a rateable proportion of the premium when by reason of accidental over-valuation, short interest, or double insurance the underwriter has never been on the risk to the full amount insured (*i*). No such rule, however, seems to have been established in the case of fire and similar risks. In most cases the express conditions of the policy would preclude any claim for return of premium on such grounds, but even where there are no such conditions the rule in marine insurance would not be extended to other classes of risk in the absence of any custom or practice to return a proportion of the premium in cases of over insurance. The

(*e*) *Key* v. *National Life* (1899), 107 Iowa, 446.

(*f*) *Harnickell* v. *New York Life* (1888), 111 N. Y. 390.

(*g*) *Laberge* v. *Equitable Insurance* (1895), 24 Can. S. C. 595.

(*h*) *Sullivan* v. *Metropolitan Life* (1899), 174 Mass. 467.

(*i*) *Fisk* v. *Masterman* (1841), 8 M. & W. 165.

nearest approach to the application of such a principle in life cases is the practice of returning an additional premium paid in respect of a licence to go beyond the limits of the risk where in fact the life insured has not availed himself of the licence (*k*).

Claim for return of premium barred by Statute of Limitation.

Claims for the return of premium may be barred by the Limitation Act, 1623, if no action is brought within six years after the cause of action arose (*l*). Where the contract is illegal, where there is no contract at all, for want of agreement or because there was mutual mistake, or where the assured may set aside the contract on the ground of misrepresentation by the insurers, the cause of action arises when each premium is paid, and therefore premiums which were paid more than six years before the action is brought cannot be recovered, except in cases where there has been fraud on the part of the company or its agents, in which event the statute does not begin to run until the discovery of the fraud (*m*). Where the insurance is voidable by the insurer on the ground of misrepresentation or breach of warranty by the assured the cause of action does not arise until the insurer has elected to avoid the contract (*n*). If therefore the assured has, in the circumstances, any right at all to recover his premiums such right is not barred in whole or in part until six years after the insurer has elected to avoid.

Acknowledgment of receipt of premium.

Where an action is brought for return of premium the acknowledgment of the receipt of premium in a policy properly executed under the seal of the insurers is said to be conclusive evidence of payment of premium (*o*).

Where a return of premium has been made the policy is cancelled and the assured cannot afterwards have the benefit of it. Error in law does not entitle the assured to have the policy restored (*p*); but, on the other hand, if the premium was returned on a mutual mistake of the facts upon which the validity of the policy depended the assured might, even after loss, claim to have the policy restored (*q*).

(*k*) Bunyon on Life Insurance, 2nd Ed. 95.

(*l*) 21 Jac. 1, c. 16.

(*m*) *Beer* v. *Prudential Assurance* (1902), 66 J. P. 729.

(*n*) Bunyon on Life Insurance, 2nd Ed. 97.

(*o*) *Dalzell* v. *Mair* (1808), 1 Camp. 532; *Anderson* v. *Thornton* (1853), 8 Exch. 425. But see *Roberts* v. *Security*, [1897] 1 Q. B. 111, 115.

(*p*) *May* v. *Christie* (1815), Holt, N. P. 67.

(*q*) *Reyner* v. *Hall* (1813), 4 Taunt. 725.

Section III.—Salvage Premiums

Premium paid by third person.

Frequently where a person beneficially entitled to a life policy is unable or unwilling to continue the payment of the premiums, some other person steps in and, either for his own benefit or for the benefit of the person who has failed to pay, pays the premiums and so keeps the policy on foot. Where the person beneficially entitled or his representative finally reaps the benefit of a policy which has been kept alive in this way the question arises whether he is not under a legal as well as a moral obligation to repay out of the policy moneys the amount of the premiums to the person who paid them to the insurers, and so saved the policy.

What right to repayment by the assured.

Voluntary payment by stranger gives him no claim.

Apart from any contractual relationship between the parties it has been contended that a mere stranger who has saved the policy by paying the premiums is entitled to claim at least repayment out of the policy moneys on the grounds (i) that as a salvor he is entitled to a lien for salvage remuneration (*r*); (ii) that the assured having adopted his acts and taken the fruits of his payments he is entitled to a lien for his disbursements (*s*). It has been held, however, that the doctrine of salvage is peculiar to maritime law and cannot be extended to cases of this kind (*t*), and that the doctrine of adoption is not applicable to the case of a man enforcing his own contract or using his own property even although incidentally he thereby reaps the benefit of the uninvited expenditure or labours of another in respect thereof (*u*). A stranger, therefore, who steps in uninvited and by paying the premiums keeps on foot a policy which but for his intervention would have lapsed, not only has no direct claim on the policy moneys but has no right to recover the premiums either personally against the assured or by way of lien on the policy (*x*). The mere fact that he thought he had a beneficial interest in the policy does not place him in any better position (*y*).

Except against an officer of the

Although the voluntary payment of premiums creates no legal claim against the person who takes the benefit of the policy there

(*r*) See *Shearman* v. *British Empire* (1872), L. R. 14 Eq. 4; *Tharp, In re* (1852), 2 Sm. & Giff. 578 *n.*

(*s*) See *Busteed* v. *West of England* (1857), 5 Ir. Ch. R. 553.

(*t*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234; *Leslie, In re* (1883), 23 Ch. D. 552.

(*u*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234.

(*x*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234; *Leslie In re*, (1883), 23 Ch. D. 552; *Clack* v. *Holland* (1854), 19 Beav. 262; *Burridge* v. *Row* (1842), 1 Y. & C. Ch. 183.

(*y*) *Winn, In re* (1887), 57 L. T. 382; *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357.

Court such as a trustee in bankruptcy.

may be a moral claim, and accordingly when the person taking such benefit is an officer of the Court, such as a trustee in bankruptcy, the Court will not permit him to retain money which morally belongs to some one else (*z*). Thus, where a trustee in bankruptcy claims any policy of the bankrupt the Court may order the repayment of premiums which have even after the date of the bankruptcy been paid by a third person to keep the policy on foot (*z*).

Payment at the request of assured gives a right to repayment.

If a person beneficially entitled to the policy moneys requests another to pay the premiums on his behalf, he by implication promises to repay the amount so advanced (*a*). The transaction is presumed to be a loan and not a gift, and the assured is under a personal obligation to repay the loan.

Promise to repay inferred from knowledge and acquiescence of assured.

A promise to repay may sometimes be implied from slight circumstances (*b*). Knowledge and acquiescence in the fact that the premiums are being paid by another for the assured's benefit is generally sufficient to raise the inference that the assured accepts the payments as being on his behalf and impliedly promises to repay them (*c*). "Wherever," said Bowen, L.J., in *Falcke* v. *Scottish Imperial*, "you find that the owner of the property saved knew of the service being performed you will have to ask yourself, and the question will become one of fact, whether, under all the circumstances, there was what the law calls an implied contract for repayment or a contract which would give rise to a lien" (*d*).

Whether simple request or promise to repay creates a lien on the policy.

It has been suggested (*e*) that a request to pay the premiums not only gives rise to a personal obligation on the part of the assured, but also creates a charge upon the policy moneys so that the person who pays the premiums can follow the policy into the hands of assignees, and when the policy moneys become due can insist on the payment of his debt in priority to other creditors or to any claimants on the fund. It is submitted, however, that a bare request and express or implied promise to repay the premiums advanced do not in themselves create a charge on the policy (*f*),

(*z*) *Tyler, In re*, [1907] 1 K. B. 865; *Schondler* v. *Wace* (1808), 1 Camp. 487; and see *Gibson* v. *Overbury* (1841), 7 M. & W. 555, 559.

(*a*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234, Cotton, L.J., at p. 241; Fry, L.J., at p. 252.

(*b*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234, Cotton, L.J., at p. 241.

(*c*) *Power's Policies, In re*, [1899] 1 Ir. R. 6; *Walker, In re* (1893), 68 L. T. 517.

(*d*) 34 Ch. D. 234, 248.

(*e*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234, Cotton, L.J., at p. 241.

(*f*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234, Fry. L.J., at p. 252.

but that there may be circumstances from which it can be implied that the parties intended to create not merely a personal obligation but a charge. If, moreover, the beneficial owner of a policy stands by and allows another to pay the premiums in the belief that he is the owner, and the beneficial owner knows that he pays in that belief and knows that he is wrong, equity will not allow the beneficial owner to profit by the other's mistake which he could have prevented, and therefore gives that other a charge upon the policy for the repayment of his outlay (*g*). Payment in belief of ownership without full knowledge of the circumstances on the part of the true owner does not give rise to any right to have the premiums repaid (*h*).

Part owners paying the premium.

It has been sometimes contended that one who has an interest in a policy as a part owner or reversioner, and who pays the premiums in order to preserve his interest acquires thereby a right of contribution against all others who are beneficially interested and a lien on the policy for their proportions of the premium (*i*).

Tenants in common have a right to contribution.

The right of contribution, however, in respect of voluntary outlay is limited to tenants in common, joint tenants, and coparceners, and does not extend so as to be applicable as between those entitled to successive interests such as life-tenants and remaindermen (*k*), and even as between co-owners the right is merely a personal right, and does not create, as was once supposed, any charge upon the property which has received the benefit (*l*). One therefore who has an interest in the nature of a reversion or *spes successionis* in a policy of insurance has no right to indemnity on paying the premiums, even although he never receives any benefit from the policy (*m*). A joint tenant or tenant in common who pays the premium, has a right of action for a contribution against his co-owners, but except by contract he has no charge on the policy (*n*).

Reversioners and others have no right to contribution.

No part owners as such have any lien on the policy.

In one case cited in the Journal of the Institute of Actuaries

(*g*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234, Cotton, L.J., at p. 243; *Leslie, In re* (1883), 23 Ch. D. 552, Fry, L.J., at p. 565.

(*h*) *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234.

(*i*) *Money* v. *Gibbs* (1837), 1 Dr. & Wal. 394.

(*k*) *Waugh's Trustees, In re* (1877), 46 L. J. Ch. 629.

(*l*) *Leslie, In re* (1883), 23 Ch. D. 552, Fry, L.J., at p. 563.

(*m*) *Leslie, In re* (1883), 23 Ch. D. 552.

(*n*) *Leslie, In re* (1883), 23 Ch. D. 552; *Teasdale* v. *Sanderson* (1864), 33 Beav. 534; *Kay* v. *Johnston* (1856), 21 Beav. 536; *Young, Ex parte* (1813), 2 V. & B. 242; *Harrison, Ex parte* (1814), 2 Rose, 76; *Wood* v. *Birch*, Sug. V. & P. 700. Two cases *contra* (*Swan* v. *Swan* (1819), 8 Price 518, and *Hamilton* v. *Denny* (1809), 1 Ball & B. 199) were disapproved by Fry, L.J., in the case of *In re Leslie*.

A mortgaged certain leaseholds and a policy on his own life to an insurance company. He assigned the equity of redemption of the leaseholds to B, but retained the equity to redeem the policy, and afterwards became bankrupt. The office informed B that if the premiums on the policy were not paid they would call in the loan. B accordingly paid the premiums and, on the policy being assigned to A's trustee in bankruptcy, claimed repayment of the premiums by the trustee. It was held by the Court of Appeal that as B had paid the premiums voluntarily as a stranger, he had no claim (*o*).

Mortgagee has a lien for premiums paid to preserve his security.

A mortgagee, however, is in a different position from other part owners. He holds the policy as security for a debt, and unless he had the power of paying the premiums and adding them to the charge, the security might be of little value. The mortgagee therefore is entitled to preserve his security by paying the premiums to keep the policy on foot, and if he does so he can add them to the charge (*q*). It seems doubtful, however, whether the premiums can be recovered as a personal debt from the mortgagor; but if the mortgagor has undertaken to pay the premiums they could be recovered from him as damages for breach of contract. In one case where the mortgage of a policy and other property was set aside it was held that the mortgagee who had for some years paid the premiums was entitled to a charge on the policy for the sums actually advanced by and owing to him, and for the premiums; but that he was not entitled to any personal remedy against the mortgagor in respect of the premiums, and that therefore if the mortgagor elected to abandon all claim to the policy, the mortgagee could not recover the amount of premiums paid, although considerably in excess of the value of the policy (*r*).

A mortgagor who has not covenanted to keep up a mortgaged policy does not by voluntarily paying premiums to preserve his equity of redemption acquire thereby any right as against the mortgagee to repayment of such premiums out of the policy moneys (*s*). Nor can any assignee of the equity of redemption

(*o*) Journal of the Institute of Actuaries, vol. 33, p. 392.

(*q*) *Gill* v. *Downing* (1874), L. R. 17 Eq. 316; *Aylwin* v. *Witty* (1861), 30 L. J. Ch. 860; *Drysdale* v. *Piggott* (1856), 8 De G. M. & G. 546.

(*r*) *Pennell* v. *Millar* (1856), 23 Beav. 172.

(*s*) *Norris* v. *Caledonian Insurance* (1869), L. R. 8 Eq. 127; *Saunders* v. *Dunman* (1878), 7 Ch. D. 825; *Falcke* v. *Scottish Imperial* (1886), 34 Ch. D. 234; see contra *Shearman* v. *British Empire* (1872), L. R. 14 Eq. 4.

primâ facie claim repayment of premiums against the mortgagee, and consequently a second mortgagee having paid the premiums on a policy in order to preserve the security was not entitled to any charge in respect thereof in priority to the claim of the first mortgagee (*t*). An assignee of the equity of redemption may have a right to be reimbursed in respect of premiums or other costs of preserving the security such as the costs of an action against the company, but whether he has or has not this right depends not on the bare fact that the mortgagee gets the benefit of his expenditure, but on special circumstances from which the inference may be drawn that there was an undertaking to repay (*u*).

Trustees have a lien for premiums paid to preserve the trust property.

Trustees and other persons who hold the policy in a fiduciary capacity are entitled to preserve the policy for their beneficiaries, and to pay the premiums if the person who primarily ought to pay them fails to do so. Trustees ought to pay the premiums from trust funds if any are available for that purpose, but if there are none and they pay them out of their own pockets they are entitled to a first charge on the policy to indemnify themselves (*x*). Where the trustees had the means of procuring trust funds properly available for the purpose of paying premiums, it was held that they did not acquire a charge on the policy by paying it out of their own pockets (*y*).

Payments made by others at the request of trustees.

And not only are trustees entitled to a charge in respect of disbursements for premiums paid out of their own pockets, but they may give a like charge to others who advance the premiums at their request (*z*). It has been said that if the trustees have trust funds available for the premiums they cannot charge the policy by borrowing from strangers any more than they can by paying out of their own pockets (*a*); but, on the other hand, it would seem that if a trustee requests a beneficiary of the trust to pay the premiums the beneficiary has a charge on the policy even although there are available funds in the possession of the trustee (*b*).

(*t*) *Power's Policies, In re*, [1899] 1 Ir. R. 6.

(*u*) *Strutt* v. *Tippett* (1890), 62 L. T. 475; *Myers* v. *United Guarantee* (1855), 7 De G. M. & G. 112.

(*x*) *Clack* v. *Holland* (1854), 19 Beav. 262, Romilly, M.R., at p. 273; *Walker, In re* (1893), 68 L. T. 517; *Earl of Winchelsea* (1888), 39 Ch. D. 168; *Norris* v. *Caledonian* (1869), L. R. 8 Eq. 127; *McElroy* v. *Hancock Mut.* (1898), 88 Md. 137.

(*y*) *Clack* v. *Holland* (1854), 19 Beav. 262.

(*z*) *Clack* v. *Holland* (1854), 19 Beav. 262.

(*a*) *Clack* v. *Holland* (1854), 19 Beav. 262.

(*b*) *Todd* v. *Moorhouse* (1874), L. R. 19 Eq. 69.

Payments made by beneficiaries.

There is some authority for saying that if a beneficiary of a trust pays the premiums in default of the person who ought to pay them, he is entitled to a charge even although he did not act on the request of the trustees (*c*); but there seems to be no reason why a beneficial part owner under a trust should have any greater right to an indemnity than a part owner at law, and therefore it would appear that the better opinion is that only in the case of joint tenancy or tenancy in common has a beneficiary a right to contribution against the other beneficiaries, and even then he cannot enforce it by a lien against the policy unless he has acted by request of the trustees (*d*).

Where a person has an interest in a policy under an assignment which is voidable, as in the case of a voluntary assignment which is voidable by the assignor's trustee in bankruptcy, the premiums which he has paid before the date when the assignment is avoided constitute a first charge on the policy moneys (*e*). Equity makes such a charge a condition of the right to have the assignment set aside against an innocent holder (*e*).

Lien on the policy created by contract.

Any person can by contract with the beneficial owner of a policy acquire a right to recover the premiums which he has paid to keep it on foot, and his contract may give him a charge on the policy for that purpose (*f*). Once a lien has been acquired he can keep the policy on foot for his own benefit, and add the further premiums to the charge (*f*), and he may, by requesting others to advance the premiums, give them a charge upon the property, since that is the same as if he had borrowed the money and assigned his security (*f*).

(*c*) *Burridge* v. *Row* (1842), 1 Y. & C. Ch. 183; *Tharp, In re* (1852), 2 Sm. & G. 578 *n.*

(*d*) *Ante*, p. 801.

(*e*) *West* v. *Reid* (1843), 2 Hare, 249; *Edwards* v. *Martin* (1865), L. R. 1 Eq. 121.

(*f*) *Aylwin* v. *Witty* (1861), 30 L. J. Ch. 860.

CHAPTER IX

Stamp Duties

A knowledge of the provisions of the Stamp Acts is of great importance to those dealing with policies of insurance, and particularly to insurance companies when issuing policies and paying claims. An insurance company is liable to penalties if it fails to execute a duly stamped policy within one month after receiving or taking credit for premiums, or if it issues a policy which is not properly stamped (*a*), or if it pays a claim upon an assignment of a policy and the assignment is not properly stamped (*b*). No indemnity offered by a claimant against liability in respect of improper stamping of any instrument dated after May 16, 1888, would protect the office, as any such indemnity would be void (*c*). But apart from penalties, the company must be satisfied that every document forming a step in a claimant's title is properly stamped, because otherwise they might be paying on a title which owing to defective stamping could not be proved in Court, and if afterwards some other claim was made against them for the same moneys, they might not be in a position to disprove it until the documents of title upon which they had paid the first claim had been duly stamped. A table of stamp duties is contained in Schedule I. of the Stamp Act, 1891, and all instruments must be stamped in accordance with that schedule, as amended by subsequent Stamp or Finance Acts. If there is any doubt as to the sufficiency of a stamp upon any instrument, the Commissioners of Inland Revenue may be required to express their opinion, and, if it is stamped in accordance with their opinion with an

Generally.

(*a*) Stamp Act, 1891, s. 100.
(*b*) Sec. 118.
(*c*) Sec. 117. Apparently it is competent to give an indemnity in respect of the insufficient stamping of an instrument dated prior to the specified date. Such indemnity, however, must be stamped before execution as the Inland Revenue refuse to stamp such indemnities after execution on the ground that they are not bound to do so and are not minded to assist in reference to such indemnities.

adjudication stamp, no objection can thereafter be taken to the sufficiency of the stamp. In a doubtful case, therefore, the office may properly call upon the claimant to have any document of title adjudicated before paying the claim.

Section I.—Stamps on Policies

Stamps required on policies.

The stamp duty chargeable on policies is briefly as follows: Life policies are chargeable with an *ad valorem* duty (which must be denoted by an impressed stamp (*d*)) upon the total amount insured (*e*), the duty running from one penny where the amount does not exceed ten pounds, to ten shillings for every thousand pounds or fractional part thereof where the amount exceeds one thousand pounds (*f*). Accident, sickness, fire, burglary, and all insurances against loss or damage to property (*g*) (other than marine insurances) are chargeable with a uniform duty of one penny, whatever the amount insured (*h*). Employers' liability policies where the annual premium does not exceed two pounds, are also chargeable with a duty of one penny (*i*). The one penny duty on policies, other than life or marine, may be denoted by an adhesive stamp (*k*). Employer's liability policies where the premium exceeds two pounds (*l*), guarantee policies (*m*), bond investment policies (*n*), and the like, are chargeable with a duty of sixpence as an agreement, or if under seal with a duty of ten shillings as a deed (*o*). The duty of sixpence on an agreement may be denoted by an adhesive stamp (*p*). The duty of ten shillings on a deed must be denoted by an impressed stamp (*q*).

Insurance by advertisement.

Any notice or advertisement in a newspaper or other publication which purports to insure the payment of money in the case

(*d*) Stamp Act, 1891, s. 2.

(*e*) That is to say, on the maximum sum which may become payable in any event, but excluding bonuses (Alpe's Law of Stamp Duties, 12th Edition, p. 199).

(*f*) Stamp Act, 1891, Sched. I. (Policy of Life Insurance), ss. 91, 98.

(*g*) Insurance against loss of cattle by death arising from disease or accident is an insurance against loss or damage to property (*A.-G* v. *Cleobury* (1849), 4 Ex. 65).

(*h*) Stamp Act, 1891, Sched. I. (Policy of Insurance against Accident, etc.), ss. 91, 98.

(*i*) Finance Act, 1899, s. 11; Finance Act, 1907, s. 8.

(*k*) Stamp Act, 1891, s. 99.

(*l*) *Lancashire Insurance* v. *Inland Revenue*, [1899] 1 Q. B. 353.

(*m*) *Mortgage Insurance* v. *Inland Revenue* (1888), 57 L. J. Q. B. 174.

(*n*) *Mortgage Insurance* v. *Inland Revenue* (1888), 21 Q. B. D. 352.

(*o*) In Scotland an agreement is chargeable as a deed when there is a registration clause. The distinction between an instrument under seal and an instrument under hand only is not known in Scotland.

(*p*) Stamp Act, 1891, s. 22.

(*q*) Stamp Act, 1891, s. 2.

of accident, sickness, fire, burglary, or any damage or injury to property is a policy within the meaning of the Stamp Acts, and liable to duty accordingly (*r*).

Composition in lieu of stamps on policy.

To meet the difficulty of stamping such notices and advertisements the Commissioners of Inland Revenue are authorised to enter into an agreement with the insurer for the rendering of quarterly accounts of unstamped policies, and the payment of a 5 per cent. duty on the aggregate amount of all sums received in respect of premiums on such policies (*s*).

Stamp Act, 1891 (*t*), **Schedule I., amended by Finance Act, 1899** (*u*), **sec. 11, and Finance Act, 1907** (*w*), **sec. 8**

Table of duties.

	£	*s.*	*d.*
POLICY OF LIFE INSURANCE—			
Where the sum insured does not exceed £10	0	0	1
Exceeds £10 but does not exceed £25	0	0	3
Exceeds £25 but does not exceed £500 :			
For every full sum of £50, and also for any fractional part of £50, of the amount insured	0	0	6
Exceeds £500 but does not exceed £1000 :			
For every full sum of £100, and also for any fractional part of £100, of the amount insured	0	1	0
Exceeds £1000 :			
For every full sum of £1000, and also for any fractional part of £1000, of the amount insured	0	10	0
And *see* sections 91, 98, and 100.			
POLICY OF INSURANCE AGAINST ACCIDENT and POLICY of insurance for any payment agreed to be made during the sickness of any person, or his incapacity from personal injury, or by way of indemnity against loss or damage of or to any property ..	0	0	1
POLICY OF INSURANCE AGAINST LIABILITY incurred by employers in consequence of claims made upon them by workmen who have sustained personal injury when the annual premium on such policy does not exceed two pounds	0	0	1

Stamp Act, 1891, ss. 91, 98, 99, 100, 116

Meaning of policy of insurance.

91. For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

Meaning of policy of life insurance

98.—(1) For the purposes of this Act the expression "policy of life insurance" means a policy of insurance upon any life or lives or upon any event

(*r*) Stamp Act, 1891, s. 98; Finance Act, 1895, s. 13; Finance Act, 1899, s. 11; Finance Act, 1907, s. 8 (1).

(*s*) Stamp Act, 1891, s. 116; Finance Act, 1896, s. 13; Finance Act, 1907, s. 8 (2).

(*t*) 54 & 55 Vict. c. 39.

(*u*) 62 & 63 Vict. c. 9.

(*w*) 7 Edw. 7, c. 13.

and policy of insurance against accident.

or contingency relating to or depending upon any life or lives except a policy of insurance against accident; and the expression "policy of insurance against accident" means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice only from accident or violence or otherwise than from a natural cause.

(2) A policy of insurance against accident is not to be charged with any further duty than one penny by reason of the same extending to any payment to be made during sickness or incapacity from personal injury.

Duty on certain policies may be denoted by adhesive stamp.

99. The duty of one penny upon a policy of insurance other than a policy of sea insurance or life insurance may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the policy is first executed.

Penalty for not making out policy, or making, &c. any policy not duly stamped.

100. Every person who—

(1) Receives, or takes credit for, any premium or consideration for any insurance other than a sea insurance, and does not, within one month after receiving, or taking credit for, the premium or consideration, make out and execute a duly stamped policy of insurance; or

(2) Makes, executes, or delivers out, or pays or allows in account, or agrees to pay or allow in account, any money upon or in respect of any policy other than a policy of sea insurance which is not duly stamped;

shall incur a fine of twenty pounds.

Composition for stamp duty on policies of insurance against accident.

116.—(1) Where any person issuing policies of insurance against accident, shall, in the opinion of the Commissioners, so carry on the business of such insurance as to render it impracticable or inexpedient to require that the duty of one penny be charged and paid upon the policies, the Commissioners may enter into an agreement with that person for the delivery to them of quarterly accounts of all sums received in respect of premiums on policies of insurance against accident.

(2) The agreement shall be in such form and shall contain such terms and conditions as the Commissioners may think proper, and the person with whom the agreement is entered into shall observe the rules in the second part of the Second Schedule to this Act.

(3) After an agreement has been entered into between the Commissioners and any person and during the period for which the agreement is in force, no policy of insurance against accident issued by that person shall be chargeable with any duty, but in lieu of and by way of composition for that duty there shall be charged on the aggregate amount of all sums received in respect of premiums on policies of insurance against accident a duty at the rate of five pounds per centum as a stamp duty.

(4) If the duty charged is not paid upon the delivery of the account it shall be a debt due to Her Majesty from the person by or on whose behalf the account is delivered.

(5) In the case of wilful neglect to deliver such an account as is hereby required or to pay the duty in conformity with this section the person shall be liable to pay to Her Majesty a sum equal to ten pounds per centum upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect continues.

Stamp Act, 1891, Schedule II.

Rules as to composition for stamp duties.

1. Every account shall be made in such form and shall contain all such particulars as the Commissioners shall require.

2. Every account shall be a full and true account of all unstamped policies of insurance against accident issued during the quarter of a year ending on the quarterly day next preceding the delivery thereof, and of all sums of money received for or in respect of such policies so issued during that quarter, and of all sums of money received and not already accounted for in respect of any other unstamped policies of insurance against accident issued at any time before the commencement of that quarter.

3. Accounts shall be delivered to the Commissioners within twenty days after the fifth day of April, the fifth day of July, the tenth day of October, and the fifth day of January in each year.

4. The duty shall be paid upon the delivery of the account.

Finance Act, 1895 (*x*), sec. 13

Extension of Stamp Act, 1891, s. 98, to policies of insurance for sickness.

13. Whereas section ninety-eight of the Stamp Act, 1891, provides that "a policy of insurance against accident" includes a notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication from accident, and doubts have arisen as to the like notices or advertisements in other cases, it is hereby for the removal of doubts declared that "a policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury" within the meaning of the Stamp Act, 1891, includes a notice or advertisement in a newspaper or other publication which purports to insure such payment.

Finance Act, 1896 (*y*), sec. 13

Extension of Stamp Act, 1891, s. 116, to policies of insurance for sickness.

13. The provisions of section one hundred and sixteen of the Stamp Act, 1891 (which relates to a composition for stamp duty on policies of insurance against accident), shall apply as if the expression "policy of insurance against accident" in that section included a policy of insurance for any payment agreed to be made during the sickness of any person or during his incapacity from personal injury.

Finance Act, 1899 (*z*), sec. 11

Extension of Stamp Act, 1891, s. 98, to employers' liability insurance.

11. The provisions contained in section ninety-eight of the Stamp Act, 1891, in reference to the expression "policy of insurance against accident" shall extend to and include policies of insurance or indemnity against liability incurred by employers in consequence of claims made against them by workmen who have sustained personal injury when the annual premium on such policies does not exceed *one* pound.

Finance Act, 1907 (*a*), sec. 8

Advertisement insurance against

8.—(1) It is hereby declared for the removal of doubts that "a policy of insurance for any payment agreed to be made by way of indemnity against

(*x*) 58 Vict. c. 16.
(*y*) 59 & 60 Vict. c. 28.
(*z*) 62 & 63 Vict. c. 9.
(*a*) 7 Edw. 7, c. 13.

loss or damage to property.

loss or damage of or to any property" within the meaning of the Stamp Act, 1891, includes any notice or advertisement in a newspaper or other publication which purports to insure such payment.

(2) The provisions of section one hundred and sixteen of the said Act (which relates to composition for stamp duty on policies of insurance against accident) shall apply to policies of insurance for any payment agreed to be made by way of indemnity against loss or damage of or to any property as they apply to policies of insurance against accident.

Employers' liability insurance.

(3) Section eleven of the Finance Act, 1899 (which relates to policies of insurance in respect of injury to workmen), shall be read as if two pounds were substituted for one pound as the amount of annual premium therein mentioned.

Endowment policy chargeable as a life policy.

An endowment policy where the assured is entitled to the sum assured on attaining a certain age is a policy of life insurance within the meaning of section 98. It is a policy upon a contingency depending on a life. It is therefore chargeable as a policy only, and not with any higher duty as a bond or covenant to secure payment of money under the heading in the schedule, "Mortgage, Bond, Debenture, Covenant." This principle applies whether the policy be a pure endowment policy, a double endowment policy (as in the case cited below), an endowment policy with returnable premiums, or an endowment assurance policy under which the sum assured is payable at a certain age or on earlier death.

Prudential Insurance Co. v. Inland Revenue, [1904] 2 K. B. 658

Prudential Insurance Co. v. *Inland Revenue.*

In this case the insurance company issued an instrument under seal headed "Old Age Endowment with Life Assurance," whereby they agreed that in consideration of a weekly premium of 6*d.*, to be paid by the assured until he should attain the age of 65 or during his life they should make one or other of the following payments: £95, on attaining the age of 65; £30 on death under that age. The Commissioners held that the main promise was to pay at the age of 65 and that the instrument was not a policy of life insurance, but a bond to secure that payment, and assessed it for duty at 2*s.* 6*d.* instead of 1*s.* as a policy. On appeal, Channell, J., held that the instrument was a policy, and chargeable only as such. He said the mere heading of the instrument was of little assistance. He must look at the contract itself and see what it really was. The only substantial question was whether it was a policy of insurance. If it was, there could be no doubt that it related to or was dependent on a life. Policy of insurance was defined as including every writing whereby any contract of insurance was made. Was this a contract of insurance? Contracts of insurance were not confined to contracts of indemnity. The learned judge then continued: "A contract of insurance must be a contract whereby for some consideration, usually, but not necessarily, for periodical payments called premiums, you secure to yourself some benefit, usually, but not necessarily, the payment of a sum of money upon the happening of some event. Then the

next thing that is necessary is that the event should be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time, there must be uncertainty as to the time at which it will happen. The remaining essential is that which was referred to by the Attorney-General when he said the insurance must be against something. A contract which would otherwise be a mere wager may become an insurance by reason of the assured having an interest in the subject matter—that is to say, the uncertain event which is necessary to make the contract amount to an insurance must be an event which is *primâ facie* adverse to the interest of the assured. The insurance is to provide for the payment of a sum of money to meet a loss or detriment which will or may be suffered upon the happening of the event. . . . It seems to me that for the purpose of determining whether this contract comes within the definition, we must look at it as a whole and not split it up into two different parts. If it were to be so split up and treated as two separate contracts, I should incline to the view that even the old-age endowment portion of it—that is to say, the contract to pay the sum of £95—would satisfy the definition. In the first place, the event on which the money is to be paid is uncertain, for it is uncertain whether the assured will live to the age of 65, and whether consequently the money will be payable at all. Secondly, it seems to me that the event, in addition to being uncertain, is *primâ facie* adverse to the interests of the insured. A person whose life was insured at 6*d.* a week would presumably be a poor person and one who would have to earn his own living, and his capacity of so earning his living would probably be materially diminished by the time he reached the age of 65. . . . And when you take the whole contract together there does not seem to be any real difficulty about the matter. A contract of life insurance is one by which persons entitle their executors to receive a sum of money for distribution among their family in the event of their death. The objection to insurance is that if the assured lives beyond the average period of life upon which the premiums of insurance are based he has made a bad bargain, and he would have done better if he had saved his money and invested it at compound interest. Consequently in order to attract insurances it is usual for the insurance companies to give benefits to persons who live beyond the average period of life. Most of them do this by way of bonuses after the policy has been in existence for a certain period, and the giving of such a bonus of course does not prevent the contract from being a contract of insurance. Sometimes it is provided that the sum insured shall be payable either upon the assured reaching a certain age or upon death, whichever first happens. It is clear that that also would be a contract of insurance. That is very like this case, the only difference being that here a larger sum is payable in the former event, and that is a difference which, in my opinion, is immaterial."

Where there is more than one insurance in the same policy.

The same document may contain more than one contract of insurance, and may be separately chargeable in respect of each (*b*). The fact that there are several underwriters on the same policy does not make the policy separately chargeable in

(*b*) Stamp Act, 1891, s. 3 (2).

respect of each (*c*). The several underwriters have such a community of interest in the subject matter that one stamp is sufficient (*c*). If, however, separate and distinct risks are insured in the same policy, as if a burglary policy also contains a fidelity insurance of the assured's employees, then the policy is chargeable as two separate instruments (*d*). In order to determine whether different obligations by the insurers contained in the policy are separately chargeable, the test is to see whether each obligation will stand alone (*d*). Where the one obligation is merely incidental to the other, which constitutes the principal obligation, then the document is chargeable in respect of the latter obligation only (*d*).

Accident policy with obligation to return proportion of premiums.

A policy of insurance against accident or illness does not become chargeable as a life policy as well as an accident policy by reason of the fact that the company undertakes to return to the assured or his representatives a certain proportion of the premiums if, upon the assured's attaining a certain age or dying under that age, the policy shall continue in force and no claim shall have been made upon it.

General Accident v. Inland Revenue (1906), 8 F. 477

General Accident v. *Inland Revenue.*

The company by their policy promised to pay; (A) the sum of four pounds per month during disablement through illness; (B) the sum of four pounds per month during disablement from personal injury caused by accident; (C) the sum of one hundred pounds in the event of (1) death from accident, (2) loss of one hand and foot or both hands or both feet or permanent destruction of the sight of both eyes. Then followed this clause: "(D) Return of Premium. So soon as the assured under this policy shall reach the age of 65 years or in the event of the previous death of the assured (the policy in either alternative being in full force and effect) the corporation agrees to return to the assured or to such assured's executors, administrators, or assigns 50 per cent. of all premiums which have been paid to the corporation under this policy not exceeding in the aggregate the sum of £12, provided that no payment has had to be made under C (1) or C (2) of this policy." The policy was stamped with a penny stamp as an accident policy. The Crown claimed that it was also chargeable with a duty of threepence as a life policy insuring a sum exceeding £10 but not exceeding £25. The Court held that the policy was chargeable as an accident policy only. That was the general character of the instrument, and *primâ facie* it was chargeable as an accident policy, and as that only. No doubt the same document might contain an accident policy and a life policy; but the best test for ascertaining whether there were in fact two such instruments on the same document was to see whether the alleged life policy could stand alone. It was clear that the provisions for

(*c*) *Goodson* v. *Forbes* (1815), 6 Taunt. 171; *Allen* v. *Morrison* (1828), 8 B. & C. 565.

(*d*) *General Accident* v. *Inland Revenue* (1906), 8 F. 477.

return of premium could not stand alone as a life policy. They were in fact merely incidental to the accident policy, and constituted a scheme for reduction of premiums in certain events.

Stamps on policies issued under Married Women's Property Act:

A policy granted under section 11 of the Married Women's Property Act, 1882, may, in addition to the *ad valorem* policy duty, attract duty as a declaration of trust or settlement (*dd*). There has been considerable difference of opinion on this subject, but compliance with the following rules will probably satisfy the Inland Revenue authorities :—

Cases where no additional duty is attracted.

(1) No additional duty is required if the policy contains no declaration of trust. This will be the case where the policy follows the Act *simpliciter*, and merely states that it is for the benefit of the wife or of the wife and children generally. Some doubt arises where the policy is expressed to be for the benefit of a named wife of the assured " if living at his death." It has been suggested that the introduction of a contingency is a departure from the form of the statutory trust, and therefore attracts additional duty as a declaration of trust. It is not in fact the practice of the authorities to require any additional stamp on this ground, and probably they could not insist upon it, as, strictly speaking, the words do not amount to a declaration of trust. The resulting trust in favour of the assured and his personal representatives is merely the consequence of the termination of the statutory trust by reason of the failure of the object thereof. Another doubt arises on the introduction into these policies of the condition that the policy shall not be surrendered for cash but only for a paid-up policy. The object of this condition is to create a restraint on anticipation, and it is therefore said that it creates a trust beyond the limits of the statutory trust, and should attract duty accordingly as a declaration of trust. It is submitted that if this condition is merely part of the contract of insurance between the company and the assured it does not attract additional duty as a declaration of trust, and that such duty is only payable where it is a special restraint on the wife's interest only. Thus it would be payable if the policy declared that it was for the benefit of " the wife of the assured, if living at his death, absolutely," and that " during the continuance of this trust the policy may not be surrendered for cash " ; but it would not be payable where the policy was

(*dd*) Such additional duty being payable by, and the stamping being the duty of, the assured as settlor and not the insurers (Stamp Act, 1891, s. 15 (2) (d)).

declared to be for the benefit of " the wife of the assured if living at his death absolutely," and then there was a condition in general terms, applicable to the assured's interest as well as to the trust in favour of the wife, that the policy should not be surrendered for cash.

Cases where additional duty is required in respect of declaration of trust.

(2) If the policy contains any declaration of trust not involving a trust for successive interests, it will attract an additional duty of 10*s.* as a declaration of trust. If the trust created is one other than the statutory trust under the section, it is clear that the extra duty must be paid, as in the case where there is a special restraint upon anticipation of the wife's interest. It is submitted that where the trust created does not travel beyond the limits of the statutory trust the mere expression in the policy that it is subject to that trust ought not to attract additional duty. The Inland Revenue authorities, however, appear to take the view that any expression of the fact that there is a trust is chargeable. Thus if the policy declared that " the amount of assurance payable shall be held by the persons receiving the same for the benefit of . . . wife of the assured, if living at his death, absolutely," they would probably charge it as a declaration of trust, and even a bare statement that the policy is made in pursuance of section 11 of the Married Women's Property Act, 1882, might be sufficient in their opinion to attract such duty. If it is desired to escape a claim for additional duty, the words of the policy must leave the creation of the trust entirely to the section. The following form, for instance, would not be charged with additional duty: " It is hereby declared that this policy shall be for the benefit of . . . the wife of the assured in the event and in the event only of her surviving him."

Cases where settlement duty is required.

(3) If the policy contains not only a declaration of trust, but carves out interests in succession, the policy is liable to additional duty as a settlement, that is, to an *ad valorem* duty of 5*s.* per cent. on the value of the policy at the time the first premium is paid, and the policy becomes effective. If the policy moneys are directed to be held for the benefit of the wife during her life and with remainder to the children absolutely, there is clearly a settlement. If the policy is an annual premium policy, it may have no surrender value during the first year, but as the first premium has been paid it has some value, and is probably chargeable with a minimum duty of 5*s.* If the policy is a single premium policy, then 5*s.* per cent. duty will be payable on the sum assured.

Stamp on cover note for fire or burglary.

The interim receipt or cover note issued by insurance companies to effect temporary insurance in fire, burglary, and similar risks is a "policy of insurance" within the meaning of the Stamp Act, and therefore must be stamped with a penny stamp as a policy even although the premium received is less than £2 (*e*). One penny stamp, however, is sufficient, whatever the amount of the premium or the sum insured may be, because if the receipt is stamped as a policy it is not also liable to duty as a receipt (*f*).

Stamp on duplicate or certified copy policy.

Sometimes when a policy is lost or destroyed, the company are prepared upon a statutory declaration and indemnity to issue a duplicate policy, but the usual course in the case of a lost policy is at most to issue a certified copy with a memorandum stating that it confers no right on the assured or any other holder. In the case of a duplicate policy where the duty on the original was more than 5*s*. the duplicate will bear a maximum stamp of 5*s*., and must be stamped with an impressed stamp denoting that the duty on the original was paid. If the duty on the original was less than 5*s*. the stamp will be the same as the original, and no impressed stamp denoting payment of the duty on the original is necessary (*g*). In the case of a certified copy the duty is 1*s*., or if the duty on the original was less than 1*s*. then the same duty as on the original (*h*).

Stamp on re-insurances.

The present practice with regard to the stamping of re-insurances where one company relieves another of part of its risk is as follows:

In the case of a life policy the re-insurance guarantee is stamped with sixpence as an agreement, or if under seal with ten shillings as a deed (*i*) subject to the original policy being duly stamped and so certified to the stamping authorities. If the policy duty on the amount re-insured would be less than sixpence or ten shillings, as the case may be, then the policy duty only is chargeable.

In the case of other policies the re-insurance is stamped with the same stamp as an original contract.

(*e*) Bunyon on Fire Insurance, 3rd edition, p. 58.

(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39, Sched. I., "Receipt" Exemption).

(*g*) Stamp Act, 1891 (Sched. I., Duplicate), s. 72.

(*h*) Stamp Act, 1891 (Sched. I., Copy or Extract), s. 63.

(*i*) In Scotland there is no such distinction as in England between documents which are sealed and those which are under hand only. As regards stamp duty, the presence or absence of a registration clause in a Scottish agreement has the same effect that the presence or absence of a seal has in an English agreement. Reassurances rarely, if ever, contain a registration clause, and therefore when executed in Scotland by a Scottish company are liable only to the duty of sixpence.

Stamp duty on annuities.

A bond to secure an annuity in consideration of a single premium is chargeable with stamp duty as a conveyance or transfer on sale, that is, with an *ad valorem* duty of, approximately, 10*s.* per cent. upon the amount of the premium, and since April 29, 1910, 20*s.* per cent. except where the consideration is less than £500 and the instrument contains a statement that the transaction is not part of a larger transaction or series of transactions where the consideration exceeds £500 (*k*). A reversionary annuity (that is payable to A on death of B) in consideration of an annual premium is chargeable at 2*s.* 6*d.* per £5 of the annuity or sum periodically payable. A deferred annuity that is payable to A on his attaining a specified age) in consideration of an annual premium is chargeable at 6*d.* per £5 of the annuity (*l*). In the case of a re-assurance or guarantee of an annuity the Inland Revenue authorities were formerly content in every case with an *ad valorem* duty as a bond, but they now demand the same duty as is chargeable upon the contract guaranteed (*m*).

Section II.—Stamps on Receipts

Stamp Act, 1891, Schedule I.

Stamp on receipt.

	£	*s.*	*d.*
RECEIPT given for, or upon the payment of, money amounting to £2 or upwards	0	0	1

EXEMPTIONS.

(11) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.

Stamp Act, 1891, ss. 101, 102, 103

Provisions as to duty upon receipts.

101.—(1) For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money

(*k*) *Vide infra*, p. 822.
(*l*) *Vide infra*, p. 841.
(*m*) Titles to Life Assurance Policies, by A. E. Sprague; Transactions of the Faculty of Actuaries (Scotland), vol. ii. Part XI. p. 370. Sometimes in the case of a grant of an annuity, and more frequently in the case of a guarantee of an annuity between offices, the only evidence of the transaction is a simple receipt specifying in detail the terms of the annuity. It is claimed that such a receipt does not attract duty either as

amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Terms upon which receipts may be stamped after execution.

102. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

(1) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;

(2) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Penalty for offences in reference to receipts.

103. If any person—

(1) Gives a receipt liable to duty and not duly stamped; or

(2) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or

(3) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds.

Receipt for moneys indorsed on policy.

The exemption from receipt duty of receipts indorsed upon a duly stamped instrument acknowledging the receipt of the money thereby secured or therein mentioned applies to a receipt indorsed upon a policy of insurance for the policy moneys or surrender value, and therefore when the policy has been duly stamped no stamp is required upon the receipt which is indorsed thereon (*n*).

Where receipt is also a discharge.

If the insurers desire not merely a receipt for the policy moneys, but a discharge from all further claims, as they would in the case of a compromise where the claimant has accepted less than his full claim, the receipt with such discharge must be stamped with a sixpenny stamp as an agreement (*o*).

Interim receipt.

A receipt for premium, if also intended to operate as a cover note and to give interim protection, must be stamped as a policy (*p*).

Duplicate receipt.

If receipt of the same sum of money is acknowledged in two

a conveyance or a bond, but it is submitted that if it is the only record of the transaction, it is chargeable as if the obligation of the grantor was fully expressed.

(*n*) *London and Westminster Bank* v. *Inland Revenue*, [1900] 1 Q. B. 166; *Firth and Sons, Ltd* v. *Inland Revenue*, [1904] 2 K. B. 205.

(*o*) *White* v. *South London Tramway Co.* (1889), The Times, December 13.

(*p*) *Vide supra*, p. 815.

separate documents, both must be stamped as receipts. Thus where a creditor gave a composite stamped receipt for a single payment which covered a sum due for rent and goods supplied, and also an unstamped document purporting to be a receipt for the rent, it was held that the latter document ought to have been stamped (*q*).

Section III.—Stamps on Assignments

Obligation on office paying claim.

The proper stamping of assignments of life policies is secured by penalising the office which pays a claim upon an unstamped or insufficiently stamped assignment. The following is the section of the Stamp Act dealing with the matter.

Stamp Act, 1891, sec. 118 (*r*)

Assignment of policy of life assurance to be stamped before payment of money assured.

118.—(1) No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

(2) If any payment is made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to Her Majesty from the person by whom the payment is made.

Absence of stamp does not invalidate assignment.

The object of the above section is to ensure payment of duty, and this is done by throwing upon the insurance companies the obligation to see that duty has been paid in respect of every assignment upon which a claim is based. The penalty for failure to fulfil this obligation is twofold; (1) the office cannot obtain a valid discharge from any claimant whose title is based upon an unstamped or insufficiently stamped assignment; (2) the stamp duty and penalty may be recovered from the office. It has been suggested that the effect of the section is to prevent any assignment being valid at law or in equity unless and until properly stamped, so that if A assigned to B, and then assigned to C, and the second assignment was stamped first, it would obtain priority. It seems reasonably clear that this is not so. The section does not purport to affect the assignee's equitable

(*q*) *A.-G.* v. *Ross*, [1909] 2 I. R. 246.

(*r*) Re-enacting Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), s. 19, where these provisions were first enacted.

title, or the validity of the assignment, but is aimed solely at his right to sue, or to give a discharge to, the insurers (*qq*). A title, therefore, which is only defective by reason of insufficient stamping, can be made good at any time by having the documents stamped, and no priority will have been lost by reason of the delay.

Assignment of any policy is chargeable as an assignment of property.

The Stamp Act does not impose any peculiar stamp duties upon assignments of policies as distinguished from assignments of other property. An assignment of a policy must be stamped as a conveyance, mortgage, or settlement, as the case may be. It was held in one case by Lord Tenterden that the assignment of a marine policy (upon which no loss had occurred) by way of security was not a conveyance of property within the meaning of the Stamp Acts then in force (*r*), but this decision was doubted by the Court of Exchequer in *Caldwell* v. *Dawson* (*s*), where it was held that an assignment in security of a life policy was chargeable with stamp duty as a mortgage of property. It seems reasonably clear under the present Stamp Act that every assignment of a policy is chargeable with duty as a conveyance, mortgage, or settlement of property.

Assignments of separate policies or separate interests in the same policy.

Where several different items of property are transferred by the same instrument between the same parties, that constitutes one transfer only (*t*). The instrument must be properly stamped so as to cover the aggregate of the items, and thus if a policy is assigned together with other property the assignment will not be admissible as evidence of the assignment of the policy unless the stamp is sufficient to cover the assignment of the whole property conveyed. Each item in such an assignment is not chargeable separately. Thus if there were three policies in three different companies assigned between the same parties, the same duty would be chargeable on the assignment as if there was an assignment of a single policy of the aggregate value of the three. But where the same document contains assignments between different parties of different interests, then there is an instrument relating to several distinct matters within the meaning of section 4 of the Stamp Act, 1891, and each transaction is separately chargeable. Thus where separate policies or separate interests in the same policy are assigned to different parties by the same instrument,

(*qq*) The legal chose in action under the Policies of Assurance Act, 1867, does not pass unless and until the assignment is properly stamped (30 & 31 Vict. c. 144, s. 5).

(*r*) *Blandy* v. *Herbert* (1829), 9 B. & C. 396.

(*s*) (1850), 5 Exch. 1.

(*t*) *Freeman* v. *Inland Revenue* (1871), L. R. 6 Ex. 101.

there are as many assignments as there are parties taking a separate interest, and each assignment is chargeable with stamp duty as though it stood alone. Where a document containing an assignment also fulfils some other function not merely incidental to the assignment, then there are separate instruments written upon the same material within the meaning of section 3 of the Stamp Act, 1891, and each must be separately and distinctly stamped so that each stamp can only be used for or applied to the instrument for which it is intended. Apparently if one such instrument was properly stamped and the other was not, the document would be admissible as evidence of the properly stamped instrument, although inadmissible as to the other.

Where an assignment is cancelled or superseded, or a mortgage discharged.

Every document forming a step in the assignee's title must be properly stamped. According to a strict interpretation of the Act, it is submitted that an insurance company ought to insist on the stamping of every document which has at any time transferred the legal or equitable right to the policy moneys from one person to another (*x*). Thus where an assignment has been executed but not stamped within the time limited, and another assignment is afterwards executed to the same effect in order to evade the penalty which would be payable on stamping the first assignment, the first assignment ought to be stamped and the penalty paid (*y*). It has been said that the second assignment ought also to be stamped, but as the first assignment is the operative instrument, and the second, if it only purports to do what the first has done already, is inoperative, it is submitted that the second assignment need not be stamped. If, however, it has been stamped, no allowance will be made from the stamp duty and penalties payable on the first assignment. Again, if an assignment is cancelled there is in effect an assignment and re-assignment, and each forms a step in the title of the assignor to whose hands the right to the policy moneys has returned. The assignment must be stamped, and if there is a written re-assignment it also must be stamped. Thus in the case of a mortgage which has been paid off the mortgagor ought to produce the mortgage and written discharge, if any, both properly stamped.

But although a strict interpretation of the Stamp Act requires

(*x*) Article by Mr. A. R Barrand, Journal of the Institute of Actuaries, vol. xxxiii. p. 209.

(*y*) In several cases, however, where the circumstances have been brought to the notice of the Inland Revenue authorities they have stated that no claim for duty or penalty would be raised in respect of the first assignment.

every instrument which has once been operative as an assignment to be stamped, the Inland Revenue authorities do not at present claim duty in every case. Thus where a mortgage has been discharged and the policy has been mortgaged again, payment may be made to the later mortgagee if his mortgage is properly stamped, and the authorities will not insist on the earlier mortgage and the discharge being stamped. Also in the case of a second assignment being executed when the first assignment is unstamped and liable to penalties the authorities do not always insist on the stamping of the first assignment. No company, however, should rely in any of the above cases on the presumed consistency of the authorities at Somerset House, but should obtain a letter from them either dealing with the particular case or generally stating that duty will not be claimed from the insurance company in respect of certain documents being unstamped.

Question whether there is any obligation upon a company receiving and recording notice of assignment to see that the assignment is properly stamped.

Where an assignment of a policy is notified to a company the assignee may send the deed with a request that the company shall register it. It has been suggested that if the company did register assignments they would bring themselves within the provision of section 17, and thereby take on themselves the burden of seeing that each assignment registered was properly stamped. It is very doubtful whether section 17 applies to the case of companies recording assignments in their private books. The comparison of section 17 with section 16 suggests that the provisions of the latter only apply to a public officer who registers or enters the instrument in performance of some public or statutory duty. If so, it would seem that neither section 16 nor 17 has any application to entries of assignment or notices of assignment made in the company's books.

Stamp Act, 1891, ss. 16, 17

16. Every public officer having in his custody any rolls, books, records, papers, documents, or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person thereto authorised by the Commissioners to inspect the rolls, books, records, papers, documents, and proceedings, and to take such notes and extracts as he may deem necessary, without fee or reward, and in case of refusal shall for every offence incur a fine of ten pounds.

17. If any person whose office it is to enrol, register, or enter in or upon

any rolls, books, or records any instrument chargeable with duty, enrols, registers, or enters any such instrument not being duly stamped, he shall incur a fine of ten pounds.

It is not in fact the practice of the life offices to record assignments, but only to record the fact that they have received notice of an assignment. The office may, as a matter of courtesy, point out to an assignee who intimates an assignment any defect therein or any obvious insufficiency of stamp, but in doing so it should expressly disclaim any responsibility in the matter. If in any special case an office does record an assignment as distinguished from a notice of assignment it first satisfies itself that the stamp thereon is sufficient.

Assignments by way of conveyance on sale or gift.

Assignments by way of sale or gift are governed by the following provisions of the Stamp and Finance Acts :—

Stamp Act, 1891, Schedule I.

	£	s.	d.
CONVEYANCE or TRANSFER on sale or otherwise—			
(1) Of any stock of the Bank of England	0	7	9
(2) Of any stock of the Government of Canada inscribed in books kept in the United Kingdon or of any Colonial stock to which the Colonial Stock Act, 1877, applies: For every £100 and also for every fractional part of £100 of the nominal amount of stock transferred	0	2	6
CONVEYANCE or TRANSFER on sale (*z*), Of any property (*except such stock as aforesaid*), Where the amount or value of the consideration for the sale does not exceed £5	0	0	6
Exceeds £5, and does not exceed £10	0	1	0
,, £10 ,, £15	0	1	6
,, £15 ,, £20	0	2	0
,, £20 ,, £25	0	2	6
,, £25 ,, £50	0	5	0
,, £50 ,, £75	0	7	6
,, £75 ,, £100	0	10	0
,, £100 ,, £125	0	12	6
,, £125 ,, £150	0	15	0
,, £150 ,, £175	0	17	6
,, £175 ,, £200	1	0	0

(*z*) The Finance Act, 1910, doubles these duties except where the consideration is less than £500 and the instrument contains a statement certifying that the transaction is not part of a larger transaction or series of transactions where the consideration exceeds £500 (10 Edw. 7, c. 8, s. 73; *infra*, p. 826). Conveyances or transfers executed after April 29, 1910, must therefore be stamped in accordance with this provision.

	£	*s.*	*d.*
Exceeds £200, and does not exceed £225	1	2	6
„ £225 „ £250	1	5	0
„ £250 „ £275	1	7	6
„ £275 „ £300	1	10	0
„ £300	3	0	0
For every £50, and also for any fractional part of £50, of such amount or value	0	10	0
CONVEYANCE or TRANSFER by way of security of any property (*except such stock as aforesaid*) or of any security (*see* Mortgage)—			
CONVEYANCE or TRANSFER of any kind not hereinbefore described	0	10	0

Stamp Act, 1891, ss. 54, 55, 56, 57, 58, 59, 60, 61, 62

Meaning of "conveyance on sale."

54. For the purposes of this Act the expression "conveyance on sale" includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.

How ad valorem duty to be calculated in respect of stock and securities.

55.—(1) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with ad valorem duty in respect of the value of the stock or security.

(2) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with ad valorem duty in respect of the amount due on the day of the date thereof for principal and interest upon the security.

How consideration consisting of periodical payments to be charged.

56.—(1) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period not exceeding twenty years, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with ad valorem duty on such total amount.

(2) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument.

(3) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically during any life or lives, the conveyance is to be charged in respect of that consideration with ad valorem duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument.

(4) Provided that no conveyance on sale chargeable with ad valorem duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than ten shillings.

How conveyance in consideration of a debt, &c., to be charged.

57. Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty.

Direction as to duty in certain cases.

58.—(1) Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with ad valorem duty in respect of such distinct consideration.

(2) Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with ad valorem duty in respect of the distinct part of the consideration therein specified.

(3) Where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only is to be charged with ad valorem duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but the last-mentioned duty shall not exceed the ad valorem duty payable in respect of the principal instrument.

(4) Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with ad valorem duty in respect of the consideration moving from the sub-purchaser.

(5) Where a person having contracted for the purchase of any property but not having obtained a conveyance contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with ad valorem duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration.

(6) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with ad valorem duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the ad valorem duty.

Certain contracts to be chargeable as conveyances on sale.

59.—(1) Any contract or agreement *made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration* (*a*), for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands,

(*a*) These words repealed Revenue Act, 1909 (9 Edw. 7, c. 43, s. 7).

tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

(2) Where the purchaser has paid the said ad valorem duty and before having obtained a conveyance or transfer of the property, enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the ad valorem duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings or of sixpence, as the case may require.

(3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the Commissioners, upon application, either shall denote the payment of the ad valorem duty upon the conveyance or transfer, or shall transfer the ad valorem duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped.

(4) Provided that where any such contract or agreement is stamped with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof.

(5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the Commissioners for stamping with the ad valorem duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the Commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly stamped. Nothing in this proviso shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof.

(6) Provided also, that the ad valorem duty paid upon any such contract or agreement shall be returned by the Commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

As to sale of an annuity or right not before in existence.

60. Where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.

Principal instrument, how to be ascertained.

61.—(1) In the cases herein-after specified the principal instrument is to be ascertained in the following manner:

(*a*) Where any copyhold or customary estate is conveyed by a deed, no

surrender being necessary, the deed is to be deemed the principal instrument:

(*b*) In other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in court, is to be deemed the principal instrument:

(*c*) Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.

(2) In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the ad valorem duty thereon accordingly.

What is deemed to be a conveyance on any occasion not being a sale or mortgage.

62. Every instrument and every decree or order of any Court or of any Commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person is to be charged with duty as a conveyance or transfer of property.

Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings.

Finance Act, 1898 (*a*), sec. 6

Removal of doubt as to application of Stamp Act, 1891, ss. 54 and 57.

6. For the removal of doubts with reference to the effect of sections fifty-four and fifty-seven of the Stamp Act, 1891, it is hereby declared that the definition of "conveyance on sale" in the said section fifty-four includes a decree or order for or having the effect of an order for foreclosure.

Provided that—

(*a*) the ad valorem stamp duty upon any such decree or order shall not exceed the duty on a sum equal to the value of the property to which the decree or order relates, and where the decree or order states that value that statement shall be conclusive for the purpose of determining the amount of the duty;

(*b*) where ad valorem stamp duty is paid upon such decree or order any conveyance following upon such decree or order shall be exempt from the ad valorem stamp duty.

Finance Act, 1910 (*b*), ss. 73, 74

Stamp duty on conveyances or transfers on sale.

73. The stamp duties chargeable under the heading "CONVEYANCE or TRANSFER on Sale of any Property" in the First Schedule to the Stamp Act, 1891 (in this Part of this Act referred to as the principal Act), shall be double those specified in that Schedule: Provided that this section shall not apply to the conveyance or transfer of any stock or marketable security as defined by section one hundred and twenty-two of that Act, or to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed five hundred pounds and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds five hundred pounds.

(*a*) 61 & 62 Vict. c. 10. (*b*) 10 Edw. 7, c. 8.

Stamp duty on gifts *inter vivos*.

74.—(1) Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale:

Exclusion of gift to non-profit sharing body.

Provided that this section shall not apply to a conveyance or transfer operating as a voluntary disposition of property to a body of persons incorporated by a special Act, if that body is by its Act precluded from dividing any profit among its members and the property conveyed is to be held for the purposes of an open space or for the purposes of its preservation for the benefit of the nation,

Commissioners may express opinion on conveyance.

(2) Notwithstanding anything in section twelve of the principal Act, the Commissioners may be required to express their opinion under that section on any conveyance or transfer operating as a voluntary disposition inter vivos, and no such conveyance or transfer shall be deemed to be duly stamped unless the Commissioners have expressed their opinion thereon in accordance with that section.

Stamping after execution.

(3) Subsection (2) of section fifteen of the principal Act, which enables certain instruments to be stamped after execution, shall apply to conveyances or transfers operating as voluntary dispositions inter vivos as if those conveyances or transfers were specified in the first column of the table in paragraph (d) of that subsection, and the grantor or transferor were specified in the second column of that table.

Settlement.

(4) Where any instrument is chargeable with duty both as a conveyance or transfer under this section and as a settlement under the heading "SETTLEMENT" in the First Schedule to the principal Act, the instrument shall be charged with duty as a conveyance or transfer under this section, but not as a settlement under the principal Act.

Conveyance for indequate consideration.

(5) Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.

Conveyance for appointing trustee.

(6) A conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan or made for effectuating the appointment of a new trustee or the retirement of a trustee, whether the trust is expressed or implied, or under which no beneficial interest passes in the property conveyed or transferred, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether expressed or implied, or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property, shall not be charged with duty under this section, and this subsection shall have effect notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer.

When assignment is chargeable as conveyance on sale.

An assignment is chargeable with duty as a conveyance on sale when it is made for a consideration in money, or money's worth such as the discharge of a debt, or in stocks or shares (*c*). If the assignment is contained in a marriage or other family settlement made in consideration of natural love and affection, it will be chargeable as a settlement, and not as a conveyance on sale, even although part of the consideration may be money or stocks or shares (*d*); but, on the other hand, where a transaction is primarily a sale it will be chargeable as such, even although it may form part of what is called a family arrangement (*e*).

Upon what amount is duty chargeable.

Duty is chargeable on the actual consideration passing, not necessarily on the consideration recited in the instrument. The consideration includes the total money obligation falling upon the purchaser directly or indirectly as the price of the property transferred to him (*f*).

Assignment to satisfy debt.

The provisions of section 57 require some comment. Where property is conveyed by a debtor to his creditor in full or part payment of a debt, duty as on a conveyance on sale is chargeable to the amount of the debt discharged, even although owing to the insolvency of the debtor the debt might be regarded as a bad debt (*g*).

Foreclosure of mortgage.

Where a mortgagor is foreclosed and the equity of redemption passes to the mortgagee either under the order of the Court or by a conveyance made in pursuance of the order, the order or the conveyance is chargeable to the amount of the value of the property but not to the full value of the debt, even although the effect of the foreclosure order is to debar the mortgagee from suing for the balance of the debt without opening up the foreclosure (*h*). Where a debtor executed a trust deed for creditors and a mortgagee valued his security and proved for the balance and the trustee conveyed to him the equity of redemption, the conveyance was chargeable with *ad valorem* duty to the amount of the valuation (*i*).

Sale subject to debt.

Where property which is subject to a mortgage or charge is purchased the purchaser, in addition to the purchase price, must pay off the debt before he is entitled to the free and unincumbered

(*c*) *Coats* v. *Inland Revenue*, [1897] 2 Q. B. 423.
(*d*) *Massy* v. *Nanney* (1837), 3 Bing. N. C. 478.
(*e*) *Bristol* (*Marquess*) v. *Inland Revenue*, [1901] 2 K. B. 336.
(*f*) *Inland Revenue* v. *Glasgow and S.-W. Ry.* (1887), 12 A. C. 315.
(*g*) *Inland Revenue* v. *North British Railway Co.* (1901), 4 F. 27.
(*h*) *Huntington* v. *Inland Revenue*, [1896] 1 Q. B. 422; Finance Act, 1898, s. 6; *Lovell and Collard's Contract, In re*, [1907] 1 Ch. 249.
(*i*) *Scottish Equitable* v. *Inland Revenue* (1894), 22 R. 85.

corpus of the subject matter of the sale, and therefore the whole sum, principal, and interest, which at the date of the sale would be required to redeem the property, must be added to the price for the purposes of duty, and this is so even although the purchaser has not given the vendor any indemnity or promised to pay the debt (*k*).

Where policy is subject to charge in favour of office.

Where a policy of insurance is subject to a mortgage or charge in favour of the company which issued it and the policy is assigned subject to that charge, the Inland Revenue authorities do not in practice insist upon payment of more than the actual consideration passing between assignor and assignee (*l*). They consider that the case of an advance by the office which insured the policy is totally different from the case of an advance by an independent office or person: but it may well be doubted whether there is any such difference in law to permit of the present official opinion being relied on as a general and permanent ruling.

Voluntary dispositions and dispositions for an inadequate consideration.

A disposition of property *inter vivos* made without valuable consideration or for an inadequate consideration after April 29, 1910, is chargeable upon the same scale of duty as a conveyance or transfer on sale, but the duty is assessed upon the actual value of the property transferred instead of the amount of the consideration, and the instrument is not deemed to be duly stamped unless it has been adjudicated by the Commissioners (*m*). A voluntary assignment of a policy executed after the above date is not therefore duly stamped unless it bears the Inland Revenue adjudication stamp; and if there is any reason to suppose that a transfer for valuable consideration may have been made for an inadequate consideration, the transfer cannot safely be acted upon unless there has been an adjudication.

Voluntary dispositions before 1910.

A voluntary disposition executed before April 29, 1910, and not being a settlement, was chargeable with a ten shilling stamp only, as a conveyance or transfer not otherwise specified. Apparently the fact that the policy was subject to a charge in favour of a third person did not make the disposition chargeable as a

(*k*) *Mortimore* v. *Inland Revenue* (1864), 2 H. & C. 838. If the mortgagee is a party to the assignment and the purchaser covenants with him to pay the mortgage debt, the document will also be chargeable under the head of "Mortgage Bond Debenture Covenant, (2) Collateral Security,' with a duty at the rate of 6*d*. for every £100 or fraction thereof of such debt.

(*l*) Article by Mr. A. R. Barrand, in the Journal of the Institute of Actuaries, vol. xxxiii. p. 227; Highmore on Stamp Laws, 2nd edition, p. 136.

(*m*) Finance Act, 1910, s. 74.

conveyance on sale unless the donee bound himself to pay the debt charged on the policy.

Assignments by way of mortgage.

Assignments by way of mortgage are chargeable under the heading of Mortgage in the schedule to the Stamp Act, 1891.

Stamp Act, 1891, Schedule I.

MORTGAGE, BOND, DEBENTURE, COVENANT (except a marketable security otherwise specially charged with duty), and WARRANT OF ATTORNEY to confess and enter up judgment.

	£	s.	d.
(1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money—			
Not exceeding £10	0	0	3
exceeding £10 and not exceeding £25	0	0	8
,, £25 ,, £50	0	1	3
,, £50 ,, £100	0	2	6
,, £100 ,, £150	0	3	9
,, £150 ,, £200	0	5	0
,, £200 ,, £250	0	6	3
,, £250 ,, £300	0	7	6
,, £300			
For every £100, and also for any fractional part of £100, of the amount secured	0	2	6
(2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:			
For every £100, and also for any fractional part of £100, of the amount secured	0	0	6
(3) Being an equitable mortgage:			
For every £100, and any fractional part of £100, of the amount secured	0	1	0
(4) TRANSFER, ASSIGNMENT, DISPOSITION, or ASSIGNATION of any mortgage, bond, debenture, or covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:			
For every £100, and also for any fractional part of £100, of the amount transferred, assigned, or disponed, exclusive of interest which is not in arrear	0	0	6
And also where any further money is added to the money already secured	The same duty as a principal security for such further money.		

	£	s.	d.
(5) RECONVEYANCE, RELEASE, DISCHARGE, SURRENDER, RESURRENDER, WARRANT TO VACATE, or RENUNCIATION of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured: For every £100, and also for any fractional part of £100, of the total amount or value of the money at any time secured	0	0	6

Revenue Act, 1903 (*a*), sec. 7

Ten shillings maximum duty on collateral security.

7. The whole amount of duty payable under or by reference to paragraph (2) of the heading "MORTGAGE, BOND, DEBENTURE, COVENANT, and WARRANT OF ATTORNEY" in the First Schedule to the Stamp Act, 1891, on any instrument being a collateral or auxiliary or substituted security or by way of further assurance shall not exceed ten shillings.

Stamp Act, 1891, ss. 86, 87, 88, 89, and 23

Meaning of "mortgage."

86.—(1) For the purposes of this Act the expression "mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be;

And includes—

(*a*) Conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik to a reversion of or affecting any lands, estate, or property, real or personal, heritable or moveable, whatsoever: and

(*b*) Any deed containing an obligation to infeft any person in an annual rent, or in lands or other heritable subjects in Scotland, under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured: and

(*c*) Any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts, in full satisfaction thereof, or who exceed five in number: and

(*d*) Any defeazance, letter of reversion, back bond, declaration, or other deed or writing for defeating or making redeemable or explaining or qualifying any conveyance, transfer, disposition, assignation, or tack of any lands, estate, or property whatsoever, apparently absolute, but intended only as a security: and

(*e*) Any agreement (other than an agreement chargeable with duty as an equitable mortgage), contract, or bond accompanied with a deposit of title deeds for making a mortgage, wadset, or any other security or conveyance as aforesaid of any lands, estate, or property comprised

(*a*) 3 Edw. 7, c. 46.

in the title deeds, or for pledging or charging the same as a security: and

(*f*) Any deed whereby a real burden is declared or created on lands or heritable subjects in Scotland: and

(*g*) Any deed operating as a mortgage of any stock or marketable security.

(2) For the purpose of this Act the expression "equitable mortgage" means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property.

Direction as to duty in certain cases.

87.—(1) A security for the transfer or retransfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of the stock; and a transfer, assignment, disposition, or assignation of any such security, and a reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security, is to be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of the stock.

(2) A security for the payment of any rentcharge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid.

(3) A transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security.

(4) Where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the ad valorem duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant, if made in court.

(5) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the ad valorem duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of court roll of the surrender or grant, as the case may be, is not to be charged with any higher duty than ten shillings.

(6) An instrument chargeable with ad valorem duty as a mortgage is not to be charged with any further duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to a purchaser, or in trust for, or according to the direction of, a purchaser.

Security for future advances, how to be charged.

88.—(1) A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.

(2) Where such total amount is unlimited, the security is to be available for such an amount only as the ad valorem duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made.

(3) Provided that no money to be advanced for the insurance of any property comprised in the security against damage by fire, or for keeping up any policy of life insurance comprised in the security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in the security upon the dropping of any life whereon the property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with ad valorem duty.

Exemption from stamp duty in favour of benefit building societies restricted.

89. The exemption from stamp duty conferred by the Act of the Session held in the sixth and seventh years of King William the Fourth, chapter thirty-two, for the regulation of benefit building societies, shall not extend to any mortgage made after the thirty-first day of July one thousand eight hundred and sixty-eight, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding five hundred pounds.

Certain mortgages of stock to be chargeable as agreements.

23.—(1) Every instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(2) Every instrument under hand only (not being a promissory note or bill of exchange) making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(3) A release or discharge of any such instrument shall not be chargeable with any ad valorem duty.

Memorandum of deposit.

A policy of insurance is not a security for money transferable by delivery, and therefore a memorandum of deposit is chargeable *ad valorem* under the schedule, and not as an agreement under section 23. Where a memorandum of deposit relates to marketable securities and policies, it will be chargeable with a sixpenny agreement stamp in respect of the marketable securities and *ad valorem* in respect of the policies.

Equitable mortgage.

As an equitable mortgage is chargeable at a lower rate than other mortgages, it is important to determine when a mortgage of a policy is an equitable mortgage. It might be said that an equitable mortgage is a mortgage created by an instrument under hand only as compared with a mortgage created by a deed, or it might be said that there is an equitable mortgage where the instrument is not sufficient to transfer to the mortgagee the title to sue in his own name. The Inland Revenue authorities, however,

have adopted neither of these possible tests, but have applied a test of their own which, although reasonable, does not seem to have any legal justification. Their practice is to pass as an equitable mortgage a simple memorandum of deposit containing no powers of sale or similar conditions, but to charge the higher duty on (1) all instruments under seal and (2) all instruments under hand, including memoranda of deposit which contain express powers of sale or other conditions which are under the Conveyancing Act implied in a mortgage by deed or which contain an agreement to execute a legal mortgage when called upon (*n*). As long as this practice is continued companies are practically safe in following it without inquiring whether it is legally accurate.

Primary or collateral security.

The duty chargeable on a simple memorandum of deposit is the same rate, that is the rate of an equitable mortgage, whether it is a primary or collateral security, and it cannot be deducted from the higher duty payable on a complete mortgage if such is afterwards executed (*o*). The question has been raised whether a mortgage of a policy to secure a debt for which the debtor has already given his promissory note is a primary or collateral security. It is submitted that the mortgage of the policy, although not the first in point of time, must be deemed the principal security, and is chargeable as such and not merely as a collateral security.

Mortgage to secure balance of account.

In the case of a mortgage to secure a current account on future advances without limit, the document is available only as a security for the amount covered by the stamp, and if any advance is made in excess of the amount so covered the document is deemed to be a new and separate instrument bearing date on the day on which the advance is made (*p*). Each time, therefore, that the balance of the account exceeds the amount covered by the stamp impressed upon the document at that time, the document ought to receive an additional stamp to cover the excess (*p*). If it is not so stamped the document is not available in the hands of the mortgagee as security for the excess, although it remains a valid and properly stamped security for the amount covered by the stamp. Strictly speaking, when an office is called upon to pay upon a policy mortgaged to secure a current account, it

(*n*) Alpe's Law of Stamp Duties, 12th Edition, p. 187; article by Mr. A. R. Barrand in Journal of Institute of Actuaries.

(*o*) Alpe's Law of Stamp Duties. 12th Edition, p. 182.

(*p*) Stamp Act, 1891, s. 88; article by Mr. A. R. Barrand in the Journal of the Institute of Actuaries, vol. xli.

ought to be satisfied that the mortgage was stamped to cover the maximum balance charged at any time upon the policy. This follows from the principle that every document which has at any time transferred the legal or equitable right to the policy moneys from one person to another ought to be properly stamped (*q*). If the balance of the current account at any time exceeded the amount covered by the stamp on the mortgage, then an equitable right to the policy moneys was transferred to the mortgagee by a document not properly stamped. If, however, the practice is followed of not insisting upon the stamping of a mortgage where the title has returned to the mortgagor, then it will not be necessary to insist on the mortgage to secure a current account being stamped so as to cover anything beyond the balance existing at the time payment on the policy is made (*q*). When payment is made on a surrender, the surrender value may be less than the balance charged on the policy. The stamp in such case ought to be sufficient to cover the balance, but the Inland Revenue does not require more in any case than a stamp sufficient to cover the payment actually made by the company.

Conveyance *ex facie* absolute but in fact mortgage.

Sometimes a mortgage is effected by deed of conveyance purporting *ex facie* to be an absolute sale, and the fact that it is a mortgage only appears *aliunde*. The intention to treat the transaction as a mortgage usually appears in some contemporary document, such as a letter addressed by the assignee to the assignor, known in Scotland as a "back letter." If the object of putting the transaction in this form is to enable the assignee to exercise the powers of an absolute owner against third parties without disclosing the assignor's equity of redemption, then the conveyance must be stamped as a conveyance on sale. If, however, it is not desired to use the conveyance otherwise than as a mortgage, and the conveyance and "back letter" are produced together for adjudication, the Commissioners will usually accept a duty of 10*s*. on the conveyance and mortgage duty on the "back letter."

Reconveyance. Release. Discharge.

The fifth paragraph under the heading Mortgage in the schedule imposes an *ad valorem* duty upon a reconveyance, release, discharge, etc., of any security. This only applies to such discharges as have the effect of wholly freeing the subjects of the security from that security. Where a discharge merely discharges the security in part and leaves a balance still charged on the subject matter, that instrument is liable to an ordinary deed or agreement stamp.

(*q*) *Vide supra*, p. 820.

Where after such partial discharge the subjects of the security are finally discharged from the balance, such final discharge is liable to the *ad valorem* duty under the fifth paragraph calculated upon the total amount at any time secured (*r*).

Transfer of charge effected by release and new charge in favour of transferee.

Where instead of a simple assignment of a debt and a transfer of the security by the mortgagee to the assignee of the debt the transaction takes the form of a lease by the mortgagee in favour of the mortgagor, and a fresh conveyance by the mortgagor to the assignee of the subject of the security with a proviso for redemption on payment of the debt to the assignee, the instrument is not chargeable as a release and fresh mortgage, but merely as a transfer (*s*).

Receipt for moneys due on mortgage.

A bare receipt indorsed on the mortgage deed or memorandum of deposit acknowledging the repayment of the money thereby secured is not chargeable with duty if the mortgage or memorandum itself was duly stamped (*t*); but if the indorsement contains anything else but a bare receipt for the money, it may be chargeable as a reconveyance, release or discharge of the security.

Deed of arrangement.

Where the title to a policy passes under a deed of arrangement made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally otherwise than in pursuance of the bankruptcy laws, such deed must, in addition to the duty chargeable thereon as a conveyance or mortgage, as the case may be, be stamped with an *ad valorem* duty of one shilling for every hundred pounds or fraction of a hundred pounds of the sworn value of the property passing (*u*).

Assignments constituting settlements.

An assignment may be chargeable as a settlement under that heading in the schedule to the Stamp Act, 1891.

Stamp Act, 1891, Schedule I.

SETTLEMENT. Any instrument, whether voluntary or upon any good or valuable consideration, other than a bonâ fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or

(*r*) *McKimmie's Trustees* v. *Inland Revenue* (1895), 23 R. 232.

(*s*) *Wale* v. *Inland Revenue* (1879), 4 Ex. D. 270; *Humphreys* v. *Inland Revenue* (1899), 81 L. T. 199.

(*t*) Stamp Act, 1891, First Schedule, Receipt Exemption (II.); *Firth & Son* v. *Inland Revenue*, [1904] 2 K. B. 205.

(*u*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57, ss. 4 (2), 6 (2).

	£	s.	d.
any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever:			
For every £100, and also for any fractional part of £100, of the amount or value of the property settled or agreed to be settled	0	5	0

Exemption.

Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power.

Stamp Act, 1891, ss. 104, 105, 106

As to settlement of policy or security.

104.—(1) Where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby the settlement is made or agreed to be made is to be charged with ad valorem duty in respect of that money.

(2) Provided as follows:

(*a*) Where, in the case of a policy, no provision is made for keeping up the policy, the ad valorem duty is to be charged only on the value of the policy at the date of the instrument:

(*b*) If in any such case the instrument contains a statement of the said value, and is stamped in accordance with the statement, it is, so far as regards the policy, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Settlements when not to be charged as securities.

105. An instrument chargeable with ad valorem duty as a settlement in respect of any money, stock, or security is not to be charged with any further duty by reason of containing provision for the payment or transfer of the money, stock, or security, or by reason of containing, where the money, stock, or security is in reversion or is not paid or transferred upon the execution of the instrument, provision for the payment, by the person entitled in possession to the interest or dividends of the money, stock, or security, during the continuance of such possession, of any annuity or yearly sum not exceeding interest at the rate of four pounds per centum per annum upon the amount or value of the money, stock, or security.

Where several instruments one only to be charged with ad valorem duty.

106.—(1) Where several instruments are executed for effecting the settlement of the same property, and the ad valorem duty chargeable in respect of the settlement of the property exceeds ten shillings, one only of the instruments is to be charged with the ad valorem duty.

(2) Where a settlement is made in pursuance of a previous agreement upon which ad valorem settlement duty exceeding ten shillings has been paid in respect of any property, the settlement is not to be charged with ad valorem duty in respect of the same property.

(3) In each of the aforesaid cases the instruments not chargeable with ad valorem duty are to be charged with the duty of ten shillings.

How value of policy ascertained.

Duty is chargeable on the net value of the policy at the time of the settlement, unless there is a covenant by the settlor to pay the premiums when the duty is chargeable on the total sum assured and any bonus declared at the time of settlement. Before the Stamp Act, 1864, the Inland Revenue authorities did not insist upon duty beyond the value of the policy at the time of the settlement unless there was a fund provided for payment of the premiums, and therefore settlements made before 1864 will be sufficiently stamped if stamped in accordance with that practice (*x*). Where there is a discretionary power or direction given to trustees to pay the premium out of the income from other settled property, the settlement ought to pay duty to the full amount of the sum assured (*y*).

Where property other than policies money or securities for money is settled.

If a settlement of a life policy transfers any property other than money, stock, policies, or securities for money, it must be stamped in respect of such other property as a conveyance or transfer, and not as a settlement. Additional stamp duty will be chargeable in respect of any covenants not relating to the property specifically settled.

Policy conveyed to trustees as security for settlors covenants.

Where a settlement has been made whereby the settlor covenants to make certain payments to the trustees, and it is agreed that a life policy or other property shall be conveyed to the trustees to secure such payments, the conveyance is chargeable as a mortgage, and not as a settlement (*z*).

Voluntary settlements made since April 29, 1910.

Settlements which involve a transfer of the property to trustees and are made otherwise than for valuable and adequate consideration, are, since April 29, 1910, chargeable not as settlements, but as voluntary dispositions *inter vivos* with the same *ad valorem* duty as a conveyance on sale, and are not to be deemed duly stamped unless they bear the Inland Revenue adjudication stamp (*a*). Settlements made in consideration of marriage, that is ante-nuptial settlements, cannot be treated for this purpose as made for inadequate consideration, and therefore are chargeable with settlement duty only. All other settlements must in practice be submitted to the Inland Revenue for adjudication, because, if voluntary or if the Commissioners are of opinion that the consideration is inadequate, duty as a conveyance on sale is chargeable.

(*x*) Mr. A. R. Barrand, Journal of the Institute of Actuaries, vol. xxxiii. p. 241.

(*y*) Mr. A. R. Barrand, *ibid.* p. 242.

(*z*) *Inland Revenue* v. *Oliver*, [1909] A. C. 427.

(*a*) Finance Act, 1910, s. 74.

Section IV.—Stamps on Other Documents

The following is a selection from the schedule to the Stamp Act, 1891, in so far as it relates to instruments which may form part of the title to a policy of insurance or may be required by an insurance company as evidence in support of a claim. Stamp Act 1891, Schedule I.

Stamp Act, 1891, Schedule I. and ss. 22, 24, 63, 64, and 72

	£	*s.*	*d.*
AFFIDAVIT and STATUTORY DECLARATION (*b*)	0	2	6

Exemptions.

(1) Affidavit made for the immediate purpose of being filed, read, or used in any court, or before any judge, master, or officer of any court.

(2) Affidavit or declaration made upon a requisition of the Commissioners of any public board of revenue, or any of the officers acting under them, or required by law, *and made before a justice of the peace* (*c*).

AGREEMENT or any MEMORANDUM of an AGREEMENT, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument 0 0 6

Exemptions.

(1) Agreement or memorandum the matter whereof is not of the value of £5.

22. The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed. Duty may be denoted by adhesive stamp.

APPOINTMENT of a new trustee (*d*), and APPOINTMENT in execution of a power of any property, or of any use, share, or interest in any property, by any instrument not being a will 0 10 0

(*b*) Where an affidavit or statutory declaration is sworn to as to the whole of it by one deponent and as to part of it only by another, the instrument constitutes only one affidavit or declaration, and is not chargeable with double duty as an instrument relating to several distinct matters (*Reversionary Interest Society* v. *Inland Revenue* (1906), 22 T. L. R. 740).

(*c*) Words in italics repealed Finance Act, 1907 (7 Edw. 7, c. 13, s. 6).

(*d*) Where the deed of appointment contains a declaration under section 12 of the Trustee Act, 1893, to the effect that the trust property shall vest in the new trustee or trustees, the instrument is apparently chargeable not only as an appointment, but as a conveyance or transfer with an additional 10*s.* stamp. An appointment by a policy holder of a trustee of a policy taken out under section 11 of the Married Women's Property Act, 1882, is clearly chargeable under this head unless the appointment is contained in the policy or made contemporaneously therewith. If the appointment is contained in a separate document made after the execution of the policy, it is chargeable as the appointment of a "new trustee," because, until such appointment, the policy holder himself was the trustee.

	£	s.	d.
APPRAISEMENT or VALUATION of any property, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificers' work whatsoever.			
Where the amount of the appraisement or valuation does not exceed £5	0	0	3
Exceeds £5 and does not exceed £10	0	0	6
„ £10 „ £20	0	1	0
„ £20 „ £30	0	1	6
„ £30 „ £40	0	2	0
„ £40 „ £50	0	2	6
„ £50 „ £100	0	5	0
„ £100 „ £200	0	10	0
„ £200 „ £500	0	15	0
„ £500	1	0	0

Exemptions.

(1) Appraisement or valuation made for, and for the information of, one party only, and not being in any manner obligatory as between parties either by agreement or operation of law.

(2) Appraisement or valuation made in pursuance of the order of any Court of Admiralty, or of any Court of Appeal from a judgment of any Court of Admiralty.

(3) Appraisement or valuation of property of a deceased person made for the information of an executor or other person required to deliver, in England or Ireland, an affidavit, or to record in any commissary court in Scotland an inventory of the estate of such deceased person.

(4) Appraisement or valuation of any property made for the purpose of ascertaining the legacy or succession or account duty payable in respect thereof.

Appraisements to be written out.

24.—(1) Every appraiser, by whom an appraisement or valuation chargeable with stamp duty is made, shall, within fourteen days after the making thereof, write out the same, in words and figures, showing the full amount thereof, upon duly stamped material, and if he neglects or omits so to do, or in any other manner discloses the amount of the appraisement or valuation, he shall incur a fine of fifty pounds.

(2) Every person who receives from any appraiser, or pays for the making of, any such appraisement or valuation, shall, unless the same be written out and stamped as aforesaid, incur a fine of twenty pounds.

AWARD in England or Ireland, and AWARD or DECREET ARBITRAL in Scotland (*dd*).

BOND for securing the payment or repayment of money or the transfer or retransfer of stock.

See Mortgage, etc., and Marketable Security (*e*).

(*dd*) The uniform duty of 10*s.* was substituted by the Revenue Act, 1906 (6 Edw. 7, c. 20, s. 9), for the *ad valorem* duty imposed by the Stamp Act, 1891.

(*e*) *Vide supra*, p. 831.

	£	s.	d.
BOND in relation to any annuity upon the original creation and sale thereof			
See Conveyance on Sale and section 60 (*f*).			
BOND, COVENANT, or INSTRUMENT of any kind whatsoever.			
(1) Being the only or principal or primary security for any annuity (*except upon the original creation thereof by way of sale or security, and except a superannuation annuity*), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.			
For a definite and certain period, so that the total amount to be ultimately payable can be ascertained.	The same ad valorem duty as a bond or covenant for such total amount.		
For the term of life or any other indefinite period (*g*).			
For every £5, and also for any fractional part of £5, of the annuity or sum periodically payable	0	2	6
(2) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes where the principal or primary instrument is duly stamped.			
Where the total amount to be ultimately payable can be ascertained	The same ad valorem duty as a bond or covenant of the same kind for such total amount.		
In any other case:			
For every £5, and also for any fractional part of £5, of the annuity or sum periodically payable	0	0	6
(3) Being a grant or contract for payment of a superannuation annuity, that is to say a deferred life annuity granted or secured to any person in consideration of annual premiums payable until he attains a specified age and so as to commence on his attaining that age.			
For every £5, and also for any fractional part of £5, of the annuity	0	0	6
BOND of any kind whatsoever not specifically charged with any duty:			
Where the amount limited to be recoverable does not exceed £300	The same ad valorem duty as a bond for the amount limited:		
In any other case	0	10	0
COMMISSION OF LUNACY	0	5	0

(*f*) *Vide supra*, p. 822.

(*g*) Where there is a covenant to make a weekly payment for life or any indefinite period, the duty chargeable is an *ad valorem* duty on the weekly sum, and not on the total of the weekly payments to be made during any one year (*Clifford* v. *Inland Revenue*, [1896] 2 Q. B. 187; *Jackson* v. *Inland Revenue* (1902), 50 W. R. 666); but where there is a covenant to make an annual payment by quarterly or other periodical instalments, the duty chargeable is

£ s. d.

COPY or EXTRACT (*attested or in any manner authenticated*) of or from—

(1) An instrument chargeable with any duty.
(2) An original will, testament, or codicil.
(3) The probate or probate copy of a will or codicil.
(4) Any letters of administration or any confirmation of a testament.
(5) Any public register (*except any register of births, baptisms, marriages, deaths, or burials*).
(6) The books, rolls, or records of any court.

In the case of an instrument chargeable with duty not amounting to one shilling .. .. The same duty as such instrument.

In any other case 0 1 0

Exemptions.

(1) Copy or extract of or from any law proceeding.
(2) Copy or extract in Scotland of or from the commission of any person as a delegate or representative to the convention of royal burghs or the general assembly or any presbytery or church court.

And *see* section 63.

COPY or EXTRACT (*certified*) of or from any register of births, baptisms, marriages, deaths, or burials 0 0 1

Exemptions.

(1) Copy or extract furnished by any clergyman, registrar, or other official person pursuant to and for the purposes of any Act, or furnished to any general or superintending registrar under any general regulation.
(2) Copy or extract for which the person giving the same is not entitled to any fee or reward.

Stamping of certain copies and extracts after attestation.

63. An attested or otherwise authenticated copy or extract of or from—

(1) An instrument chargeable with any duty;
(2) An original will, testament, or codicil;
(3) The probate or probate copy of a will or codicil;
(4) Letters of administration or a confirmation of a testament;

may be stamped at any time within fourteen days after the date of the attestation or authentication on payment of the duty only.

Duty may be denoted by adhesive stamp.

64. The duty upon a certified copy or extract of or from any register of births, baptisms, marriages, deaths, or burials is to be paid by the person requiring the copy or extract, and may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the copy or extract is signed before he delivers the same out of his hands, custody, or power.

COVENANT. Any separate deed of covenant (*not being an instrument chargeable with ad valorem duty as a conveyance on sale or*

an *ad valorem* duty on the annual payment (*Lewis* v. *Inland Revenue*, [1898] 2 Q. B. 290).

	£ s. d.
mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid.	
Where the ad valorem duty in respect of the consideration or mortgage money does not exceed 10*s.*	A duty equal to the amount of such ad valorem duty.
In any other case	0 10 0
DECLARATION of any use or trust of or concerning any property by any writing, not being a will, or an instrument chargeable with ad valorem duty as a settlement	0 10 0
DEED of any kind whatsoever, not described in this schedule ..	0 10 0
DUPLICATE or COUNTERPART of any instrument chargeable with any duty.	
Where such duty does not amount to 5*s.*	The same duty as the original instrument.
In any other case	0 5 0

72. The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor) is not to be deemed duly stamped unless it is stamped as an original instrument or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart. Provision as to duplicates and counterparts.

LETTER OR POWER OF ATTORNEY, and COMMISSION, FACTORY, MANDATE, or other instrument in the nature thereof:	
(1) For the sole purpose of appointing or authorising a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more	0 0 1
(2) By any petty officer, seaman, marine, or soldier serving as a marine, or his representatives, for receiving prize money or wages	0 1 0
(3) For the receipt of the dividends or interest of any stock:	
Where made for the receipt of one payment only ..	0 1 0
In any other case	0 5 0
(4) For the receipt of any sum of money, or any bill of exchange or promissory note for any sum of money, not exceeding £20, or any periodical payments not exceeding the annual sum of £10 (*not being herein-before charged*) ..	0 5 0
(5) For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds:	
Where the value of the stocks or funds does not exceed £20	0 5 0
In any other case	0 10 0
(6) Of any kind whatsoever not herein-before described ..	0 10 0

Exemptions.

(1) Letter or power of attorney for the receipt of dividends of any definite and certain share of the Government or Parliamentary stocks or funds producing a yearly dividend less than £3.

(2) Letter or power of attorney or proxy filed in the Probate Division of the High Court of Justice in England or Ireland, or in any ecclesiastical court.

(3) Order, request, or direction under hand only from the proprietor of any stock to any company or to any officer of any company or to any banker to pay the dividends or interest arising from the stock to any person therein named.

Section V.—General Exemptions from Stamp Duty

Certain general exemptions from stamp duty are contained in the Stamp Act and in other Acts not dealing primarily with stamp duties. The following are the more important exemptions affecting insurance business:—

1. Testaments, testamentary instruments, and dispositions *mortis causa* in Scotland (*h*).
2. Draft or order or receipt given by or to a registered friendly society or branch in respect of money payable by virtue of its rules or of the Friendly Societies Act, 1896 (*i*).
3. Letter or power of attorney granted by any person as trustee for the transfer of any money of a registered friendly society or branch invested in his name in the public funds.
4. Bond given to or on account of a registered society or branch or by the treasurer or other officer thereof.
5. Policy of assurance or appointment or revocation of appointment of agent or other document required or authorised by the Friendly Societies Act or by the rules of a registered friendly society or branch (*k*).
6. Instruments granted by or to a building society and being of a similar nature to the above-mentioned instruments granted by or to a friendly society (*l*).

(*h*) Stamp Act, 1891, Sched. I., General Exemptions from all stamp duties.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

(*k*) Does not exempt from stamp duty securities in which the funds of a friendly society are invested (*Royal Liver Friendly Society, In re* (1870), L. R. 5 Ex. 78; *Carter* v. *Bond* (1803), 4 Esp. 252).

(*l*) Building Societies Act, 1874 (37 & 38 Vict. c. 42, s. 41; *A.-G.* v. *Phillips* (1871), 24 L. T. 832; *Old Battersea Society* v. *Inland Revenue*, [1898] 2 Q. B. 291; *A.-G.* v. *Gilpin* (1871), L. R. 6 Ex. 193.

7. Receipt given in Scotland by any industrial and provident society for all moneys secured to the society on the security of any of the society's property when such receipt is registered in conformity with the provisions of section 44 of the Industrial and Provident Societies Act, 1893 (*m*).
8. Copy register of births, etc., certificates, or declarations, receipts, or other instruments relating to the purchase or payment of annuities or sums payable at death under the Government Annuity Acts (*n*).
9. Every deed, conveyance, assignment, surrender or other admission relating solely to freehold, leasehold, copyhold, or customary property or to any mortgage charge or other incumbrance on or any estate, right, or interest in any real or personal property which is part of the estate of any bankrupt and which after the execution of the deed, conveyance, assignment, surrender, admission or other assurance either at law or in equity is or remains the estate of the bankrupt or of the trustee under the bankruptcy and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond, or other instrument or writing relating solely to the property of any bankrupt or to any proceeding under any bankruptcy (*o*).

Section VI.—General Regulations for Stamping Instruments

Stamp Act, 1891, ss. 2, 3, 4, 5, 6

All duties to be paid according to regulations of Act.

2. All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

How instruments are to be written and stamped.

3.—(1) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped, is to be so stamped that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

(2) If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable.

Instruments to be separately

4. Except where express provision to the contrary is made by this or any other Act—

(*m*) 56 & 57 Vict. c. 39, s. 44 (5).
(*n*) 16 & 17 Vict. c. 45, s. 29.
(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 144).

charged with duty in certain cases.

(*a*) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters;

(*b*) An instrument made for any consideration in respect whereof it is chargeable with ad valorem duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations.

Facts and circumstances affecting duty to be set forth in instruments.

5. All the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument; and every person who, with intent to defraud Her Majesty,

(*a*) executes any instrument in which all the said facts and circumstances are not fully and truly set forth; or

(*b*) being employed or concerned in or about the preparaton of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances;

shall incur a fine of ten pounds.

Mode of calculating ad valorem duty in certain cases.

6.—(1) Where an instrument is chargeable with ad valorem duty in respect of—

(*a*) any money in any foreign or colonial currency, or

(*b*) any stock or marketable security,

the duty shall be calculated on the value, on the day of the date of the instrument, of the money in British currency according to the current rate of exchange, or of the stock or security according to the average price thereof.

(2) Where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with that statement, it is, so far as regards the subject matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Cases where adhesive stamp is permitted.

The general rule is that stamp duty must be denoted by an impressed stamp. By express provision in the Stamp Act the following stamp duties may be denoted by an ordinary "Postage and Revenue" adhesive stamp, provided that such stamp is cancelled by the person issuing or executing the instrument, writing, on or across the stamp his name or initials, together with the true date of his so writing, or otherwise effectively rendering the stamp incapable of use for any other purpose or that it is otherwise proved that the stamp was affixed at the proper time.

Duty of one penny upon a policy of insurance other than a policy of sea insurance;

Duty of one penny upon a receipt;

Duty of sixpence upon an agreement;

Duty of one penny upon a certified copy or extract of or from any register of births, baptisms, marriages, deaths, or burials.

Any person required by law to cancel an adhesive stamp and refusing or neglecting to do so incurs a fine of ten pounds.

Any person fraudulently removing or using for any other purpose an adhesive stamp removed from an instrument with which it has been stamped incurs a fine of fifty pounds.

Stamp Act, 1891, ss. 10, 11, 12, and 13

Appropriated stamps.

10—(1) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description.

(2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated.

Denoting stamps.

11. Where the duty with which an instrument is chargeable depends in any manner upon the duty paid upon another instrument, the payment of the last-mentioned duty shall, upon application to the Commissioners and production of both the instruments, be denoted upon the first-mentioned instrument in such manner as the Commissioners think fit.

Assessment of duty by Commissioners.

12.—(1) Subject to such regulations as the Commissioners may think fit to make, the Commissioners may be required by any person to express their opinion with reference to any executed instrument upon the following questions:

(*a*) Whether it is chargeable with any duty;

(*b*) With what amount of duty it is chargeable.

(2) The Commissioners may require to be furnished with an abstract of the instrument, and also with such evidence as they may deem necessary, in order to show to their satisfaction whether all the facts and circumstances affecting the liability of the instrument to duty, or the amount of the duty chargeable thereon, are fully and truly set forth therein.

(3) If the Commissioners are of opinion that the instrument is not chargeable with any duty, it may be stamped with a particular stamp denoting that it is not chargeable with any duty.

(4) If the Commissioners are of opinion that the instrument is chargeable with duty, they shall assess the duty with which it is in their opinion chargeable, and when the instrument is stamped in accordance with the assessment it may be stamped with a particular stamp denoting that it is duly stamped (*p*).

(5) Every instrument stamped with the particular stamp denoting either that it is not chargeable with any duty, or is duly stamped, shall be admissible in evidence, and available for all purposes notwithstanding any objection relating to duty.

(6) Provided as follows:

(*a*) An instrument upon which the duty has been assessed by the Commissioners shall not, if it is unstamped or insufficiently stamped, be stamped otherwise than in accordance with the assessment:

(*b*) Nothing in this section shall extend to any instrument chargeable with ad valorem duty, and made as a security for money or stock

(*p*) Voluntary dispositions are not to be deemed to be duly stamped unless the Commissioners have expressed their opinion thereon (Finance Act, 1910, s. 74 (2)).

without limit; or shall authorise the stamping after the execution thereof of any instrument which by law cannot be stamped after execution:

(c) A statutory declaration made for the purpose of this section shall not be used against any person making the same in any proceeding whatever, except in an inquiry as to the duty with which the instrument to which it relates is chargeable; and every person by whom any such declaration is made shall, on payment of the duty chargeable upon the instrument to which it relates, be relieved from any fine or disability to which he may be liable by reason of the omission to state truly in the instrument any fact or circumstance required by this Act to be stated therein.

Persons dissatisfied may appeal.

13.—(1) Any person who is dissatisfied with the assessment of the Commissioners may, within twenty-one days after the date of the assessment, and on payment of duty in conformity therewith, appeal against the assessment to the High Court of the part of the United Kingdom in which the case has arisen, and may for that purpose require the Commissioners to state and sign a case, setting forth the question upon which their opinion was required, and the assessment made by them.

(2) The Commissioners shall thereupon state and sign a case and deliver the same to the person by whom it is required, and the case may, within seven days thereafter, be set down by him for hearing.

(3) Upon the hearing of the case the court shall determine the question submitted, and, if the instrument in question is in the opinion of the court chargeable with any duty, shall assess the duty with which it is chargeable.

(4) If it is decided by the court that the assessment of the Commissioners is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the court to be repaid to the appellant, with or without costs as the court may determine.

(5) If the assessment of the Commissioners is confirmed the court may make an order for payment to the Commissioners of the costs incurred by them in relation to the appeal.

Instrument chargeable under two heads.

When an instrument comes within each of two categories chargeable with duty under the Stamp Act, the Crown is entitled to only one of the duties, but it may choose the higher (*q*).

Stamp Act, 1891, ss. 14 and 15

Terms upon which instruments not duly stamped may be received in evidence.

14.—(1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum

(*q*) *Speyer Bros. and Inland Revenue*, [1908] A. C. 92.

of one pound, be received in evidence, saving all just exceptions on other grounds.

(2) The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the instrument, and shall pay over to such person as the Commissioners may appoint the money received by him for the duty and penalty.

(3) On production to the Commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument.

(4) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Penalty upon stamping instruments after execution.

15.—(1) Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(2) In the case of such instruments here-inafter mentioned as are chargeable with ad valorem duty, the following provisions shall have effect:

(*a*) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper ad valorem duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any place out of the United Kingdom, unless the opinion of the Commissioners with respect to the amount of duty with which the instrument is chargeable, has, before such expiration, been required under the provisions of this Act:

(*b*) If the opinion of the Commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the Commissioners within fourteen days after notice of the assessment:

(*c*) If any such instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight has not been or is not duly stamped in conformity with the foregoing provisions of this sub-section, the person in that behalf herein-after specified shall incur a fine of ten pounds, and in addition to the penalty payable on stamping the instrument there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the Commissioners, or of the court, judge, arbitrator, or referee before whom it is produced:

(*d*) The instruments and persons to which the provisions of this sub-section are to apply are as follows:—

Title of Instrument as described in the First Schedule to this Act.	Person liable to Penalty.
Bond, covenant, or instrument of any kind whatsoever – – – –	The obligee, covenantee, or other person taking the security.
Conveyance on sale – – –	The vendee or transferee.
Voluntary disposition inter vivos (*r*) –	The grantor or transferor (*r*).
Lease or tack – – – –	The lessee.
Mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment.	The mortgagee or obligee; in the case of a transfer or reconveyance, the transferee, assignee, or disponee, or the person redeeming the security.
Settlement – – – – –	The settlor.

(3) Provided that save where other express provision is made by this Act in relation to any particular instrument:

(*a*) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(*b*) The Commissioners may, if they think fit, at any time within three months after the first execution of any instrument, mitigate or remit any penalty payable on stamping.

(4) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

What policies and assignments must be stamped.

The result of section 14 (4) is that the following policies and assignments of policies are chargeable with duty, and unless stamped in accordance with the Stamp Act in force at the time of execution cannot be used in this country :—

(*a*) policy of assurance issued in the United Kingdom;

(*b*) policy of assurance payable in the United Kingdom;

(*c*) assignment of any policy falling under (*a*) or (*b*), wherever such assignment may have been executed;

(*d*) assignment of any policy if the assignment was executed in the United Kingdom.

(*r*) Finance Act, 1910, s. 74 (3).

CHAPTER X

Clauses and Conditions

Section I.—General Rules of Construction

Where a contract of insurance is made between persons domiciled or resident in different countries, as where a policy is issued by an English office to a domiciled Scotsman, there may be a conflict of law as to the proper interpretation or legal incidents of the contract. When such conflict of law arises the *lex contractus*, or law of the contract, must be applied in each case (*a*). The law of the contract is the law which the contract itself imports is to be the law governing the contract, or in other words, the law which the parties contemplated as being the law governing the contract (*b*). The intention of the parties must be ascertained from the terms of the contract and the circumstances attending its formation (*b*). Parol evidence as to their actual intention would not be admissible (*b*). In the absence of any definite indication in the terms of the policy itself there is a presumption that the parties intend the contract to be governed by the *lex loci contractus*, or the law when the contract was made, that is to say, where the offer was accepted (*c*). Thus where an English marine insurance company had an agent in Glasgow with full authority to make binding contracts on behalf of the company, such contracts made by him in Glasgow were held to be governed by Scots law (*d*). But where the foreign agent has not full authority to contract the case is different. An English life assurance company had an agent in Edinburgh. The agent had no authority to make binding contracts but only to forward proposals to the head office in London. The board in London considered and "accepted" a proposal. The policy was executed in London and was sent to the Edinburgh agent, who delivered it to the assured on payment of the premium. It was held that the contract was an English contract and that the obligation of the parties fell to be determined by English law (*e*).

Where there is conflict of law *lex contractus* prevails.

Primâ facie place of the contract is the law of the contract.

(*a*) Dicey, Conflict of Laws, 2nd edition, p. 556.

(*b*) *Missouri Steamship Co., In re* (1889), 42 Ch. 321, 336.

(*c*) *Cowan* v. *O'Connor* (1888), 20 Q. B. D. 640; *Mutual Life* v. *Cohen* (1900), 79 U. S. 262; *Mutual Life* v. *Phinney* (1899), 178 U. S. 327; *Equitable Life* v. *Clements* (1890), 140 U. S. 226; *Knights of Pythias* v. *Meyer* (1904), 189 U. S. 508; *Globe Fire* v. *Moffat* (1907), 154 Fed. Rep. 13; *Carollton Furniture Co.* v. *American Credit Co.* (1903), 124 Fed. Rep. 25.

(*d*) *Albion Fire Soc.* v. *Mills* (1828), 3 W. & S. 218.

(*e*) *Parken* v. *Royal Exchange Insurance* (1846), 8 D. 365.

Terms of contract may indicate a contrary intention.

The *primâ facie* rule that a contract is to be construed according to the law of the place where it was made may be ousted when the terms of the contract contain a distinct indication of the actual intention of the parties. Thus an arbitration clause in English form is strong evidence that the parties intended the whole contract to be governed by English law (*f*).

Spurrier v. La Cloche, [1902] A. C. 446

Spurrier v. *La Cloche.*

A policy of the Sun Fire Office in their ordinary form in the English language contained an arbitration clause specified to be subject to the provisions of the Arbitration Act, 1889. The policy was executed in Jersey by the agents of the company, these purporting to insure a collection of foreign stamps in the possession of the assured, who was resident in Jersey. The Court held that, although the contract was made and was to be fulfilled in Jersey, yet the clear intention of the parties was that it should be governed by English law, and that English law therefore must prevail.

Foreign law incorporated for limited purpose.

The intention of the parties to a contract may be that as to part it should be governed by one law and as to another part by another, and where this is the intention it will receive effect accordingly (*g*). A policy which is an English contract and intended to be construed according to English law, may import the provisions of a foreign law for some one specific purpose, but for that purpose only (*h*).

Dever, Ex parte (1887), 18 Q. B. D. 660

Dever, Ex parte.

A policy was issued by an American office through a branch office in London. It was issued upon the application of a wife upon her husband's life, and was expressed to be "for her sole use if living in conformity with the statute." The husband and wife were resident and domiciled in London. The statute referred to was a New York statute of 1870, which provided that where a policy was issued for the benefit of a married woman on her husband's life, it should not be subject to the claims of the husband's creditors except in so far as the premium paid by the husband exceeded $500 in any one year. The Court held that it was not the intention of the parties that the contract should be governed by American law, and that such law was only introduced for the purpose of indicating that the money was to be paid to the wife for her sole use. English law applied, and the husband's creditors were excluded altogether.

Same rules of construction as in other written contracts.

Policies of insurance are to be construed like other written instruments (*i*). There are no peculiar rules of construction applicable to the clauses and conditions in a policy which are not equally applicable to the terms of other contracts (*k*). The conditions are to be construed fairly between the parties, and the Court will endeavour to ascertain their meaning by adopting the ordinary rules of construction (*l*).

(*f*) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202.
(*g*) *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614.
(*h*) *Dever, Ex parte* (1887), 18 Q. B. D. 660; *Crosland* v. *Wrigley* (1895), 43 W. R. 673.
(*i*) Smith, B., *Abbott* v. *Howard* (1832), Hayes, 381, 401.
(*k*) Lord Ellenborough, C.J., *Robertson* v. *French* (1803), 130, 135.
(*l*) Parke, B., *Glen* v. *Lewis* (1853), 8 Ex. 607, 617; *Hart* v. *Standard* (1889), 22 Q. B. D. 499, 501; *Smith* v. *Accident* (1870), L. R. 5 Ex. 302, 307; *Hargreave* v. *Smee* (1829), 6 Bing. 244, 248.

Contra proferentem.

If there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases against the company (*m*). A policy ought to be so framed that he who runs can read (*m*). A party who profers an instrument cannot be permitted to use ambiguous words in the hope that the other side will understand them in a particular sense, and that the Court which has to construe them will give them a different sense, and therefore where the words are ambiguous they ought to be construed in that sense in which a prudent and reasonable man on the other side would understand them (*n*).

Where language is that of assured.

The language used in a policy, more particularly in the written part of it, may be the language of the assured, as, for instance, where the description of the property or the limits of the risk are taken verbatim from the proposal form. In such cases the rule that the instrument is to be construed against the party who has prepared it may operate in favour of the company (*o*).

Tendency to favour protection as against forfeiture.

But whichever party is responsible for the language there should be a tendency in all cases to hold for the assured rather than for the company (*p*). It is for the benefit of trade that policies should be construed in favour of protection and against forfeiture (*q*).

In absence of ambiguity obvious meaning must be accepted.

The above rules, however, are not to be used to create ambiguity where none exists (*r*), and if the meaning of the words is reasonably clear it must have full effect even although it operates harshly as against the assured (*s*). It would not be in the interest of trade or of the public generally to disregard the obvious meaning of the words and try to wring from them a hidden meaning in favour of the assured. Such a policy would operate against the public by tending to raise insurance rates (*t*).

Words to be construed in ordinary and popular sense,

Words and phrases are to be construed primarily in their

(*m*) Lord St. Leonards, *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484, 507; *Life Association* v. *Foster* (1873), 11 M. 351, 358, 364, 371; *Notman* v. *Anchor Insurance* (1858), 4 C. B. (N.S.) 476, 481; *Hargreave* v. *Smee* (1829), 6 Bing. 244, 248; *Hunt* v. *Springfield Fire* (1904), 196 U. S. 47; *Thompson* v. *Phenix Insurance* (1890), 136 U. S. 287, 297; *Grace* v. *American Central* (1883), 109 U. S. 278, 282; *Travellers' Insurance* v. *M'Conkey* (1888), 127 U. S. 661, 666; *National Bank* v. *Insurance Co.* (1877), 95 U. S. 673, 678; *Krazenstein* v. *Western Assurance* (1889), 116 N. Y. 54.

(*n*) Blackburn, J., *Fowkes* v. *Manchester, etc., Life* (1863), 3 B. & S. 917, 929.

(*o*) *Birrell* v. *Dryer* (1884), 9 A. C. 345, 352.

(*p*) *Fitton* v. *Accidental Death* (1864), 17 C. B. N. S. 122, 135; *Smith* v. *Accident Insurance* (1870), L. R. 5 Ex. 302, 309.

(*q*) *Pelly* v. *Royal Exchange Insurance* (1757), 1 Burr. 341, 349; *Trew* v. *Railway Passengers' Assurance* (1861), 6 H. & N. 839, 844; *Phœnix Life* v. *Sheridan* (1858), El. B. & E. 156, 166.

(*r*) *Cole* v. *Accident Insurance* (1889), 5 T. L. R. 736.

(*s*) *Smith* v. *Accident Insurance* (1870), L. R. 5 Ex. 302, 307; *Birrell* v. *Dryer* (1884), 9 A. C. 345, 350; *Imperial Fire* v. *Coos County* (1893), 151 U. S. 452, 463; *Sulphite Pulp Co.* v. *Faber* (1895), 11 T. L. R. 547.

(*t*) *Carpenter* v. *Providence Washington* (1842), 16 Pet. 495, 510.

ordinary and popular sense (*u*). Some regard must be had to the personality of the contracting parties, and if the assured is a person in humble life and acting without legal advice there is the more reason for rejecting any strictly technical meaning, whether legal or scientific (*x*).

with reasonable latitude.

The words must not be construed with extreme literalism (*y*), but with reasonable latitude, keeping always in view the principal object of the contract of insurance (*z*) and yet as far as possible to give sensible effect to every condition and stipulation in the policy (*a*).

Certain words may have a conventional or technical meaning.

Words must sometimes be construed otherwise than in their popular sense, (1) because the context compels a different construction (*b*), or (2) because they are words of common form which from long usage and frequent decisions of the Court have received a fixed and more or less conventional meaning (*c*), or (3) because by the universal custom of some trade or business an artificial meaning peculiar to that trade has been attached to the words in question (*d*).

Construction of words of common form.

When the question is one of construing words of common form the absence of authority is often as valuable as the existence of decisions. Thus when a novel defence is set up and where the materials for such a defence must have existed in countless instances, and yet there is no trace of it ever having been raised in the reported cases the total absence of authority may be sufficient reason for refusing to sanction an argument which would alter the generally accepted construction of the words in question (*e*).

Written clauses override printed conditions.

If the written clauses in a policy cannot be reconciled with the printed conditions the former override the latter inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning with relation to the particular risk and the printed words are a general formula adapted equally to all insurances in the same class of risk (*f*).

Where printed form is inapplicable to class of risk for which it is used.

The printed form of policy used is sometimes inapplicable to the particular risk as when a policy adapted for marine risk is

(*u*) Lord Ellenborough, C.J., *Robertson* v. *French* (1803), 4 East, 130, 135; *Stanley* v. *Western Insurance* (1868), L. R. 3 Ex. 71; *Hart* v. *Standard* (1889), 22 Q. B. D. 499, 500; *McCowan* v. *Baine*, [1891] A. C. 401, 411; *Standard Life, etc.* v. *McNulty* (1907), 157 Fed. Rep. 224.

(*x*) *Life Association* v. *Foster* (1873), 11 M. 351, 371.

(*y*) *McCowan* v. *Baine*, [1891] A. C. 401, 403.

(*z*) *Pearson* v. *Commercial Union* (1876), 1 A. C. 498, 507, 510.

(*a*) *Wallace* v. *Insurance Co.* (1832), 4 La. 289.

(*b*) *Robertson* v. *French* (1803), 4 East, 130, 136; *McCowan* v. *Baine*, [1891] A. C. 401, 408.

(*c*) *Pelly* v. *Royal Exchange Insurance* (1757), 1 Burr. 341, 347.

(*d*) *Robertson* v. *French* (1803), 4 East, 130, 135.

(*e*) *Trinder Anderson* v. *Thames, etc., Insurance*, [1898] 2 Q. B. 114, 124; *Dudgeon* v. *Pembroke* (1877), 2 A. C. 284, 296.

(*f*) *Robertson* v. *French* (1803), 4 East, 130, 136; *Wallace* v. *Insurance Co.* (1832), 4 La. 289; *Phœnix* v. *Flemming* (1898), 65 Ark. 54.

used to cover risks on land (*g*) or *vice versâ* (*h*), or where a policy adapted for original insurance is used to express a contract of re-insurance (*i*) or where the conditions in some other company's policy are incorporated by reference (*k*). In such cases the conditions will be enforced in so far as they are not inconsistent with the contract to which they are applied (*k*). A condition not in terms applicable to the risk may be applied *mutatis mutandis*. Thus where a vessel was insured against fire and the contract of insurance was embodied in a policy ordinarily used for insuring buildings, it was held that the clause which prohibited the storing of gunpowder "on the premises" was applicable, and that for "premises" must be read "ship" (*l*). On the other hand the conditions or some of them may be totally inapplicable and may be disregarded. In one case of a re-insurance contract, expressed in the form of a printed slip pasted on to the form of a policy applicable to an original insurance, the whole of the conditions were totally inapplicable to a re-insurance contract except the condition providing that the right to bring an action on the policy should be limited to twelve months after the date of the loss. This condition, apart from its context, could have been applied, but on the other hand it was an unreasonable condition inasmuch as the re-insurer could not sue until the original loss was settled, and the settlement of that loss might be delayed without any fault on his part. The Court, therefore, declined to read the condition into the contract and held that the conditions as a whole were inapplicable (*m*). In a preliminary contract of insurance the contract is made subject to the terms contained in the company's ordinary form of policy; but certain of these conditions will not be applied if they are of such a nature that it would be unreasonable to expect the insured to comply with them before he had a copy of the policy to refer to (*n*). A condition requiring notice of loss to be given within a specified period is a condition which is not applicable until the policy is delivered to the assured (*o*). In applying printed conditions to a risk for which they were not originally designed the nature of the risk must be taken into consideration in the construction of the conditions and they may thus receive a different construction from that which they would have received if applied to the class of risk for which they were originally designed (*p*). On the other hand their original meaning must not be entirely lost sight of (*q*).

(*g*) *Baring Bros.* v. *Marine Insurance* (1894), 10 T. L. R. 276.
(*h*) *Beacon Life* v. *Gibb* (1862), 1 Moore, P. C. N. S. 73.
(*i*) *Home Insurance* v. *Victoria Montreal Fire*, [1907] A. C. 59; *Foster* v. *Mentor Life* (1854), 3 El. & Bl. 48.
(*k*) *Sulphite Pulp* v. *Faber* (1895), 11 T. L. R. 547.
(*l*) *Beacon Life* v. *Gibb* (1862), 1 Moore, P. C. N. S. 73.
(*m*) *Home Insurance* v. *Victoria Montreal Fire*, [1907] A. C. 59.
(*n*) *Mitchell* v. *City of London Assurance* (1888), 15 Ont. A. R. 262.
(*o*) *Coleman's Depositories* v. *Life and Health*, [1907] 2 K. B. 798.
(*p*) *Foster* v. *Mentor Life* (1854), 3 El. & Bl. 48.
(*q*) *Baring Bros.* v. *Marine Insurance*, (1894), 10 L. T. 276.

Ejusdem generis.

There is a well-known canon of construction that where a particular enumeration is followed by general words such as "or other," the general words ought to be limited to matters *ejusdem generis* with those specifically enumerated (*r*). The rule is confined, however, to cases where the general words are accompanied by a context containing a category of specific words which can be grouped under a genus. Where the context contains the description of a complete genus, and there are no *alia similia* to which the general words could apply, the rule has no application (*s*). Further, the rule is like every other rule of construction, a mere guide to the intention of the parties and therefore the rule cannot prevail if the parties have used words which clearly indicate that the *ejusdem generis* rule was not intended to apply to that particular case (*t*). Thus where a charter party contained an exemption from liability arising from "frosts floods strikes . . . and any other unavoidable accidents or hindrances of what kind soever beyond their control," it was held that the rule did not apply because the use of the words "of what kind soever" were intended to exclude the application of the rule (*u*).

Clauses of specific application control those of general application.

Clauses of specific application may contradict clauses of general application which if they stood alone would control the specific subject matter. Where this is so the clause of specific application prevails (*x*).

Repugnant provisions.

Where two clauses equally specific or equally general are repugnant the general rule is that the first shall stand and the last be rejected (*y*).

Proposal may be incorporated as part of the contract.

The proposal form and the statements and declarations therein contained may be, and usually are, incorporated with the policy by reference, and being so incorporated must be read with the policy as part of the written contract (*a*). Even where the policy is under seal the policy may by reference incorporate as part of the deed a proposal form under hand only (*b*). A mere reference to the proposal as having been made is not an incorporation of it into the contract (*c*). There must be something to show that it is referred to not merely as a matter of recital but as a part of the contract (*c*). If the proposal or the declaration in the proposal is declared to be the basis of

(*r*) *S.S. Knutsford (Ltd.)* v. *Tillmanns*, [1908] A. C. 406; *Thames and Mersey Insurance* v. *Hamilton* (1887), 12 A. C. 484, 490, 501; *Sun Office* v. *Hart* (1889), 14 A. C. 98, 104; *Lee* v. *Alexander* (1883), 8 A. C. 853; *Lambourn* v. *McLellan*, [1903] 2 Ch. 268; *Mair* v. *Railway Passengers* (1877), 37 L. T. N. S. 356; *Thorman* v. *Dowgate* (1909), 15 Com. Cas. 67.

(*s*) *Sun Office* v. *Hart* (1889), 14 A. C. 98, 104.

(*t*) *Thorman* v. *Dowgate* (1909), 15 Com. Cas. 67.

(*u*) *Larsen* v. *Sylvester*, [1908] A. C. 295.

(*x*) *Williamson* v. *Commercial Union* (1876), 26 U. C. C. P. 591, 595.

(*y*) *Employers' Liability* v. *Morrow* (1906), 143 Fed. Rep. 750.

(*a*) *Worsley* v. *Wood* (1796), 6 T. R. 710; *Newcastle Fire* v. *Macmorran* (1815), 3 Dow, 255.

(*b*) *Routledge* v. *Burrell* (1789), 1 Black. H. 255.

(*c*) *Wheelton* v. *Hardisty* (1857), 8 El. & Bl. 232.

the insurance, or the basis and condition of the contract that is sufficient (*d*).

Incorporation of other documents.

Other extraneous documents may be incorporated as part of a policy, but they must be so incorporated either by express reference, or by being physically attached to the policy (*e*). If not so incorporated a document although delivered with the policy is not a part of the written contract of insurance (*f*).

Subsequent alteration of articles or by-laws referred to in the policy.

It is very common to import into the policy by reference the company's articles of association, deed of settlement or by-laws. As the company may during the currency of the policy alter its articles or by-laws, the question arises whether the contract is one made on the basis that any alteration will not affect the contractual rights of the assured (*g*), or whether it is one made subject to the right of the company to affect the contractual rights of the assured by such alteration (*h*). The answer depends on the intention of the parties as expressed in the policy, but *primâ facie*, the assured must be taken as contracting subject to the power of the company to alter its rules.

British Equitable v. Bailey, [1906] A. C. 35

British Equitable v. *Bailey.*

In this case the question was whether the company could alter their rules as to the division of profits and maintenance of a reserve fund so as to diminish the share of profits of a participating policy holder who had effected his insurance at a time when the rules provided that all profits should be divided without any deduction for a reserve fund. The company's deed of settlement provided that "the provisions of the deed of settlement and any by-law of the company may be altered, repealed or suspended by a by-law or by-laws, but not otherwise." When the assured effected his insurance in 1886, the by-laws then in force provided that the entire profits made by the company in the mutual department, after deducting the expenses, should be divided among the policy holders and no provision was made for any deduction for a reserve fund. The company issued a prospectus pointing out the benefits of this system to participating policy holders. This prospectus and the system of distribution advertised therein attracted the assured to the company. In his proposal he agreed to conform to and abide by the deed of settlement and by-laws, rules, and regulations of the company in all respects. The policy promised payment of the sum assured and "all such other sums if any as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise . . . according to their practice for the time being." In 1903 the company proposed to make a change in their method of distribution by taking out of the profits provision for a reserve fund, and to alter their by-laws accordingly. The policy holder brought this action for an injunction to restrain

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(*d*) *Thomson* v. *Weems* (1884), 9 A. C. 671; *Sceales* v. *Scanlan* (1843), 6 Ir. L. R. 367.

(*e*) *Heath* v. *Durant* (1844), 12 M. & W. 438.

(*f*) *Pawson* v. *Barnevelt* (1779), 1 Dougl. 12 (n.).; *Bize* v. *Fletcher* (1779), 1 Dougl. 12 (n.).

(*g*) *Yelland* v. *Yelland* (1898), 25 Ont. A. R. 91; *Knights Templar* v. *Jarman* (1900), 104 Fed. Rep. 638; *Lloyd* v. *Supreme Lodge* (1899), 98 Fed. Rep. 66; *Sieverts* v. *National Benevolent* (1895), 95 Iowa, 710.

(*h*) *British Equitable* v. *Bailey*, [1906] A. C. 35.

the company from distributing their profits otherwise than as stated in the prospectus. Kekewich, J., held that the prospectus contained a collateral contract under which the company were bound to maintain the distribution of profits as advertised therein. The Court of Appeal held that the prospectus could be read as part of the contract. The House of Lords reversed the decision of the Courts below, and held that the prospectus was not part of the contract, but was only a description of the system *de facto* existing at the time. The company in no way bound themselves to perpetuate that system. On the contrary, the assured bound himself to abide by the deed of settlement and by-laws which gave the company power to alter the system.

Alteration of articles not validly confirmed.

Where a policy provided that "the provisions contained in the articles of association shall be deemed and considered part of this policy," and the company had five years previously resolved to alter the articles and had registered a copy of the altered articles, and the altered articles were printed on the policy, the Court held that the assured was bound by the articles as altered, notwithstanding that the alteration was invalid under the Companies Act by reason of the fact that it had not been confirmed by a special resolution (*i*).

Statements in company's prospectus or advertisements

Statements made by a company in its prospectus, or other advertisements are frequently urged by the assured as matter which should be taken into consideration as part of the contract between the parties. It will seldom happen that such advertisements are referred to in the policy in such a way as to be imported into it as part of the written contract. They must therefore, if at all, be given effect to in some other way. It is clear that if they are merely to be regarded as representations inducing the contract they may afford ground for rescission or return of premiums, but cannot be read as part of the bargain between the parties. Statements made in an advertisement may, however, operate as terms of the contract in one or other of the following ways: (1) they may form part of the preliminary contract, and, if the policy does not correspond with the advertisement, it may be reformed in order to represent the true contract between the parties (*k*); (2) they may constitute a collateral agreement not varying the terms of the policy, but representing a supplementary part of the bargain.

may constitute part of the preliminary contract.

Before a prospectus or advertisement can be read into the preliminary contract between the parties, it must be proved that the assured applied upon the faith of the statements made therein (*l*). Further, it must be shown that the statements relied on were made not merely as representations intended to attract applicants, but as statements indicating the basis upon which the company invited applications (*m*). Statements as to the benefits to be derived from insurance with the company are frequently nothing more than expressions of expectation or belief

(*i*) *Muirhead* v. *Forth, &c., Insurance*, [1894] A. C. 72.
(*k*) *Anstey* v. *British Natural Premium Life* (1908), 24 T. L. R. 871.
(*l*) *Wheelton* v. *Hardisty* (1857), 8 El. & Bl. 232.
(*m*) *British Equitable* v. *Bailey*, [1906] A. C. 35.

or representations of existing facts. Such statements are not to be construed as promises forming part of the contract (*n*).

May be merely expressions of opinion as to the legal effect of the company's policy.

When an advertisement purports to state what the legal effect of the company's policy is, that may be construed either as a promise to issue a policy which will have the legal effect stated or as an expression of opinion that the particular form of policy which the company offers has the legal effect stated. In the first case the policy ought, if necessary, to be rectified so as to conform to the promise (*o*), but in the second case there would be no ground for rectification, the parties having clearly intended that the form of the policy as it stood should express the contract between them (*p*). In some cases it has been said that a representation by the company as to the legal effect of their policy estops the company in equity from setting up a defence inconsistent with their representation (*q*). Probably, however, this rule carries the assured no further than the equitable right to rectification, so that where there is no ground for rectification there is no ground for estoppel (*r*).

Rectification of policy so as to correspond with contract actually made.

Where a preliminary contract is concluded and a policy is afterwards issued which is not in accordance with the contract made, the assured may claim to have the policy rectified so as to represent the true agreement (*s*). Where there is no preliminary contract, and the execution and delivery of the policy concludes the first binding contract, the assured is bound by the terms of the policy which he accepts (*t*), provided, however, that he is entitled to assume that the policy is in accordance with the application which he made, and if not so he may have it rectified (*u*).

Strong presumption that policy does represent the actual contract.

A strong case is required to support a claim for rectification on the ground that the policy does not represent the actual con-

(*n*) *British Equitable* v. *Bailey*, [1906] A. C. 35; *Angers* v. *Mutual Reserve* (1904), 35 Can. S. C. 330.

(*o*) *Salvin* v. *James* (1805), 6 East, 571.

(*p*) *Wheelton* v. *Hardisty* (1857), 8 El. & Bl. 232; *Ruse* v. *Mutual Life* (1861), 23 N. Y. 516; 24 N. Y. 653.

(*q*) *Wood* v. *Dwarris* (1856), 11 Exch. 493; Lord Campbell, C.J., in *Wheelton* v. *Hardisty* (1857), 8 El. & Bl. 232, 278; *Fowler* v. *Metropolitan Life* (1886), 41 Hun. 357.

(*r*) *Reis* v. *Scottish Equitable* (1857), 2 H. & N. 19.

(*s*) *Macdonald* v. *Law Union* (1874), L. R. 9 Eq. 330; *Foster* v. *Mentor Life* (1854), 3 El. & Bl. 48; *Collett* v. *Morrison* (1851), 9 Hare, 162; *Motteux* v. *London Assurance* (1739), 1 Atk. 545; *London, Liverpool, and Globe* v. *Wyld* (1877), 1 Can. S. C. 604; *Aetna Life* v. *Brodie* (1879), 5 Can. S. C. 1; *Aetna Life* v. *Frierson* (1902), 114 Fed. Rep. 56; *Abraham* v. *North German Insurance* (1889), 40 Fed. Rep. 717; *Farwell* v. *Home Insurance* (1905), 136 Fed. Rep. 93; *Thompson* v. *Phœnix Insurance* (1889), 136 U. S. 287.

(*t*) *MacMaster* v. *New York Life* (1899), 99 Fed. Rep. 856.

(*u*) *Mowat* v. *Provident Savings Life* (1900), 27 Ont. A. R. 675; *M'Elroy* v. *British American Assurance* (1899), 94 Fed. Rep. 990; *Hough* v. *Guardian Fire and Life* (1902), 18 T. L. R. 273; *Wyld* v. *Liverpool, etc., Insurance* (1876), 23 Grant, 442. But see *Accident Insurance* v. *Crandal* (1887), 120 U. S. 527.

tract (*x*). There is a strong presumption that the policy which the assured accepts does in fact contain the actual contract made (*y*). If the contrary is asserted it must be clearly proved, and it must be shown that the parties were in fact *ad idem* (*z*). It is not too late to claim rectification even after loss, but the longer the policy is retained without objection the stronger the case required to displace the presumption that the policy embodies the real contract (*a*).

Misrepresentation of agent as to terms of policy.

Misrepresentation by an officer or agent of the company as to the legal effect of the company's policy may be good ground for rescission or return of premiums (*b*). It is not good ground for rectification unless the officer or agent had authority to bind the company. An officer or agent of a company, without general authority to contract, has no authority to bind the company by construing the policy and stating to an applicant what he believes to be its legal effect (*c*).

Insurers may claim rectification.

The right to claim rectification of the policy is not confined to the assured. In a proper case it may be claimed by the company to relieve it against its own mistake in issuing a policy not in accordance with the contract made (*d*).

Parol evidence to fill blanks.

Where there is an obvious omission in a policy, as where there is a blank, it may be filled up upon parol evidence as to the intention of the parties (*e*).

Parol evidence is inadmissible to vary written contract.

The general rule of construction is that when a contract is expressed in writing parol evidence is inadmissible to explain or vary the terms of the written instrument (*f*). Although a contract is always to be construed according to the intention of the parties, that intention can only be ascertained from the instrument itself, and all other evidence of intention is excluded.

When parol evidence is admissible.

Although parol evidence is inadmissible for the purpose of varying a written contract, it is admissible for the following purposes:—

(1) To show that there was a mutual mistake and that the

(*x*) *Allom* v. *Property Insurance* (1911), The Times, Feb. 9.

(*y*) *Armstrong* v. *Provident Savings Life* (1901), 2 Ont. L. R. 771; *Provident Savings Life* v. *Mowat* (1902), 32 Can. S. C. 147.

(*z*) *Fowler* v. *Scottish Equitable* (1859), 28 L. J. Ch. 225.

(*a*) *Henkle* v. *Royal Exchange Assurance* (1749), 1 Ves. Sen. 317.

(*b*) *Kettlewell* v. *Refuge Assurance*, [1908] 1 K. B. 545.

(*c*) *Comerford* v. *Britannia Assurance* (1908), 24 T. L. R. 593.

(*d*) *Ball* v. *Storie* (1823), 1 Sim. & Stu. 210.

(*e*) *Fazakerly* v. *McKnight* (1856), 6 E. & B. 759; *Sears* v. *Agricultural Insurance* (1882), 32 U. C. C. P. 585.

(*f*) *Davies* v. *National Fire and Marine*, [1891] A. C. 485; *Hare* v. *Barstow* (1843), 8 Jur. 928; *Abbott* v. *Howard* (1832), Hayes, 381, 401; *Anglo-Californian* v. *London, etc., Insurance* (1904), 10 Com. Cas. 1; *Horncastle* v. *Equitable* (1906), 22 T. L. R. 375; *Insurance Co.* v. *Mowry* (1877), 96 U. S. 544; *Thompson* v. *Knickerbocker Life Insurance* (1881), 104 U. S. 252; *Northern Assurance* v. *Grand View* (1901), 183 U. S. 308; *Hough* v. *Peoples Fire* (1872), 36 Md. 398; *Robertson* v. *Marjoribanks* (1819), 2 Stark. 573, 576.

written contract did not in fact express what was clearly agreed between the parties (*g*).

(2) To show the existence of a collateral agreement not varying the terms of the written contract, but containing a separate agreement (*g*).

(3) To show the conditions under which the parties were contracting, that is the surrounding facts and circumstances which must necessarily be known to the Court before it can construe the precise meaning of the language used (*h*).

(4) To show the intention of the parties where there is a latent ambiguity, that is to say, an ambiguity which does not appear on the face of the document, but which is only disclosed by evidence of the surrounding circumstances (*i*).

(5) To prove a custom, that is to say, to show some actual usage in a particular trade or business known to both parties and in contemplation of which they must be deemed to have contracted (*k*).

(5) To prove that certain words or phrases have a technical trade meaning other than their natural meaning (*l*).

(6) To prove a subsequent agreement written or oral by which the parties are alleged to have varied the original contract (*m*).

Section II.—Life Policies

1. Clauses relating to Suicide

Suicide an illegal risk.

It is contrary to public policy to insure a man against self destruction or death at the hands of justice and therefore even without the suicide or felony clause no recovery could be had by the representatives of an assured who deliberately and while of sane mind committed suicide or who suffered death as a criminal at the hands of justice (*p*).

Express exception usually inserted.

It is usual however to insert an express provision limiting the risk, so as not to include death by suicide, except where a party other than the life insured has a beneficial interest in the policy. The provision may be contained either in the proposal,

(*g*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215; *Edward Lloyd, Ltd.* v. *Sturgeon Falls, etc., Ltd.* (1901), 85 L. T. 162; *Harnickell* v. *New York Life* (1888), 111 N. Y. 390.

(*h*) *Bawden* v. *London, etc., Assurance*, [1892] 2 Q. B. 534; *May* v. *Buckeye Mutual* (1870), 25 Wis. 291; *Birrell* v. *Dryer* (1884), 9 A. C. 345, 353.

(*i*) *Hordern* v. *Commercial Union* (1887), 56 L. J. P. C. 78.

(*k*) *Blackett* v. *Royal Exchange* (1832), 2 Cr. & J. 244, 249; *Levy* v. *Merchants' Assurance* (1885), 52 L. T. 263; *Syers* v. *Bridge* (1780), 2 Dougl. 527, 530; *Crofts* v. *Marshall* (1836), 7 Car. & P. 597; *Foster* v. *Mentor Life* (1854), 3 El. & Bl. 48.

(*l*) *Bower* v. *Shand* (1877), 2 A. C. 455, 468; *Birrell* v. *Dryer* (1884), 9 A. C. 345, 353; *Danish* v. *Hudson River Fire* (1853), 66 Mass. 416.

(*m*) *Stuart* v. *Freeman*, [1903] 1 K. B. 47.

(*p*) *Ante*, p. 172.

in the form of a warranty, or in the policy, either in the form of a warranty or as an exception to the general liability to pay on death.

Meaning of "suicide."

"Suicide" or "death by his own hand" and similar phrases implies a wilful and intentional act on the part of the self destroyer (*q*). According to the English and some of the American authorities there is "suicide" if the individual understands the physical nature of the act even although he is so insane that he cannot distinguish between right and wrong (*r*). But the majority of the American Courts have held on the contrary that there is no "suicide" unless the individual can distinguish right and wrong (*s*), or if he is impelled to self destruction by a blind and uncontrollable impulse (*t*).

Onus of proof.

The onus is on the insurers to prove suicide within the exception (*u*), but if they prove self destruction the onus shifts and the claimant must prove absence of intention to destroy life (*x*). In America where the facts proved pointed to one of two alternatives, suicide or murder, and the evidence was equally consistent with either view the Court held that as there was a strong presumption against murder death by suicide was the proper finding (*y*). A coroner's verdict to that effect is *primâ facie* proof of suicide (*z*). The statement by a claimant in his

(*q*) *Stormont* v. *Waterloo Life* (1858), 1 F. & F. 22; *Wainwright* v. *Bland* (1835), 1 M. & R. 481; *Eastabrook* v. *Union Mutual Life* (1866), 54 Me. 224.

(*r*) *Borradaile* v. *Hunter* (1843), 5 Scott, N. R. 418; *White* v. *British Empire Mutual Life* (1868), L. R. 7 Eq. 394; *Clift* v. *Schwabe* (1846), 3 C. B. 437; *Dufaur* v. *Professional Life* (1858), 25 Beav. 599; *Gay* v. *Union Mutual Life* (1871), 9 Blatchf. 142; *Van Zandt* v. *Mutual Benefit Life* (1873), 55 N. Y. 169; *Pierce* v. *Travellers' Life Insurance Co.* (1874), 34 Wis. 389.

(*s*) *Manhattan Life* v. *Broughton* (1883), 109 U. S. 121; *Life Assurance* v. *Terry* (1872), 15 Wall. 580: *Phadenhauer* v. *Germania Life* (1872), 19 Am. R. 623; *Schultz* v. *Insurance Co.* (1883), 40 Ohio St. 217; 48 Am. R. 676; *Breasted* v. *Farmers* (1853), 8 N. Y. 299; *Mutual Life Insurance Co.* v. *Leubric* (1896), 71 Fed. Rep. 843.

(*t*) *Manhattan Life* v. *Broughton* (1883), 109 U. S. 121: *Life Assurance* v. *Terry* (1872), 15 Wall. 580; *Van Zandt* v. *Mutual Benefit Life* (1873), 55 N. Y. 169; *Knickerbocker Life* v. *Peters* (1875), 42 Md. 414.

(*u*) *Home Benefit* v. *Sargent* (1891), 142 U. S. 691; *Continental* v. *Delpeuch* (1876), 82 Pa. 225; *Ingersoll* v. *Knights of Golden Rule* (1891), 47 Fed. Rep. 272; *Walcott* v. *Metropolitan Life* (1891), 64 Ver. 221; 33 Am. S. R. 923; *German* v. *Brooklyn Life* (1883), 30 Hun. 535; *National Union* v. *Fitzpatrick* (1904), 133 Fed. Rep. 694; *Kerr* v. *Modern Woodmen* (1902), 117 Fed. Rep. 593; *Fidelity and Casualty* v. *Freeman* (1901), 109 Fed. Rep. 847; *Union Mutual Life* v. *Payne* (1900), 105 Fed. Rep. 172.

(*x*) *Gay* v. *Union Mutual Life* (1871), 9 Blatchf. 142; *Knickerbocker Life* v. *Peters* (1875), 42 Md. 414; *Weed* v. *Mutual Benefit* (1877), 70 N. Y. 561; *Supreme Tent* v. *King* (1906), 142 Fed. Rep. 678; *Harsencamp* v. *Mutual Benefit Life Insurance Co.* (1902), 120 Fed. Rep. 477; Contra *Schultz* v. *Insurance Co.* (1883), 40 Ohio St. 217; 48 Am. R. 676.

(*y*) *Fidelity and Casualty* v. *Egbert* (1897), 84 Fed. Rep. 410.

(*z*) *Prince of Wales Assurance* v. *Palmer* (1858), 25 Beav. 605; contra *Goldschmidt* v. *Mutual Life* (1886), 102 N. Y. 486; *Sharland* v. *Washington Life* (1900), 101 Fed. Rep. 206; *Walcott* v. *Metropolitan Life* (1891), 64 Ver. 221; 33 Am. S. R. 923.

formal proof that death was caused by suicide is *primâ facie* proof against him, but he may show he made a mistake (*a*).

Meaning of suicide "sane or insane," etc.

In order to get rid of the narrow construction put by the American Courts on the word "suicide," many of the American policies extend the meaning by the addition of such words as "sane or insane" or "voluntary or involuntary." "Suicide sane or insane" will include all self destruction where the individual recognises the physical nature of the act, and there is an intention to take life (*b*). "Death by his own hand whether voluntary or involuntary" has much the same meaning as "suicide sane or insane," and does not exclude from recovery cases where the assured has been the accidental instrument of his own death, as where he has accidentally discharged a pistol and shot himself (*c*).

How far policy available in hands of assignee.

If there is a warranty against suicide, or if suicide of the assured is expressly excepted from the risk, the policy in the case of suicide would be equally valueless in the hands of a payee or assignee as in the hands of the assured representatives unless the interest of third persons in the policy were expressly saved from the exception (*d*). A proviso in favour of assignees and incumbrancers for value is not illegal, and will operate in favour of a wife or other beneficiaries under a marriage settlement (*e*), but not in favour of a trustee in bankruptcy (*f*). Where a policy is assigned to secure a debt existing at the date of the assignment the assignment is not based on valuable consideration (*g*): but where a policy is deposited in security for past and future advances it is an assignment for valuable consideration (*h*). The proviso although intended to save the interest of third persons only may operate in favour of the assured's estate. Thus where the insurers hold the policy in security for a loan it is valid to the extent of the loan, notwithstanding suicide of the assured while temporarily insane, and they must satisfy their debt from the policy moneys (*i*), and if the policy is mortgaged by assignment or deposit in security to a third party such third party may sue for the policy moneys and satisfy his debt therefrom and the insurers have no claim to the other securities in his hands (*k*) nor can they require the incumbrancer to resort to the other securities first or even *pari passu* (*l*). A

(*a*) *Keels* v. *Mutual Reserve* (1886), 29 Fed. Rep. 198.
(*b*) *Bigelow* v. *Berkshire Life* (1876), 93 U. S. 284; *Clarke* v. *Equitable Life Assurance Co.*, (1902), 118 Fed. Rep. 374; *Union Mutual Life Insurance Co.* v. *Payne* (1900), 105 Fed. Rep. 172.
(*c*) *Home Benefit and Sargent* (1891), 142 U. S. 691; *Keels* v. *Mutual Reserve* (1886), 29 Fed. Rep. 198.
(*d*) *Ellinger* v. *Mutual Life*, [1905] 1 K. B. 31.
(*e*) *Moore* v. *Woolsey* (1854), 4 El. & Bl. 243.
(*f*) *Jackson* v. *Forster* (1859), 1 E. & E. 463.
(*g*) *Wigan* v. *English and Scottish Law Life*, [1909] 1 Ch. 291.
(*h*) *Jones* v. *Consolidated Investment* (1858), 26 Beav. 256.
(*i*) *White* v. *British Empire Mutual Life* (1868), L. R. 7 Eq. 394.
(*k*) *Solicitors and General Life* v. *Lamb* (1864), 1 Hem. & M. 716.
(*l*) *City Bank v. Sovereign Life* (1884), 50 L. T. N. S. 565.

proviso that the suicide of the assured shall not invalidate the policy if it has been "assigned" or "legally assigned," operates in favour of a creditor with an equitable lien of which no notice has been given to the company (*m*).

No return of premium.

A company taking the defence of suicide is not bound to return the premium or premiums paid (*n*).

Clauses which have been judicially construed.

Warranty against suicide.

I also warrant and agree that I will not commit suicide whether sane or insane during the period of one year from the date of the contract.

Ellinger v. *Mutual Life New York*, [1905] 1 K. B. 31; *Mutual Life Insurance Co.* v. *Kelly* (1902), 114 Fed. Rep. 268.

Provided also that if the assured shall commit suicide within thirteen months from the date of this policy . . . this policy shall be void and all moneys paid on account of this insurance shall be forfeited.

Dufaur v. *Professional Life* (1858), 25 Beav. 599; *Stormont* v. *Waterloo Life* (1858), 1 F. & F. 22; *Clift* v. *Schwabe* (1846), 3 C. B. 437; *National Union* v. *Fitzpatrick* (1904), 133 Fed. Rep. 694; *Harsencamp* v. *Mutual Ben. Life Insurance Co.* (1902), 120 Fed. Rep. 477.

In case he shall die by suicide.

Manhattan Life v. *Broughton* (1883), 109 U. S. 121; *Gay* v. *Union Mutual Life* (1871), 9 Blatchf. 142.

Suicide sane or insane.

If the assured should die by suicide sane or insane.

Bigelow v. *Berkshire Life* (1876), 93 U. S. 284; *Supreme Tent* v. *King* (1906), 142 Fed. Rep. 678; *Kerr* v. *Modern Woodman* (1902), 117 Fed. Rep. 593; *Union Mutual Life Insurance Co.* v. *Payne* (1900), 105 Fed. Rep. 172.

In case the assured shall die by suicide felonious or otherwise sane or insane.

Pierce v. *Travellers' Life Insurance Co.* (1874), 34 Wis. 389.

Self destruction sane or insane.

Clarke v. *Equitable Life Assurance Co.* (1902), 118 Fed Rep. 374; *Sharland* v. *Washington Life* (1900), 101 Fed. Rep. 206.

Death by his own hands.

Shall die from injuries self inflicted.

Fidelity and Casualty v. *Freeman* (1901), 109 Fed. Rep. 847.

In case the assured shall die by his own hands.

Borradaile v. *Hunter* (1842), 5 Scott, N. R. 418; *White* v. *British Empire Mutual Life* (1868), L. R. 7 Eq. 394; *Wainwright* v. *Bland* (1835), 1 M. & R. 481; *Life Insurance* v. *Terry* (1872), 15 Wall 580; *Mutual Life Insurance Co.* v. *Leubric* (1896), 71 Fed. Rep. 843; *Weed* v. *Mutual Benefit* (1877), 70 N. Y. 561; *Breasted* v. *The Farmers* (1853), 8 N. Y. 299; *Van Zandt* v. *Mutual Benefit Life* (1873), 55 N. Y. 169; *Knickerbocker Life* v. *Peters* (1875), 42 Md. 414; *Eastabrook* v. *Union Mutual Life* (1866), 54 Me. 224.

If the assured shall under any circumstances die by his own hands.

Schultz v. *Insurance* (1883), 40 Ohio, St. 217; 48 Am. R. 676.

In case of death by his own hand or act voluntary or involuntary sane or insane.

Home Benefit v. *Sargent* (1891), 142 U. S. 691; *Keels* v. *Mutual Reserve* (1886), 29 Fed. Rep. 198.

Self destruction in any form.

Exceptions . . . suicide, the self destruction of the assured in any form except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the assured.

Connecticut Mutual Life v. *Akens* (1893), 150 U. S. 468.

In case he shall die by suicide or by his own hands.

Phadenhauer v. *Germania Life* (1872), 19 Am. R. 623.

(*m*) *Cook* v. *Black* (1842), 1 Hare, 390; *Dufaur* v. *Professional Life* (1858), 25 Beav. 599.

(*n*) *Mutual Life Assurance Co.* v. *Kelly* (1902), 114 Fed. Rep. 268.

Conditions in favour of assignee.

But should such a policy have been assigned to other parties for valuable consideration six calendar months before the death of the assured it remains in force to the extent of the beneficial interest therein of the parties to whom they shall have been so assigned.

Jones v. *Consolidated Investment* (1858), 26 Beav. 256.

If the person assured commit suicide and the policy shall have been assigned to any person or persons having a *bonâ fide* interest in his life to the extent of the sum assured the full amount will be paid to the party or parties so interested: if the interest be less than the sum assured the party or parties will be indemnified to the full extent of such interest.

Cook v. *Black* (1842), 1 Hare 390.

The policy shall become void except in so far as a third party may have acquired a *bonâ fide* interest by assignment or by legal or equitable lien for a valuable consideration or as a security for money.

Jackson v. *Foster* (1859), 1 E. & E. 463.

Except the policy shall have been legally assigned.

Dufaur v. *Professional Life* (1858), 25 Beav. 599.

But without prejudice to the *bonâ fide* interests of third parties based on a valuable consideration.

Wigan v. *English and Scottish Law Life*, [1909] 1 Ch. 291.

Except to the extent of any interest acquired therein by actual assignment by deed for valuable consideration or as security or indemnity or by virtue of any legal or equitable lien as security for money.

Solicitors and General Life v. *Lamb* (1864), 1 Hem. & M. 716; *Moore* v. *Woolsey* (1854), 4 El. & Bl. 243.

Except to the extent of any *bonâ fide* interest therein which at the time of such death shall be vested in any other person or persons for his her or their own benefit for a sufficient pecuniary or other consideration.

White v. *British Empire Mutual League* (1868), L. R. 7 Eq. 394.

But in case the beneficial interest in the policy has been vested in any other person either originally or by such person having taken a legal or equitable assignment thereof . . . the policy shall remain valid to the extent of the interest of such other party . . . provided notice in writing is given thirty days before death.

City Bank v. *Sovereign Life* (1884), 50 L. T. N. S. 565.

2. Clauses excluding Death resulting from Violation of the Law

Death resulting from any violation of the law is commonly excluded in American life policies. A "violation of the law" has been held to include only such unlawful acts as would from their natural and probable consequences increase the risk (*o*), but the increase of risk need not be present to the mind of the assured (*p*). Suicide has been held not to be a violation of the criminal law (*q*). A "known violation" of the law means that the assured must know of the law which he is alleged to have violated (*r*): but as he is presumed to know the law, a known violation is practically the same as merely a violation (*s*). The

(*o*) *Bloom* v. *Franklin Life* (1884), 97 Md. 478; 49 Am. R. 469.

(*p*) *Cluff* v. *Mutual Benefit Life* (1866), 95 Mass. 308; (1868), 99 Mass. 317; *Bradley* v. *Mutual Benefit Life* (1871), 45 N. Y. 422; 6 Am. R. 115.

(*q*) *Kerr* v. *Minnesota Mutual Benefit* (1888), 39 Minn. 174; *Darrow* v. *Family Fund* (1886), 45 Hun. 245; *Patrick* v. *Excelsior Life* (1875), 4 Hun. 263.

(*r*) *Bloom* v. *Franklin Life* (1884), 97 Md. 478; 49 Am. R. 469; *Cluff* v. *Mutual Benefit Life* (1866), 95 Mass. 308; (1868), 99 Mass. 317.

(*s*) *Cluff* v. *Mutual Benefit Life* (1866), 95 Mass. 398; (1868), 99 Mass. 317.

fact that the assured was drunk when he did the act alleged does not make it any the less a known violation of the law (*t*). To die "in the violation of the law" does not necessarily mean death during the violation, but merely as the natural and probable consequence of the violation (*u*), as where a man assaulting his brother's wife was struck by his brother so that he subsequently died (*x*), or a woman having submitted to an illegal operation to procure abortion died from the result (*y*).

Clauses which have been judicially construed.

In the known violation of any law.

This policy shall be void if the assured shall die in the known violation of any law of these States or the United States.

Cluff v. *Mutual Benefit Life* (1866) 95 Mass. 398; (1868), 99 Mass. 317; *Bradley* v. *Mutual Benefit Life* (1871), 45 N. Y. 422; 6 Am. R. 115; *Bloom* v. *Franklin Life* (1884), 97 Md. 478; 49 Am. R. 469; *Patrick* v. *Excelsior Life* (1875), 4 Hun. 263.

Shall die in the violation or the attempt to violate any criminal law.

Darrow v. *Family Fund* (1886), 45 Hun. 245.

In or in consequence of the violation of any law.

In or in consequence of the violation of the laws of any nation.

Hatch v. *Mutual Life* (1876), 120 Mass. 550; 21 Am. R. 541.

In or in consequence of the violation of any criminal law of any country state or territory in which the assured may be.

Kerr v. *Minesota Mutual Benefit* (1888), 39 Minn. 174.

Death caused by breach of the law on the part of the assured or by his wilfully exposing himself to any unnecessary danger or peril.

Insurance Co. v. *Seaver* (1873), 19 Wall. 531.

3. Clauses containing other Exceptions from the Risk

Risk limited to specified area.

The condition against going outside Europe or other specified territorial limits may be waived by leave or licence (*z*), or by acceptance of premium with knowledge that the assured is residing beyond the specified limits (*a*). Where the condition merely prohibits residence outside the permitted area going beyond the limits for a temporary purpose only may not constitute a breach (*b*).

Clauses which have been judicially construed.

Conditions against going abroad.

In case the person upon whose life the assurance is effected shall go beyond the limits of Europe or shall die on the seas except in passing from one part of the United Kingdom to another or in passing in times of peace in decked vessels from any European port to any other European port . . . this policy shall be void.

Reis v. *Scottish Equitable* (1857), 2 H. & N. 19; *Notman* v. *Anchor* (1858), 4 C. B. (N. S.) 476; *Wing* v. *Harvey* (1854), 5 De G. M & G. 265.

(*t*) *Bloom* v. *Franklin Life* (1884), 97 Md. 478; 49 Am. R. 469.

(*u*) *Cluff* v. *Mutual Benefit Life* (1866), 95 Mass. 308; (1868), 99 Mass. 317; *Bradley* v. *Mutual Benefit Life* (1871), 45 N. Y. 422; 6 Am. R. 115; *Kerr* v. *Minnesota Mutual Benefit* (1888), 39 Minn. 174.

(*x*) *Bloom* v. *Franklin Life* (1884), 97 Md. 478; 49 Am. R. 469.

(*y*) *Hatch* v. *Mutual Life* (1876), 120 Mass. 550; 21 Am. R. 541.

(*z*) *Reis* v. *Scottish Equitable* (1857), 2 H. & N. 19.

(*a*) *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265.

(*b*) *Converse* v. *Knights Templars* (1898), 93 Fed. Rep. 148.

The assured shall not reside outside [certain specified localities] but is authorised to pass as a passenger by the usual routes of public conveyance to or from any port or place within the foregoing limits: but if he should . . . pass beyond or be without the foregoing limits the policy shall be void.
Converse v. *Knights Templars* (1898), 93 Fed. Rep. 148.

Warranty against future intemperance.

If the assured shall become so far intemperate as to impair his health or induce delirium tremens or if his death shall result from injuries received while under influence of alcoholic liquor.
Aetna Life v. *Davey* (1887), 123 U. S. 739; *Boyce* v. *Phœnix Mutual* (1887), 14 Can. S. C 723.

The applicant is not, and will not become habitually intemperate.
North Western Insurance v. *Muskegon Bank* (1887), 122 U. S. 501.

Does not nor will he practice pernicious habit tending to shorten life.
Knecht v. *Mutual Life* (1879), 90 Pa. 119.

4. Conditions relating to Payment of Premium

See Chapter IV., pp. 228–267.

Conditions which have been judicially construed.

No insurance in force until premium paid.

No insurance will be held in force until the premium shall have been actually paid to the company.
Busteed v. *West of England* (1857), 5 Ir. Ch. R. 553.

Until the actual payment and acceptance of the first premium due thereon by an authorised agent of the company and the delivery to the insured of the necessary receipt signed by the general manager.
Tiernan v. *Peoples Life* (1896), 23 Ont. A. R. 342.

Policy not to take effect until first premium paid in cash.

The first premium to be actually paid in cash on or before the delivery hereof . . . this contract shall not take effect until this policy is delivered to the insured in person and the first premium is paid in cash hereon during his lifetime.
Mutual Reserve Life v. *Heidel* (1908), 161 Fed. Rep. 535; *Mutual Life Assurance Co. of Canada* v. *Giguère* (1902), 32 Can. S. C. 348.

During the lifetime and sound health of assured.

This policy shall take effect only upon actual payment of the first premium thereon and delivery of this policy to the assured during the lifetime and sound health of the assured in exchange for the company's receipt for said payment signed by the president secretary asistant secretary or actuary.
MacMahon v. *United States Life Insurance Co.* (1904), 128 Fed. Rep. 389; *Smith* v. *Provident Law Life Assurance* (1895), 65 Fed. Rep. 765; *Paine* v. *Pacific Mutual Life Insurance Co.* (1892), 51 Fed. Rep. 689.

Renewal premiums.

In case any premium should not be paid when due according to the terms of this contract at the office of the company or to agents when they produce receipt signed by the president or secretary then and in every such case this policy shall cease and determine except as otherwise herein expressly provided.
Prince of Wales Life and Educational v. *Harding* (1858), El. Bl. & El. 183; *Pritchard* v. *Mutual Life* (1858), 3 C. B. (N. S.) 622; *Stuart* v. *Freeman*, [1903] 1 K. B. 47; *Wheeler* v. *Connecticut Mutual Life* (1880), 82 N. Y. 543; *State Life Insurance* v. *Murray* (1908), 159 Fed. Rep. 408; *Mutual Life Assurance* v. *Tuchfield*, 159 Fed. Rep. 833; *Krebs* v. *Security Trust Life Insurance Co.* (1907), 156 Fed. Rep. 294.

Mortuary assessments.

On the first days of February May August and November (or at such other periods as the board of directors may determine) an assessment shall be made upon the entire membership. . . . A member failing to receive a notice of assessment on or before the first days of February May August and November for his share of the losses occurring during the time specified it shall be his duty to notify the home office in writing of such fact. A failure to pay the assessment within 30 days from the first days of February May August and November (or at such period as may be named by the directors) shall work a forfeiture of membership in this association with all rights thereunder.
Mutual Life v. *Hamlin* (1890), 139 U. S. 297; *Roth* v. *Mutual Reserve Life* (1908), 162 Fed. Rep. 282.

All mortuary assessments payable at the office of the association 30 days from the date of each notice. A notice addressed to a member at his post office address as appearing in the books of the association according to its usual course of business shall be deemed a sufficient notice and proof of mailing the same according to the usual course of business of said association shall be deemed sufficient proof of compliance herewith on the part of said association.

Ferrenbach v. *Mutual Reserve* (1903), 121 Fed. Rep. 945.

Days of grace.

Thirty days are allowed for the payment of each renewal premium after the same becomes due and the policy becomes void if the premium is not paid before the expiring of the 30 days: but in case the assured dies upon the day on which any renewal premium falls due or within the said space of 30 days and before the premium is paid the policy subject to the deduction of the premium is valid.

Nor will any policy be valid beyond 15 days after the expiration of any year under the premium for its renewal shall have been actually paid to the company.

Busteed v. *West of England* (1858), 5 Ir. Ch. R. 553; *Acey* v. *Fernie* (1840), 7 M. & W. 151; *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727; *Pitt* v. *Berkshire Life* (1868), 100 Mass. 500; *Baker Union Mutual* (1871), 43 N. Y. 283.

A grace of thirty days will be allowed in payment of the premium hereafter due on this policy provided always that whenever advantage is taken of this grace interest at the rate of 5 per cent. per annum shall be paid to the society for the time deferred.

Provident Savings Life v. *Taylor* (1906), 142 Fed. Rep. 709.

A grace of one month will be allowed in payment of premium at the expiration of which time if said premium remain unpaid the policy shall thereupon become void.

Manufacturers Life v. *Gordon* (1893), 20 Ont. A. R. 309.

Premium notes.

If a note or other obligation be taken for the first or renewal premium or any part thereof and such note be not paid when due the policy or assurance becomes null and void at and from default.

London and Lancashire Life v. *Fleming*, [1897] A. C. 499; *Baker* v. *Union Mutual* (1871), 43 N. Y. 283; *Hodson* v. *Guardian Life* (1867), 97 Mass. 147; *Thompson* v. *Insurance Co.* (1881), 104 U. S. 252; *Ronald* v. *Mutual Reserve Fund Life* (1892), 132 N. Y. 378; *Hutchings* v. *National Life Assurance Co.* (1905), 37 Can. S. C. 124; *Iowa Life* v. *Lewis* (1902), 187 U. S. 335; *Knickerbocker Life* v. *Pendleton* (1884), 112 U. S. 696; *M'Geachie* v. *North American Life Insurance Co.* (1893), 23 Can. S. R. 148; *Frank* v. *Sun Life Insurance Co.* (1893), 26 Ont. A. R. 564.

In case the note is not paid at maturity the full amount of the premium shall be considered earned as premium during its currency and the note payable without reviving the policy or any of its provisions.

Duncan v. *Missouri State Life Insurance* (1908), 160 Fed. Rep. 646.

Revival of policy on proof of good health.

Insurance however may be revived within any period not exceeding three months on proof satisfactory to the directors being given of the unimpaired state of the health of the person whose life is assured and payment of a fine of ten shillings per cent. on the sum assured.

Busteed v. *West of England* (1857), 5 Ir. Ch. N. 553; *Campbell* v. *National* (1874), 24 U. C. C. P. 133; *Metropolitan Life* v. *M'Tague* (1887), 49 N. J. Law, 587; *Knight Templars* v. *Mason's Life Indemnity* (1897), 80 Fed. Rep. 202; *Ronald* v. *Mutual Reserve Fund Life* (1892), 132 N. Y. 378.

Surrender for paid-up policy.

If the policy is surrendered at the end of any policy year after renewal the assured shall be entitled to a paid-up non-participating policy either (1) for a fractional amount of insurance for the whole life of the insured as per table of paid-up insurance values below or (2) for the full amount of insurance hereunder but for a limited term as per the table of periods of extended insurance herein.

Schumaker Security Life (1907), 153 Fed. Rep. 332.

Paid-up policy in lieu of forfeiture.

If after the payment of two or more annual premiums on the policy the same shall cease and determine by default in the payment of any subsequent premium when due then this company will grant a paid-up policy payable as above for such amount as the then present value of this policy will purchase as a single premium. Provided that this policy shall be transmitted to and received by this company and application made for such paid-up policy [during the lifetime of the assured] and within one year after default in the payment of premium hereon.

Wheeler v. *Connecticut Life* (1880), 82 N. Y. 543; *Miles* v. *Connecticut Life* (1892), 147 U. S. 178.

Automatic non-forfeiture.

If after the payment of three full years premium the policy should lapse for the non-payment of any premium the insurers will upon application the payment of all indebtedness and the surrender of the policy and the last renewed receipt within three months after such lapse issue a non-participating paid-up policy for as many twentieth parts of its principal amounts as complete annual premiums shall have been paid or apply the same towards the purchase of intended insurance in accordance with the schedule endorsed hereon.

Pense v. *Northern Life* (1907), 15 Ont. L. R. 131.

If after the payment of the first three annual premiums a default should be made in the payment of the annual premiums thereafter to become due such default shall not work a forfeiture but the amount insured shall be then commuted or reduced to the sum of the annual premiums paid.

Lovell v. *St. Louis Mutual Life* (1883), 111 U. S. 264; *Douglas* v. *Knickerbocker Life* (1881), 83 N. Y. 492.

This policy of insurance after two annual premiums shall have been paid thereon shall not be forfeited or become void by reason of the non-payment of premiums but the party insured shall be entitled to have it continued in force for a period to be determined as follows to wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the combined experience or actuaries rate of mortality with interest at four per cent. per annum. Four fifths of such net value shall be considered as a net single premium of temporary insurance and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumption of mortality and interest as aforesaid: or at his option may receive a paid-up policy for the full amount of premium paid. Provided that unless this policy shall be surrendered and such paid-up policy shall be applied for within 90 days after such non-payment of premiums as aforesaid then this policy shall be void and of no effect.

Knapp v. *Homœopathic Life* (1885), 117 U. S. 411.

If any premium shall not be paid when due the same shall be charged against the policy as a loan if the loan value be sufficient to enable such advance after providing for the existing loans and accrued interest, provided that, if not sufficient to cover the entire premium due, a premium for a shorter period but no less than a monthly premium shall be charged if the available loan value is sufficient. Notice of such advance shall be mailed to the assured and at any time while the policy is sustained in force the payment of premiums may be resumed.

Shumaker v. *Security Life* (1907), 153 Fed. Rep. 332.

5. Receipts for Premiums

Practice of giving interim protection in life insurance.

Except in the case of foreign agencies it is not usual upon the receipt of an application for life insurance to grant an interim receipt covering the assured until the acceptance or rejection of the risk. Receipts given for a first premium paid at the time the proposal is signed will not be readily construed as effecting any interim insurance (*c*). In America provisional insurance pending the final decision of the company is probably more common than it is here and where such intention is clearly expressed the receipt will be given effect to accordingly (*d*). An interim receipt may be given on the terms that it shall not be binding until the life has been approved by the medical officer (*e*). Receipts given for renewal premiums which are overdue are sometimes given without medical examination but on the express condition that the life is still in good health and if the condition

(*c*) *Mohrstadt* v. *Mutual Life Insurance Co.* (1902), 115 Fed. Rep. 81; *Steinle* v. *New York Life Insurance Co.* (1897), 81 Fed. Rep. 489.

(*d*) *Mutual Life Insurance* v. *Kean* (1905), 135 Fed. Rep. 677.

(*e*) *Henderson* v. *State Life* (1905), 9 Ont. L. R. 540.

is not satisfied the acceptance of subsequent premiums in due course and unconditionally does not cure the defect (*f*).

Conditions which have been judiciously construed.

No interim insurance if application rejected.

Received for the first annual premium . . . on his application for a policy of insurance on the life of . . . said policy of insurance to take effect and be in force from and after the date hereof provided the said application shall be accepted by the said company; but should the same be declined or rejected by said company then the full amount hereby paid will be returned to applicant upon delivery of this receipt. This receipt will be void when applicant is notified that a policy has not been issued and shall not be valid for any other consideration than cash actually paid.

Mohrstadt v. *Mutual Life Insurance Co.* (1902), 115 Fed. Rep. 81; *Steinle* v. *New York Life Insurance Co.* (1897), 81 Fed. Rep. 489; *Union Central Life* v. *Robinson* (1906), 148 Fed. Rep. 358.

Interim insurance.

In consideration of the application . . . and £ the mutual life insurance company does insure the life of for the sum of £ sterling for the term of 90 days from date to wit until the day of subject to the usual term of said company's policies. It is expressly stipulated that if the officers of said company at New York shall not agree to continue the assurance during the said 90 days they may terminate said insurance at any time by mailing a registered letter to the said informing him of their decision and said insurance shall thereupon become null and void. . . . If on the other hand the application for insurance is accepted by the officers of the said company at New York a permanent policy shall be made out and delivered to the assured as soon as may be and the amount herein acknowledged to have been received by the company in exchange for this provisional policy shall be allowed in payment of first premium.

Mutual Life Insurance Co. v. *Kcan* (1905), 135 Fed. Rep. 677.

Receipt for overdue premium.

The conditions on which the within payment is accepted are as follows:—

First. The said member is now living and of temperate habits and is now and has been during the past twelve months in continuous good health and free from all disease infirmity illness indisposition and weakness and he has not during said period consulted or been prescribed for or attended by any physician for any cause whatever otherwise said payment and this receipt and said policy shall be null and void and the sum paid herein shall be subject to the order of the within named person.

Second. The receipt and acceptance of the within named sum by the company shall not be held to waive forfeiture or expiration of membership or to re-instate membership or to create any liability of the company under said policy except on fulfilment of the first condition of this receipt.

Third. The acceptance of the within sum after the sum became due shall not establish a precedent for acceptance of future premiums by the company nor shall any subsequent payment upon said policy impair waive alter or change any of the conditions of this receipt or of said policy or of any agreements or conditions relating thereto.

Handler v. *Mutual Reserve Fund Life* (1904), 90 L. T. 192; *Mutual Reserve Fund Life Association* v. *Tuckfeld* (1908), 159 Fed. Rep. 833; *Ronald* v. *Mutual Reserve Fund Life* (1892), 132 N. Y. 378.

6. Declaration and Warranties as to Truth of Statements in Proposal

See Chapter V., Section VII., pp. 375–392.

Declarations and Warranties which have been judicially construed.

Declarations in proposal and medical examination form.

Proposal. I do declare that to the best of my knowledge and belief the above particulars are true and I agree that this proposal and declaration shall be the basis of the contract between me and the company.

Medical Examination Form. I do hereby declare with reference to the proposal for assurance on my life and my declaration dated that the answers to the foregoing questions are true.

Joel v. *Law Union and Crown*, [1908] 2 K. B. 863.

(*f*) *Mutual Reserve Fund Life* v. *Tuckfeld* (1908), 159 Fed. Rep. 833; *Ronald* v. *Mutual Reserve Fund Life* (1892), 132 N. Y. 378.

If anything so warranted as aforesaid shall not be true or if any circumstance material to this insurance shall not have been truly stated or shall have been misrepresented or concealed or shall not have been fully and fairly disclosed and communicated to the said company or if any fraud shall have been practised on the said company or any false statements made to them in or about the obtaining or effecting of this insurance this policy shall be null and void.

Anderson v. *Fitzgerald* (1853), 4 H. L. C. 408; *Cazenove* v. *British Equitable* (1859), 6 C. B. (N.S.) 437; (1860) 29 L. J. C. P. 160; *Everett* v. *Desborough* (1829), 5 Bing. 503; *Fowkes* v. *Manchester, etc., Life* (1862), 3 F. & F. 440; (1863), 3 B. & S. 917; *Aetna Life* v. *France* (1875), 91 U. S. 510; *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727; *Duckett* v. *Williams* (1834), 2 C. & M. 348; *Grattan* v. *Metropolitan Life* (1880), 80 N. Y. 281; *Foster* v. *Mentor Life* (1854), 3 El. & B. 48; *Geach* v. *Ingall* (1845), 14 M. & W. 95; *Hamborough* v. *Mutual Life* (1895), 72 L. T. 140; *Huguenin* v. *Rayley* (1815), 6 Taunt. 186; *Macdonald* v. *Law Union* (1874), L. R. 9 Q. B. 328; *Thomson* v. *Weems* (1884), 9 A. C. 671; *Knecht* v. *Mutual Life* (1879), 90 Pa. 118; *Equitable Life* v. *Keiper* (1908), 165 Fed. Rep. 595.

I hereby warrant that the above statements are true full and complete . . . and are offered to the company together with those contained in the declaration to the medical examiner as a consideration for and as the basis of the contract with the said company.

Home Life v. *Fisher* (1902), 188 U. S. 726; *Fitz-Randolph* v. *Mutual Relief Society* (1890), 17 Can. S. C. 333; *M'Clain* v. *Provident Saving Life* (1901), 101 Fed. Rep. 80; *Hubbard* v. *Mutual Reserve Life* (1900), 100 Fed. Rep. 719; *Doll* v. *Equitable Life* (1905), 138 Fed. Rep. 705; *Brady* v. *U. S. Life* (1894), 60 Fed. Rep. 727.

It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form part of the contract of insurance and that if there be in any of the answers herein made any untrue or evasive statements or any misrepresentation or concealment of facts then any policy granted upon this application shall be null and void and all payments made thereon shall be forfeited to the company.

Moulor v. *American Life* (1884), 111 U. S. 335.

I, (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions are true to the best of my knowledge and belief . . . and that this proposal shall be the basis of the contract and that any mis-statements or suppression of facts shall render null and void the policy of insurance and I (the party in whose favour the assurance is granted) do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association.

Confederation Life Assurance v. *Miller* (1887), 14 Can. S. C. 330; *Phœnix Life* v. *Raddin* (1886), 120 U. S. 183.

7. Questions, Answers, and Statements in Proposal

See Chapter V., Section VII., pp. 375–392.

Questions and Answers which have been judicially construed.

Name and residence of life.

Grogan v. *London, etc., Life* (1885), 53 L. T. 761; *Huguenin* v. *Rayley* (1815), 6 Taunt. 186.

Name and residence, etc.

Name residence profession or occupation.

Perrins v. *Marine and General* (1859), 2 E. & E. 317; *Hartman* v. *Keystone* (1853), 21 Pa. 466; *United Brethren* v. *White* (1882), 100 Pa. 12.

My habits of life are correct and temperate and I am in sound condition mentally and physically except as herein stated.

Standard Life, etc. v. *Sale* (1903), 121 Fed. Rep. 664.

General declarations as to temperance and health.

Good life.

Ross v. *Bradshaw* (1760), 1 Wm. Bl. 312.

Perfect health.

Mutual Relief v. *Webster* (1889), 16 Can. S. C. 718.

Sound health.
Brown v. *Metropolitan Life* (1887), 65 Mich. 306; *Deitz* v. *Metropolitan Life* (1895), 168 Pa. 504; *Jacklin* v. *National* (1894), 75 Hun. 595.

State whether now and ordinarily enjoying good health.
British Equitable v. *Great Western* (1869), 20 L. T. 422.

Good health.
Hutchison v. *National Loan* (1845), 7 D. 467; *Goucher* v. *North-Western Travelling Insurance* (1884), 20 Fed. Rep. 596; *Campbell* v. *National* (1874), 24 U. C. C. P. 133; *Barnes* v. *Fidelity* (1899), 191 Pa. 618; *Manhattan Life* v. *Carder* (1897), 82 Fed. Rep. 986; *Peacock* v. *New York Life* (1859), 20 N. Y. 293; *Grattan* v. *Metropolitan Life* (1883), 92 N. Y. 274.

Sound constitution and good health.
Sieverts v. *National Benefit* (1895), 95 Iowa, 710.

In good health and nothing in my habits or condition which is likely to impair my health or shorten life.
Richards v. *Maine Benefit* (1892), 85 Me. 99.

No disorder tending to shorten life.
Watson v. *Mainwaring* (1813), 4 Taunt. 763.

Not aware of any disorder or circumstance tending to shorten life.
Jones v. *Provincial* (1857), 3 C. B. N. S. 65.

Not afflicted with any disorder tending to shorten life . . . and have not at any time been afflicted with [certain specified diseases].
Geach v. *Ingall* (1845), 14 M. & W. 95.

Never had any sickness or disease.
Life Insurance v. *Francisco* (1873), 17 Wall. 672; *Metropolitan Life* v. *M'Tague* (1887), 49 N. J. Law, 587; *Brown* v. *Metropolitan Life* (1887), 65 Mich. 306.

Free from any and all diseases.
Fidelity Mutual v. *Jeffords* (1901), 107 Fed. Rep. 402.

Sickness.
Mutual Benefit v. *Wise* (1871), 34 Ind. 582.

No disease or ailment.
Hubbard v. *Mutual Reserve* (1900), 100 Fed. Rep. 719.

Have been free from all ailments.
Sieverts v. *National Benefit* (1895), 95 Iowa, 710.

I have never had or been afflicted with any sickness disease ailment injury or complaint except as here stated.
Fidelity Mutual v. *Miller* (1898), 92 Fed. Rep. 68; *Penn Mutual* v. *Mechanics* (1896), 72 Fed. Rep. 413.

Ever had since infancy any and what other disease.
Cazenove v. *British Equitable* (1859), 6 C. B. N. S. 437; (1860), 29 L. J. C. P. 160.

Never had any serious illness local disease or personal injury.
Moore v. *Connecticut* (1878), 3 Ont. A. R. 230; *Equitable Life* v. *Keiper* (1908), 165 Fed. Rep. 595; *Doll* v. *Equitable Life* (1905), 138 Fed. Rep. 705; *Insurance Co.* v. *Wilkinson* (1871), 13 Wall. 222.

Severe injury or illness.
Goucher v. *North-Western* (1884), 20 Fed. Rep. 596; *Bancroft* v. *Home Benefit* (1890), 120 N. Y. 14.

Severe sickness or disease.
Boose v. *World Mutual Life* (1876), 64 N. Y. 236.

Bodily infirmity.
Cotten v. *Fidelity* (1890), 41 Fed. Rep. 506.

No bodily or mental infirmity.
Manufacturers v. *Dorgan* (1893), 58 Fed. Rep. 945; *Black* v. *Travellers' Insurance* (1903), 121 Fed. Rep. 732; *Bernays* v. *U. S. Mutual Accident* (1891), 45 Fed. Rep. 455; *Cotten* v. *Fidelity, etc., Casualty* (1890), 41 Fed. Rep. 506.

Declaration relating to specified diseases.

Never had any of the following diseases . . . affection of the liver . . . kidney disease.
Connecticut Mutual Life v. *Union Trust* (1884), 112 U. S. 250; *Moulor* v. *American Life* (1884), 111 U. S. 335; *Life Insurance* v. *Francisco* (1873), 17 Wall. 672; *Hubbard* v. *Mutual Reserve* (1900), 100 Fed. Rep. 719; *Hogan* v. *Metropolitan Life* (1895), 164 Mass. 448; *Cushman* v. *U. S. Life* (1877), 70 N. Y. 72; *Knickerbocker Life* v. *Trefz* (1881), 104 U. S. 197.

Gout.
Fowkes v. *Manchester* (1863), 3 B. & S. 917.

Rupture.
Aetna Insurance v. *France* (1875), 91 U. S. 510; *Leori* v. *Metropolitan Life* (1895), 163 Mass. 117.

Paralysis.
Cruickshank v. *Northern Accident* (1895), 23 R. 147.

Spitting of blood.
Geach v. *Ingall* (1845), 14 M. & W. 95; *March* v. *Metropolitan* (1898), 186 Pa. 629; *Driser* v. *Continental Insurance* (1885), 24 Fed. Rep. 670; *Campbell* v. *New England Mutual* (1867), 98 Mass. 381.

Cough.
Geach v. *Ingall* (1845), 14 M. & W. 95.

Disease of brain.
Knickerbocker Life v. *Trefz* (1831), 104 U. S. 197; *Higbie* v. *Guardian Mutual* (1873), 53 N. Y. 603.

Not been afflicted with nor is subject to epileptic or other fits.
Chattork v. *Shawe* (1835), 1 M. & Rob. 498; *Shilling* v. *Accidental Death* (1858), 1 F. & F. 116.

Declaration as to hereditary taint.

Q. Have the person's (whose life is to be insured) parents uncles aunts brothers or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart or any other hereditary disease? *A.* No hereditary taint of any kind in family on either side of house to my knowledge.
Insurance Co. v. *Gridley* (1879), 100 U. S. 614.

There is no history of consumption or insanity in my family, *i.e.* among parents brothers or sisters uncles or aunts.
Doll v. *Equitable Life* (1905), 138 Fed. Rep. 705.

Questions relating to last illness and medical attendance.

When last ill and nature of illness.
Brown v. *Metropolitan Life* (1887), 65 Mich. 306.

Name and residence of usual medical attendant.
Hutton v. *Waterloo Life* (1859), 1 F. & F. 735; *Maynard* v. *Rhodes* (1824), 5 Dow. & R. 266; *Cushman* v. *U. S. Life* (1877), 70 N. Y. 72; *Huckman* v. *Fernie* (1838), 1 H. & H. 149; *Everett* v. *Desborough* (1829), 5 Bing. 503.

What medical men have you consulted? When? And what for?
Joel v. *Law Union and Crown*, [1908] 2 K. B. 863.

Name and address of medical attendant or attendants employed on occasion of such disease.
Cazenove v. *British Equitable* (1859), 6 C. B. N. S. 437.

How long since you were attended by a physician.
Moore v. *Connecticut* (1878), 3 Ont. A. R. 230.

Consulted or attended by a physician.
Hubbard v. *Mutual Reserve* (1900), 100 Fed. Rep. 719.

Consulted or been prescribed for by a physician.
Metropolitan Life v. *M'Tague* (1887), 49 N. J. Law, 587; *Mutual Reserve* v. *Dobler* (1905), 137 Fed. Rep. 550; *Hubbard* v. *Mutual Reserve* (1900), 100 Fed. Rep. 719.

Attended by a physician for a complaint.
White v. *Provincial Savings* (1895), 163 Mass. 108.

Name of physician who last attended.
Brown v. *Metropolitan Life* (1887), 65 Mich. 306.

Give name and address of each physician who has prescribed for or attended you within the past five years and for what disease or ailments and date.
Brady v. *U. S. Life* (1894), 60 Fed. Rep. 727.

Have you ever been an inmate of any infirmary sanitarium institution asylum or hospital.

Farrell v. *Security Mutual* (1903), 125 Fed. Rep. 685.

Questions relating to other insurances or proposals.

Has the life been offered at any other office and if so has it been accepted and at what rate?

Anderson v. *Fitzgerald* (1853), 4 H. L. C. 484, 515; *Fowkes* v. *Manchester* (1862), 3 F. & F. 440; *Fidelity Mutual* v. *Miller* (1899), 92 Fed. Rep. 63; *Penn Mutual* v. *Mechanics* (1896), 72 Fed. Rep. 413; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363; *Macdonald* v. *Law Union* (1874), L. R. 9 Q. B. 328; *General Provincial Life, In re* (1870), 18 W. R. 396; *Manhattan Life* v. *Willis* (1894), 60 Fed. Rep. 236; *Phœnix Life* v. *Raddin* (1886), 120 U. S. 183; *Webb* v. *Security Mutual Life* (1904), 126 Fed. Rep. 635; *Home Life* v. *Myers* (1901), 119 Fed. Rep. 847.

Have you any other insurance?

Mutual Reserve Life v. *Dobler* (1905), 137 Fed. Rep. 550.

State amount of insurance you now carry on your life with name of company or association by whom granted and the year of issue.

Metropolitan Life v. *Montreal Coal Co.* (1904), 35 Can. S. C. 266.

Questions relating to temperance.

Are you of sober and temperate habits?

Thomson v. *Weems* (1884), 9 A. C. 671; *Hutton* v. *Waterloo Life* (1859), 1 F. & F. 735; *Rawlins* v. *Desborough* (1840), 2 M. & Rob. 328; *Southcombe* v. *Merriman* (1842), Car. & M. 286; *Life Association of Scotland* v. *M'Blain* (1875), Ir. R. 9 Eq. 176; *Jones* v. *Brooklyn Life* (1874), 61 N. Y. 79; *Van Valkenbrugh* v. *American Popular Life* (1877), 70 N. Y. 605; *Knickerbocker Insurance* v. *Foley* (1881), 105 U. S. 350; *Aetna Life* v. *Davey* (1887), 123 U. S. 739.

Do you drink wine spirits or malt liquor? If so which of these and to what extent? Have you ever used them freely or to excess?

Home Life Insurance v. *Fisher* (1902), 188 U. S. 726; *Provident Savings Life* v. *Exchange Bank* (1904), 126 Fed. Rep. 360; *Provident Savings Life* v. *Hadley* (1900), 102 Fed. Rep. 856.

Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium or does he use any of them often or daily?

Aetna Life v. *Davey* (1887), 123 U. S. 739.

Does not nor will he practise any pernicious habit which obviously tends to the shortening of life.

Knecht v. *Mutual Life* (1879), 90 Pa. 118.

General question requiring all relevant matters to be disclosed.

Are there any other circumstances within your knowledge which the directors ought to be acquainted with?

Lindenau v. *Desborough* (1828), 3 Man. & Ry. 45; *Connecticut Mutual* v. *M'Whirter* (1896), 73 Fed. Rep. 444.

I hereby warrant and agree that I am temperate in my habits now in good health and ordinarily enjoy good health and that in the statements and answers in this application no circumstance or information has been withheld touching my past and present state of health and habits of life with which the company ought to be made acquainted.

Penn. Mutual v. *Mechanics* (1896), 72 Fed. Rep. 413.

No statements *dehors* application to have any effect.

It is covenanted and agreed that no statements or representations made or given to the person soliciting this application for a policy of insurance shall be binding on the said company unless such statements or representations be in writing in this application when the said application is received by the officers of the said company at the home office of the said company.

Continental Insurance v. *Chamberlain* (1889), 132 U. S. 304; *New York Life* v. *Fletcher* (1886), 117 U. S. 519.

Instruction as to signature where insurance on life of spouse applied for.

Under no circumstances can an application be written upon the life of a husband for the benefit of a wife or on the life of a wife for the benefit of a husband unless the life fully understands and consents to the insurance . . . and personally signs the examination form on the back of the application.

Wakeman v. *Metropolitan Life* (1899), 30 Ont. 705; *Mailhoit* v. *Metropolitan Life* (1895), 87 Me. 374.

8. Conditions relating to Authority of Agents to alter Contracts or waive Forfeiture

Effect of such conditions.

Such clauses operate as notice to the assured that agents have no power to alter contracts or waive compliance with conditions (*g*) and that the officers of the company have only authority to do so by endorsement on the policy. The condition however may, like any other condition in the policy in its favour, be waived by the conduct of the company itself in permitting its officers or agents to act contrary to the conditions (*h*). It has also been held not to apply to arrangements, made by the assured with an agent, which are conditions precedent to the contract of insurance (*i*).

Conditions which have been judicially construed.

Authority of agents.

No person except one of the executive officers designed on the back of the policy is authorised to make alter or discharge contracts or waive forfeitures.
Horncastle v. *Equitable* (1906), 22 T. L. R. 735.

No agent of the company has power to make or modify this or any contract of insurance . . . or to bind the company by making any promise or receiving any representations or information.
Harnickell v. *New York Life* (1888), 111 N. Y. 390; *Iowa Life* v. *Lewis* (1902), 187 U. S. 335.

Agents of the company are not authorised to make alter or abrogate contracts or waive forfeitures.
Insurance Co. v. *Norton* (1877), 96 U. S. 234.

No waiver except by indorsement signed as prescribed.

No waiver alteration or modification of this contract shall be binding upon the company unless the same is enclosed hereon or attached hereto and signed by the president or secretary of the company.
Pennsylvania Casualty v. *Bacon* (1904), 133 Fed. Rep. 907; *Mutual Reserve Life* v. *Cleveland Woollen Mills* (1897), 82 Fed. Rep. 508.

9. Clause providing that Policy shall be indisputable

Object of clause.

The object of this clause is to give the assured a feeling of absolute security in the validity of his policy and to render the policy more valuable as a marketable asset.

Effect of clause.

A proviso that the policy shall be indisputable except on the ground of fraud after the lapse of the specified period means that even although the policy was *ab initio* voidable on the ground of innocent misrepresentation or breach of warranty if it has run for the specified period without having been avoided by the company the company cannot at any time thereafter avoid it on such grounds (*k*). Nor can the company after the lapse of the specified period avoid the policy for any breach of warranty committed at any time during the currency of the policy (*k*).

(*g*) *Horncastle* v. *Equitable* (1906), 22 T. L. R. 735; *Iowa Life* v. *Lewis* (1902), 187 U. S. 335; *Pennsylvania Casualty* v. *Bacon* (1904), 133 Fed. Rep. 907.
(*h*) *Insurance Co.* v. *Morton* (1877), 96 U. S. 234; *Mutual Reserve Life* v. *Cleveland Woollen Mills* (1897), 82 Fed. Rep. 508.
(*i*) *Harnickell* v. *New York Life* (1888), 111 N. Y. 390.
(*k*) *Anstey* v. *British Premium Life* (1908), 24 T. L. R. 871; *North American Life* v. *Elson* (1903), 33 Can. S. C. 383.

Method of reckoning period after which clause takes effect.

Where a policy was issued subject to the condition that it should not be in force until the first premium was paid and the premium was not paid until some ten days after the day upon which the policy was dated and issued it was held nevertheless that the time during which the policy should be deemed to have been in force within the meaning of the indisputable clause should be reckoned from the day on which the policy was dated and issued (*l*). Where the condition was that the policy should be indisputable after it had been in force three years and there was a condition precedent that the policy should not come into force unless the first premium was paid in the assured's lifetime and while in good health and the condition as to good health was broken it was held that that defence could not be taken after the lapse of three years from the delivery of the policy and payment of the premium (*m*).

Defences of illegality, mistake, or fraud not precluded.

The indisputable clause cannot however preclude the company from taking the defence that the policy was illegal for want of insurable interest or otherwise nor from taking the defence that there never was any contract between the parties as for instance that there was a mistake or error *in essentialibus* (*n*). Neither does the clause prevent the company from alleging that the policy was induced by fraud (*o*), nor does it prevent the lapse of the policy from non-payment of the premium (*p*).

Where policy in hands of assignee.

The assignee of an indisputable policy does not take any better title than his assignor. The defences of illegality, error *in essentialibus* and fraud are accordingly open to the insurers even although the indisputable clause is in the widest possible terms and the assignee has taken for value and without notice.

The only way in which the assignee can protect himself against the possible fraud of the assured is to become a party to the contract in his own right and not merely as assignee of the assured's interest.

Clauses which have been judicially construed.

After five years and age admitted.

When the policy shall have been five years in existence and shall have the age of the assured admitted thereon it shall thereafter be indisputable on any ground whatever except fraud.

Anctil v. *Manufacturers' Life*, [1899] A. C. 604.

After three years.

If the policy shall have been in continuous force for three years from its date it shall thereafter be incontestable except for non-payment of premiums as herein provided or for misstatement of the age of the member in the application therefor.

Mutual Reserve Fund Life v. *Austin* (1905), 142 Fed. Rep. 398.

After being in force three years the only conditions which shall be binding upon the holder of the policy are that he shall make the payments hereon as herein provided and that the provisions as to military and naval service and as

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(*l*) *North American Life* v. *Elson* (1903), 33 Can. S. C. 383.
(*m*) *Mutual Reserve Fund Life* v. *Austin* (1905), 142 Fed. Rep. 398.
(*n*) *Anctil* v. *Manufacturers' Life*, [1899] A. C. 604.
(*o*) *Anstey* v. *British Premium Life* (1908), 24 T. L. R. 871.
(*p*) *Schmertz* v. *U. S. Life Insurance Co.* (1902), 115 Fed. Rep. 251.

to proof of age and death shall be observed. In all other respects after the expiration of the said three years the liability of the company under this policy shall not be disputed.

North American Life Assurance Co. v. *Elson* (1903), 33 Can. S. C. 383.

After two years from the date hereof if the premiums on this policy are duly paid as herein stipulated the liability of the company under the policy shall not be disputed. After two years.

Schmertz v. *U. S. Life Insurance Co.* (1902), 118 Fed. Rep. 251.

This policy except as provided herein shall be indisputable from any cause (except fraud) after it shall have been continuously in force for two years.

Anstey v. *British Natural Premium* (1908), 24 T. L. R. 871.

10. Conditions giving Assured a Right to demand a Loan or Surrender Value

In a Scottish case (*q*) a surrender clause in a sickness and accident policy was held to be a standing offer to the assured. The assured stated to the office that he had decided to accept the surrender value, but before the formal documents connected with the surrender had been executed the assured made a claim on the policy in respect of sickness. It was held that as the offer to pay a surrender value had been accepted he had no other claim under the policy.

Conditions which have been judicially construed.

At any time after this policy has been in force for one full year and premiums have been paid up to the anniversary of the insurance next after the date when the loan is made the company will lend upon demand upon the sole security of this policy the respective sum named in the table of cash loans herein which shall include any previous loan then unpaid. Interest shall be at 5 per cent. per annum in advance. Promise to grant loan on policy.

Lewis v. *New York Life* (1909), 173 Fed. Rep. 1009; *Schumaker* v. *Security Life* (1907), 153 Fed. Rep. 332.

At any time after five years' premiums have been paid this policy may be surrendered for a cash payment which in no case will be less than one third of the whole premiums received and will increase with the duration of the policy. Surrender for cash.

Ingram Johnson v. *Century Insurance* (1909), 46 S. L. R. 746.

11. Participating Policy Clause

This policy during its continuance shall be entitled to participate in the distribution of the surplus of this society by way of increase to the amount insured according to such principles and methods as may from time to time be adopted by this society for such distribution which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract but the society may at any time before a forfeiture upon the request of the person holding the absolute legal title to this policy substitute a cash payment to be fixed by said society in lieu of the said increase to the amount insured and such payment may be made by reduction of subsequent premiums if said policy holders shall so elect. Provisions for application of bonus.

Baerlein v. *Dickson* (1909), 25 T. L. R. 585; *Rosmead* v. *Norwich Union* (1898), 15 T. L. R. 9; *Equitable Life* v. *Brown* (1900), 213 U. S. 25; *Brown* v. *Equitable Life* (1907), 151 Fed. Rep. 1; *Gadd* v. *Equitable Life* (1907), 151 Fed. Rep. 1.

(*q*) *Ingram Johnson* v. *Century Insurance* (1909), 46 S. L. R. 746.

12. Conditions requiring Notice and Proof of Death

See Chapter VI., Section I., pp. 393–406.

Conditions which have been judicially construed.

Immediate notice; proofs within seven months.

Representatives shall give immediate notice in writing to the company stating the time place and cause of death . . . and shall within seven months thereafter by direct and reliable evidence furnish the company with proofs of the same giving full information.
Travellers' Insurance v. *Edwards* (1886), 122 U. S. 457

Satisfactory evidence.

[Sum insured made payable] on satisfactory evidence of the death of the insured.
Life Insurance v. *Francisco* (1873), 17 Wall. 672; *Knickerbocker Life* v. *Pendleton* (1884), 112 U. S. 696; *Iowa Life* v. *Lewis* (1902), 187 U. S. 335; *Crotby* v. *Union Mutual* (1891), 144 U. S. 621; *Grattan* v. *Metropolitan Life* (1880), 80 N. Y. 281.

Payment due within specified period after proof.

Ninety days after satisfactory proof of a valid claim.
Home Life v. *Randall* (1899), 30 Can. S. C. 97.

Sixty days after due notice and proof of such notice.
O'Reilly v. *Guardian Mutual Life* (1875), 60 N. Y. 169.

On the lapse of three calendar months after proof shall have been given of the death of the assured to the satisfaction of the directors of the said company.
Doyle v. *City of Glasgow Life* (1884), 53 L. J. Ch. 527.

Notice and proof within ninety days.

Notice of claim and proof of death shall be submitted to the company within ninety days after decease.
M'Elroy v. *Hancock Mutual Life* (1898), 88 Md. 137.

Full proofs.

Full proof on oath shall be furnished.
Insurance Co. v. *Newton* (1874), 22 Wall. 32; *Cushman* v. *U. S. Life* (1875), 63 N. Y. 404; *Hassencamp* v. *Mutual Benefit Life* (1903), 120 Fed. Rep. 477; *Cluff* v. *Mutual Benefit Life* (1868), 99 Mass. 317.

Full proofs shall be presented within twelve months from the time the loss occurs.
Prentice v. *Knickerbocker Life* (1879), 77 N. Y. 483.

The proposer . . . alleging that he is interested in the life of the assured . . . (of which allegation satisfactory proof has to be furnished to the directors).
Cowell v. *Yorkshire Provident* (1901), 17 T. L. R. 452.

Section III.—Fire Policies

1. Clauses describing Property Insured

These clauses are discussed in Chapter V., Section VI., pp. 360–375.

Clauses which have been judicially construed.

Description may be a representation, definition, or warranty.

Built of brick and slated.
Universal Non Tariff, In re (1875), L. R. 19 Eq. 485.

Warranted in stone and brick buildings.
Allom v. *Property Insurance* (1911), The Times, Feb. 9.

Warranted conformable to the first class of cotton and woollen rates delivered herewith.
Newcastle Fire v. *Macmorran & Co.* (1815), 3 Dow. 255.

On main building.
Aetna Insurance v. *A.-G. of Ontario* (1890), 18 Can. S. C. 707.

Goods in D. & Co.'s car factory.
Blake v. *Exchange Mutual* (1882), 78 Mass. 265.

In that one and a half story frame building occupied as a store-house, said building shown on plan on back of application.
Guardian Insurance v. *Connely* (1891), 20 Can. S. C. 208.

Warranted to be in conformity with the description lodged at the office.
Hare v. *Barstow* (1843), 8 Jur. 928.

How bounded and distance from other buildings if less than 10 rods.
Gates v. *Madison Country* (1851), 5 N. Y. 469.

Warranted by the assured that a continuous clear space of 100 feet shall hereafter be maintained between the property hereby insured and any wood-working or manufacturing establishment.
Petit v. *German Insurance* (1898), 98 Fed. Rep. 800.

Nature and material structure of the building and property insured.
Baxendale v. *Harvey* (1859), 4 H. & N. 445.

On grist mill valued at $6000.
Shannon v. *Gore District Mutual* (1878), 2 Ont. A. R. 396.

On stock . . . in premises situated at Nos. 754 and 756, George Street, Sydney, built of stone and brick roofed with slate and iron attached on the north to brick iron and shingles and on the south to brick and slate and occupied by the assured as a shop or dwelling.
Hordern v. *Commercial Union* (1884), 5 N. S. W. R. (Law) 309.

On building (Pianoforte Factory) Grover and Grover (Ltd.), The Bank House, Newington Green, N.
Grover v. *Matthews* (1910), 26 T. L. R. 411.

Stock-in-trade, household furniture, linen, wearing apparel and plate.
Watchorn v. *Langford* (1813), 3 Camp, 422.

Stock-in-trade consisting of corn, seed, hay, straw, fixtures and utensils in business.
Joel v. *Harvey* (1857), 5 W. R. 488.

$1000 on general stock-in-trade of groceries.
Butler v. *Standard Fire* (1879), 4 Ont. A. R. 391.

On 120 sacks of green coffee while stored in the three-story brick patented roofed building X.
Merchants Fire v. *Equity Fire* (1905), 9 Ont. L. R. 241.

On rick of hay in hay-yard £400, on smaller rick of hay in said hay-yard £200.
Gorman v. *Hand-in-Hand* (1877), Ir. R. 11 C. L. 224.

$800 on his wagons, harnesses, covers, poles and stack ropes and other tent equipments not more hazardous all while contained in the frame shingle roof barn A. B.
Mead v. *American Fire* (1897), 13 Hun. 476.

On merchandise in all or any of the brick or stone warehouses and while *in transitu* in or on any of the streets, yards or wharves of the cities of New York, etc., but if any specific parcel be insured in this or any other office, this policy shall not extend to cover the same excepting only as far as relates to any excess of value beyond the amount of such specific insurance.
Fairchild v. *Liverpool and London* (1872), 51 N. Y. 65.

Upon wool in any shed or store on station, or in transit to Sydney by land only, or in any shed or store or any wharf in Sydney, until placed on ship.
Australian Agricultural Insurance v. *Saunders* (1875), L. R. 10 C. P. 660.

Upon rolling stock . . . upon the line of the road hereby insured and its branches, spars, side-tracks, and yards owned or operated by the insured . . . but this insurance shall not apply on the line of any road leased by the insured unless the name of such leased road is specified.
Liverpool, London and Globe v. *M'Neill* (1898), 89 Fed. Rep. 131.

Upon vessel X whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months.
London Assurance v. *Great Northern Transit Co.* (1899), 29 Can. S. C. 577.

Upon goods their own or held by them in trust or on commission. Trust or commission clause.
Pittsburg Storage Co. v. *Insurance Co.* (1895), 168 Pa. 522; *Roberts* v. *Firemen's Insurance* (1894), 165 Pa. 55; *California Insurance* v. *Union Compress* (1890), 133 U. S. 387; *Hough* v. *People's Fire* (1872), 36 Ind. 398; *De Forest* v. *Fulton Fire* (1828), 1 Hall (N. Y.) 94.

Goods . . . held by them in trust or on commission for which they are responsible.
North British and Mercantile v. *Moffat* (1871), L. R. 7 C. P. 25; *North British and Mercantile* v. *London Liverpool and Globe* (1877), 5 Ch. D. 569.

Merchandise their own or held by them in trust or in which they have an interest or liability.

Home Insurance v. *Baltimore* (1876), 93 U. S. 527.

Goods his own or held by him in trust for others or sold, but not delivered, while in custody of B. & Co. warehousemen.

Granolin v. *Rochester German Insurance* (1884), 107 Pa. 26; *Pelzer Manufacturing Co.* v. *St. Paul Fire and Marine* (1890), 41 Fed. Rep. 271.

On goods sold but not delivered.

Lockhart v. *Cooper* (1882), 87 N. C. 514; 42 Am. R. 514.

On goods sold but not removed.

Waring v. *Indemnity Fire* (1871), 45 N. Y. 606; 6 Am. R. 146.

The assured's property or held by the assured (warehouseman) on trust or commission, loss, if any, payable to A (owner) as interest may appear.

Traders' Insurance v. *Pacund* (1894), 150 Ill. 245.

General exception of money, securities, etc.

Money, books of account, securities for money and evidences of debt or title are not insured.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (6).

Plate, plate glass, plated ware, jewelry, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of vertu, frescoes, clocks, watches, trinkets, and mirrors are not insured unless mentioned in the policy.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (7).

2. Clauses describing Risk and Exceptions therefrom

These clauses are discussed in Chapter VII., Section I., pp. 666–671.

Clauses which have been judicially construed.

Risks generally excepted.

The company is not liable for the losses following, that is to say:—

(*a*) For the loss of property owned by any other party than the assured unless the interest of the assured is stated in or upon the policy.

(*b*) For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power.

(*c*) Where the insurance is upon buildings or their contents: for the loss caused by want of good and substantial brick or stone chimneys; or by ashes or embers being deposited with the knowledge and consent of the assured in wooden vessels; or by stoves or stove-pipes being to the knowledge of the assured in an unsafe condition or improperly secured.

(*d*) For loss or damage to goods destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary.

(*e*) For loss or damage occurring to buildings or to their contents while the buildings are being repaired by carpenters, joiners, plasterers, or other workmen, and in consequence thereof, unless permission to execute such repairs has been previously granted in writing signed by a duly authorized agent of the company. But in dwelling-houses 15 days are allowed in each year for incidental repairs without such permission.

(*f*) For loss or damage occurring while petroleum or rock-earth or coal-oil, camphene, gasoline, burning fluid, benzene, naphtha or any liquid products thereof, or any of their constituent parts (refined coal-oil for lighting purposes only not exceeding five gallons in quantity, or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes not exceeding five gallons in quantity, excepted), or more than 25 lbs. weight of gunpowder is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (10).

(*a*) *Davidson* v. *Waterloo Mutual Fire* (1905), 9 Ont. L. R. 394.

(*f*) *Equity Fire* v. *Thompson* (1909), 41 Can. S. C. 491; reversed by P. C. (1910), 25 T. L. R. 287; *Mitchell* v. *City of London Assurance* (1888), 15 Ont. A. R. 262.

Invasion, insurrection, riot, etc.

This Company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or through any volcano, earthquake, or hurricane, or other eruption, convulsion, or disturbance, or by theft, or by neglect of the assured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighbouring premises, or (unless a fire ensues, and in that event for the damage by fire only) by explosion or any kind of lighting.

Williamsburgh City Fire v. *Baker* (1908), 164 Fed. Rep. 404.

Not to cover loss or damage by fire happening during the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law within the county or locality in which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage was not occasioned by or connected with but occurred from a cause or causes independent of the existence of such invasion, etc.

Royal Insurance v. *Martin* (1903), 192 U. S. 149.

Riot or civil commotion.

Field v. *Receiver of Metropolitan Police*, [1907] 2 K. B. 853; *Langdale* v. *Mason* (1780), Park Ins., 8th ed., 965; *Wyoming Fire* v. *Schwenk* (1880), 95 Pa. 89.

Military or usurped power.

Drinkwater v. *London Assurance* (1767), 2 Wils. 363; *City Fire* v. *Corlies* (1839), 21 Wend. 367; *Insurance Co.* v. *Boon* (1877), 95 U. S. 117.

By order of any civil authority.

Conner v. *Manchester Assurance* (1904), 130 Fed. Rep. 743.

Earthquake, hurricane, etc.

Not to cover loss or damage by fire during (unless it be proved by the assured that the loss or damage was not occasioned thereby) or in consequence of invasion, insurrection . . . earthquake or hurricane.

Scottish Union and National v. *Atfred Pawsey, Ltd.* (1908), *The Times*, October 17.

By or through earthquake.

Tootal Broadhurst Lee v. *London and Lancashire* (1908), *The Times*, May 21; *Williamsburgh Fire* v. *Baker* (1908), 164 Fed. Rep. 404; *Commercial Assurance* v. *Pacific Union* (1909), 169 Fed. Rep. 776.

Directly or indirectly by earthquakes.

Richmond Coal Co. v. *Commercial Union* (1908), 159 Fed. Rep. 985.

Shall cover loss or damage by lightning . . . but in no case to include loss or damage by cyclone, tornado, or wind.

Beaker v. *Phœnix Insurance* (1894), 143 N. Y. 402; *Holmes* v. *Phœnix Insurance* (1899), 98 Fed. Rep. 240.

Loss or damage by cyclone.

Maryland Casualty v. *Finch* (1906), 147 Fed. Rep. 388.

Explosion.

Loss or damage by explosion.

Stanley v. *Western* (1868), L. R. 3 Ex. 71; *Taunton* v. *Royal Insurance* (1864), 2 H. & M. 135; *Insurance Co.* v. *Tweed* (1868), 7 Wall. 44; *American Steam Boiler Insurance* v. *Chicago Sugar Co.* (1892), 57 Fed. Rep. 294; *Dows* v. *Faneuil Hall Insurance* (1879), 127 Mass. 346; *Smiley* v. *Citizens' Insurance* (1878), 14 W. Va. 33; *Tannerct* v. *Merchants' Mutual* (1882), 34 La. Ann. 249.

Not liable for loss in case of fire happening by any insurrection . . . nor explosions of any kind.

Heffron v. *Insurance Co.* (1890), 132 Pa. 580.

Loss occasioned by the explosion of a steam boiler.

St. John v. *American Mutual* (1854), 11 N. Y. 516.

Not liable for any loss caused by explosion unless fire ensues, and then for the loss or damage by fire only.

Transatlantic Fire v. *Dorsey* (1880), 56 Ind. 70; *Washburn* v. *Farmers' Insurance* (1880), 2 Fed. Rep. 304; *Briggs* v. *American Mercantile* (1873), 53 N. Y. 446; *Mitchell* v. *Potomac Insurance* (1901), 183 U. S. 42.

Not liable for loss caused by explosion except for such loss or damage as shall arise from explosion by gas.

Stanley v. *Western* (1868), L. R. 3 Ex. 71.

The Company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, sec. 168 (11); *Hobbs* v. *Guardian* (1886), 12 Can. S. C. 631.

Not liable for loss or damage occasioned by the keeping of explosive substances in quantities exceeding the allowance by local or civil laws . . . or the storage on or in the premises of gunpowder, nitro-glycerine, etc., except when such are used in manufacture, and then only in such quantities as shall be deemed necessary to the carrying on of such trade and as customary thereto. Any excessive, unnecessary, or unusual quantity will void the insurance thereon.

Hammond v. *Citizens* (1886), 26 N. Br. 371.

No loss is to be paid arising from petroleum or other explosive oils.

Insurance Co. v. *Express Co.* (1877), 95 U. S. 227.

Incendiarism. Not liable for any loss occasioned by or in consequence of incendiarism.

Walker v. *London Provincial* (1888), L. R. I. 23 C. L. 572; *Thurtell* v. *Beaumont* (1824), 8 Moore, 612.

Gross negligence. In case of gross negligence of the assured the policy shall be absolutely void.

Campbell v. *Monmouth Mutual* (1871), 59 Me. 430.

Fall of building. If a building shall fall except as the result of fire all insurance on it or its contents shall immediately cease and determine.

Tootal Broadhurst Lee v. *Lancashire and Fire* (1908), *The Times*, May 21; *Orient Insurance* v. *Leonard* (1902), 120 Fed. Rep. 808; *Foster* v. *Home Insurance* (1906), 143 Fed. Rep. 307; *Phœnix Insurance* v. *Luce* (1903), 123 Fed. Rep. 257; *Kiesel & Co.* v. *Sun Insurance* (1898), 88 Fed. Rep. 243; *Dows* v. *Faneuil Hall Insurance* (1879), 127 Mass. 346; *Huck* v. *Globe Insurance* (1879), 127 Mass. 306; *Western Assurance* v. *Mohlman* (1897), 83 Fed. Rep. 811.

Loss caused by removal. Where property insured is only partially damaged, no abandonment of the same will be allowed unless by the consent of the company or its agent, and in case of removal of property to escape conflagration the company will contribute to the loss and expenses attending such act of salvage proportionately to the respective interests of the company or companies and the assured.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, sec. 168; *Thompson* v. *Insurance Co.* (1850), 6 U. C. Q. B. 319; *M'Laren* v. *Commercial Union* (1885), 12 Ont. A. R. 279.

Not to cover damage caused by the removal of property from a building except it be proved that such removal was necessary to preserve the property.

Balestracci v. *Insurance Co.* (1802), 34 La. Ann. 844.

Theatre. Not to cover any loss or damage by fire which may originate in the theatre proper.

Sohier v. *Norwich Fire* (1865), 93 Mass. 336.

Plate glass, all risks other than fire, etc. All loss or damage originating from any cause whatsoever except fire, breakage during removal, alteration or repair of premises.

Marsden v. *City and County* (1866), L. R. 1 C. P. 232.

3. Conditions relating to Payment of Premiums and Duration of Risk

This subject is discussed in Chapter IV., pp. 228–267.

Conditions which have been judicially construed.

No insurance until premium paid. No insurance is considered by this office to take place until the premium be actually paid by the assured his her or their agent or agents.

Newcastle Fire v. *MacMorran* (1815), 3 Dow. 255; *Insurance Co.* v. *Colt* (1874), 20 Wall. 560; *Becker* v. *Exchange Mutual Fire* (1908), 165 Fed. Rep. 816; *Western Assurance* v. *Provincial* (1880), 5 Ont. A. R. 190.

Not liable for loss before payment of premium. Provided that this policy will not be in force until nor will the company be liable in respect of any loss or damage happening before the premium or deposit on account thereof is actually paid.

Equitable Fire and Accident v. *The Ching Wo Hung*, [1907] A. C. 96.

Renewal premium.

And during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company and for which the company shall have issued a renewal receipt or receipts.

Doherty v. *Millers' and Manufacturers' Insurance* (1902), 4 Ont. L. R. 303; 6 Ont. L. R. 78.

Premium note dishonoured.

Where a note is received the company shall not be liable for any loss or damage under this policy occurring at the time when such note or part thereof given for such premium in whole or in part shall be part due or unpaid.

Schultz v. *Hawkeye Insurance* (1875), 42 Iowa, 239; *Nedrow* v. *Farmers' Insurance* (1876), 43 Iowa, 24; *Garlick* v. *Mississippi Valley Insurance* (1876), 44 Iowa, 553.

In case any promissory note for a cash premium or for any payment or assessment on any premium note or undertaking given to the company or to any officer or agent thereof be not paid when due, the policy in connection with which such promissory note shall have been given shall be null and void and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note.

Ballagh v. *Royal Mutual Fire* (1880), 5 Ont. A. R. 82.

4. Conditions avoiding the Policy for Misdescriptions or Omissions

This subject is discussed in Chapter V., Section VI., pp. 360–375.

Conditions which have been judicially construed.

Warranty that there is no material misdescription, misstatement, or concealment.

Any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which the property to be so insured is contained, and any misstatement of or omission to state any fact material to be known for estimating the risk renders the policy void as to the property affected by such misdescription, misstatement or omission respectively.

Universal Non-Tariff Fire, In re (1875), L. R. 19 Eq. 485.

If in the said application the assured shall make any erroneous or untrue representation or statement or omit to make known to the company any fact material to the risk . . . this policy shall be void.

Parsons v. *Standard Insurance* (1879), 4 Ont. A. R. 396 (6 Ont. A. R. 521; 5 Can. S. C. 233).

If any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

Statutory Conditions, Revised Statutes of Ontario, 1897, ch. 203, sec. 168 (1); *Moore* v. *Citizens Fire* (1888), 14 Ont. A. R. 582; *Findley* v. *Fire Insurance* (1894), 25 Ont. R. 515; *Reddick* v. *Saugeen Mutual* (1888), 15 Ont. A. R. 363; *Butler* v. *Standard Fire* (1879), 4 Ont. A. R. 391; *Lount* v. *London Mutual Fire* (1905), 9 Ont. L. R. 549; *Davidson* v. *Waterloo Mutual Fire* (1905), 9 Ont. L. R. 394; *Coulter* v. *Equity Fire* (1904), 9 Ont. L. R. 35; *Fritzley* v. *Germania, etc., Fire* (1909), 19 Ont. L. R. 49.

The representations made in the application for insurance shall contain a just full and true value of the property insured so far as the same are known to the assured; and if any material fact or circumstance shall not have been fairly represented, the policy shall cease and be of no further effect.

Billington v. *Provincial Insurance* (1879), 3 Can. S. C. 182.

Any fraudulent misrepresentation in the application, or any false or incorrect statement representing the title or ownership of the applicant, or the concealment of any mortgage or execution or any incumbrance on the property or on the land on which it is situate shall avoid the contract.

Reddick v. *Saugeen Mutual* (1888), 15 Ont. A. R. 363; *Redford* v. *Mutual Fire* (1876), 38 U. C. Q. B. 538; *Riach* v. *Niagara District Mutual* (1871), 21 U. C. C. P. 464; *Shannon* v. *Hastings Mutual* (1875), 25 U. C. C. P. 470; *Schuster* v. *Dutchess County Insurance* (1886), 102 N. Y. 260; *Sinclair* v. *Canadian Mutual* (1876), 40 U. C. Q. B. 206.

Warranty that representations in application contain a full and true exposition of risk.

The assured hereby covenants and engages that the representation given in the application for this insurance is a warranty on the part of the assured, and contains a just true and full exposition of all the facts and circumstances in regard to the condition situation and value of the property insured . . . application for insurance on property shall specify the construction and material of the building to be insured . . . by whom occupied its situation . . . whether any manufacture is carried on within or about it, and such description or specification shall be deemed a part of this policy and a warranty on the part of the insured.

Blake v. *Exchange Mutual* (1858), 78 Mass. 266.

If there shall be any untrue or inaccurate statement whether intentional or not.

Parsons v. *Citizens' Insurance* (1878), 43 U. C. Q. B. 261; *Williams* v. *Commercial Union* (1876), 26 U. C. C. P. 591; *Butler* v. *Standard Fire* (1879), 4 Ont. A. R. 391.

Warranty that premises are accurately described.

Persons insuring will forfeit their rights unless the buildings insured or containing the goods insured be accurately described the trades carried on therein specified and the nature of the property correctly stated.

Shaw v. *Robberds* (1837), 6 A. & E. 75; *Pim* v. *Reid* (1843), 6 Man. & Tr. 1; *Friedlander* v. *London Assurance* (1832), 1 M. & Rob. 171.

Unless the nature and material structure of the buildings and property insured . . . be fully and accurately described.

Baxendale v. *Harvey* (1859), 4 H. & N. 445.

If the assured causes the premises to be described otherwise than they really are to the prejudice of the company.

Sly v. *Ottawa* (1879), 29 U. C. C. P. 557.

Warranty that premises are truly and accurately described.

The applicant shall specify in writing of what materials such buildings are respectively constructed both externally and internally, where situated and by whom occupied: and whether as private dwellings or how otherwise . . . and if such specification do not truly and circumstantially describe the property and the several particulars regarding the same as aforesaid so that the nature and degree of the risk may be justly estimated the policy or insurance thereon shall be null and void.

Hordern v. *Commercial Union* (1884), 5 N. S. W. R. (Law), 309.

Houses, buildings, etc. . . . shall be truly and accurately described.

Freidlander v. *London Assurance* (1832), 1 M. & Rob. 171.

Warranty that risk is accurately and fully described so far as known to assured.

It is hereby declared that the foregoing is a just full and true exposition of all the facts and circumstances in regard to the condition situation value and risk of the property to be insured so far as the same are known to the applicant and material to the risk, and the said applicant hereby agrees and consents that the same shall be held to form the basis of the liabilities of the company.

North British and Mercantile v. *McLellan* (1892), 91 Can. S. C. 288; *Stott* v. *London and Lancashire Fire* (1891), 21 Ont. R. 312; *Kerr* v. *Hastings Mutual Fire* (1877), 41 U. C. Q. B. 217; *National Bank* v. *Hartford* (1877), 95 U. S. 673.

If any person shall insure his building or goods and shall cause them to be described otherwise than they really are to the prejudice of the company, or should misrepresent or omit to communicate any circumstance material to be made known to the company in order to enable them to judge of the risk they undertake such insurance shall be of no force.

Butler v. *Standard Fire* (1879), 4 Ont. App. 391; *Klein* v. *Union Fire* (1883), 3 Ont. 234; *Hammond* v. *Citizens' Insurance* (1886), 26 N. Br. 371.

Description of premises to constitute a warranty except in so far as a plan is prepared by company's agent.

And such application or any survey, plan or description of the property to be referred to herein shall be considered a part of this policy and every part of it a warranty by the assured, but this company will not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. . . . And in case any agent takes part in the preparation of the application for this insurance he shall with the exception above provided for in case of a diagram or plan, be regarded in that work as the agent of the applicant.

Quinlan v. *Union Fire Insurance* (1883), 8 Ont. A. R. 376; *Norwich Union Fire* v. *Le Bell* (1899), 29 Can. S. C. 470; *Beacon Life and Fire* v. *Gibb* (1862), 1 Moore, P. C. (N.S.) 73; *May* v. *Buckeye Mutual* (1870), 25 Wis. 291.

If the insured shall cause the property to be insured for more than its value the policy shall be void. Warranty against over-valuation.

Field v. *Insurance Co.* (1874), 6 Biss. 121; *Miller* v. *Alliance* (1881), 7 Fed. Rep. 649.

Value.

Harrington v. *Fitchburg Insurance* (1878), 124 Mass. 126; *Franklin Fire* v. *Vaughan* (1875), 92 U. S. 516; *Redford* v. *Mutual Fire* (1876), 38 U. C. Q. B. 538; *Parsons* v. *Citizens' Insurance* (1878), 43 U. C. Q. B. 261; *Williams* v. *Commercial Union* (1876), 26 U. C. C. P. 591; *National Bank* v. *Hartford* (1877), 95 U. S. 673; *Riach* v. *Niagara District Mutual* (1871), 21 U. C. C. P. 464; *Sly* v. *Ottawa* (1879), 29 U. C. C. P. 557; *Shannon* v. *Hastings Mutual* (1875), 25 U. C. C. P. 470.

Present cash value.

Moore v. *Citizens' Fire* (1888), 14 Ont. A. R. 582.

5. Condition that Policy shall be deemed to be in accordance with Application

See Chapter III., Section VII., p. 213; and Chapter X., Section I., p. 859.

Condition which has been judicially construed.

After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application unless the company point out in writing the particulars wherein the policy differs from the application. Policy deemed to be in accordance with application.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, see 168 (2); *Mutchmoor* v. *Waterloo Insurance* (1902), 4 Ont. L. R. 606; *City of London Fire* v. *Smith* (1888), 15 Can. S. C. 69.

6. Specific Warranties relating to Risk

See Chapter V., Section IV., pp. 322, 345; and Section VI., pp. 360, 371.

Warranties which have been judicially construed.

Warranted to be on same rate terms and identical interest as A. B. Insurance, and to follow their settlement. Same rate, etc., and to follow settlements of A. B.

Barnard v. *Faber*, [1893] 1 Q. B. 340.

To follow A. B. Insurance Company, which has £1000.

Bancroft v. *Heath* (1901), 6 Com. Cas. 137.

To pay the same percentage as may be settled by the A. B. Insurance.

Beauchamp v. *Faber* (1898), 3 Com. Cas. 308.

If the premises should be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein articles denominated hazardous or extra hazardous or specially hazardous in the second class of hazards annexed to the policy except as herein specially provided for or hereinafter agreed to by this corporation in writing upon the policy the policy shall be of no effect. Warranty against hazardous trade or goods.

Sovereign Fire Insurance v. *Moir* (1887), 14 Can. S. C. 612; *Steinbach* v. *Insurance Co.* (1871), 13 Wall. 183; *Mayor of New York* v. *Brooklyn Fire* (1864), 41 Barb. 231.

If the trade or business of an innkeeper shall be carried on.

Doe v. *Laming* (1814), 4 Camp. 73, 76.

Worked by day only.

Mayall v. *Mitford* (1837), 6 A. & E. 670; *Whitehead* v. *Price* (1835), 2 C. M. & R. 447.

If there shall at any time be more than 56 lb. weight of gunpowder. Warranty against gunpowder and explosive oils, etc.

M'Ewan v. *Guthridge* (1860), 13 Moore, P. C. 304.

If more than 20 lb. weight of gunpowder shall be upon the premises at the time when any loss happens such loss shall not be made good.

Beacon Life and Fire v. *Gibb* (1862), 1 Moore, P. C. (N.S.) 73.

If gunpowder, phosphorus, saltpetre, naphtha, benzine, benzoin, varnish, benzola, petroleum or crude earth oils are kept on the premises, or if camphene, burning fluid, refined coal or earth oils are kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time without written permission indorsed on the policy.

Insurance Co. v. *Slaughter* (1870), 12 Wall. 404; *Phœnix* v. *Flemming* (1898), 65 Ark. 54; *First Congregational* v. *Holyoke Mutual* (1893), 158 Mass. 475.

If (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed in the above described premises, benzine, benzola, dynamite, ether, fireworks, gasoline, Greek-fire, gunpowder, exceeding 25 lb. in quantity, naphtha, nitro-glycerine or other explosives.

St. Paul Fire v. *Penman* (1907), 151 Fed. Rep. 961; *London and Liverpool Fire* v. *Fischer* (1899), 92 Fed. Rep. 500; *Putnam* v. *Commonwealth* (1880), 18 Blatchf. 368.

Petroleum rock-earth coal, kerosene or carbon oils of any description whether crude or refined, benzine, benzola, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene or any other inflammable liquid are not to be stored and kept or allowed in the above premises temporarily or permanently for sale or otherwise unless with written permission indorsed on this policy excepting the case of refined coal, kerosene or other carbon oil for lights if the same is drawn and the lamps filled by daylight, otherwise this policy shall be null and void.

Gunther v. *Liverpool, London and Globe* (1889), 134 U. S. 110.

7. Answers to Specific Questions relating to the Risk

See Chapter V., Section VI., pp. 360–375.

Questions and Answers which have been judicially construed.

Questions relating to interest.

Q. What is your title and interest to the property?
A. Deed.
Dacey v. *Agricultural Insurance* (1880), 21 Hun. 83.

Q. Nature of applicant's title whether fee simple, leasehold or by bond or agreement, and if others interested give names, interest and value.
A. Fee simple (insurance being on stock-in-trade).
Butler v. *Standard Fire* (1879), 4 Ont. A. R. 391.

Danger from incendiarism.

Q. Have you any reason to believe your property is in danger from incendiarism?
A. No.
Greet v. *Citizens' Insurance* (1880), 5 Ont. A. R. 596.

Other insurances.

Q. What other insurance if any is there on the property and in what office?
Parsons v. *Standard* (1879), 4 Ont. A. R. 326; (1880), 5 Can. S. C. 233.

Q. State the amount insured on the interests herein proposed in other offices.
Hanley v. *Pacific Fire* (1893), 14 N. S. W. R. (Law), 224.

Q. Has risk been declined in any other office?
Davies v. *National Fire and Marine*, [1891] A. C. 485.

Previous fires and claims.

Q. Have you ever had any property destroyed by fire? Give date of fire and if insured name of company interested.
Western Assurance v. *Harrison* (1903), 33 Can. S. C. 473.

Q. Has proponent ever been a claimant on a fire insurance company?
Davies v. *National Fire and Marine*, [1891] A. C. 485.

Precautions against fire.

Q. Are your chimneys fire-places fire boards stoves and pipes all well secured and will you engage to keep them so?
A. Yes.
Miskey v. *Burlington Insurance* (1872), 35 Iowa, 174.

Q. Is smoking or drinking of spirituous liquors allowed on the premises?
A. No.
Hosford v. *Germania Fire* (1888), 127 U. S. 399.

8. Clauses and Conditions relating to Occupancy

See Chapter V., Section VI., pp. 362, 367, 373.

Clauses which have been judicially construed.

Occupied by, etc., description, representation, or warranty.

Occupied by the assured.
Joyce v. *Maine Insurance* (1858), 45 Me. 168; *Parmelee* v. *Hoffman* (1873), 54 N. Y. 193.

Goods in the dwelling house of the assured.
Friedlander v. *London Insurance* (1832), 1 M. & Rob. 171.

Occupied by a tenant for dwelling and store.
Somerset Mutual Fire v. *Usaw* (1886), 112 Pa. 80.

Occupied as a dwelling.
Alexander v. *Germania Fire* (1876), 66 N. Y. 464; *O'Niel* v. *Buffalo Fire* (1849), 3 N. Y. 122.

Used as a dwelling.
Woodruff v. *Imperial Fire* (1880), 83 N. Y. 133.

Occupied as a storehouse.
Wall v. *East River Mutual* (1852), 7 N. Y. 370.

Occupied for stores below the upper portion to remain unoccupied.
Stout v. *City Fire* (1861), 12 Iowa, 371.

All while contained in [specified house] and occupied all the year round.
Ring v. *Phœnix* (1888), 145 Mass. 426.

Shall specify by whom the premises are occupied.
Hordern v. *Commercial Union* (1884), 5 N. S. W. R. (Law), 309.

Occupied and only while occupied as a normal school and dwelling.
Connecticut Fire v. *Buchanan* (1905), 141 Fed. Rep. 877.

Change of occupancy.

If any change be made as to tenants or occupancy.
Somerset Mutual Fire v. *Usaw* (1886), 112 Pa. 80; *Connecticut Fire* v. *Buchanan* (1905), 141 Fed. Rep. 877.

If premises become unoccupied insurers to be notified.

If after insurance being effected any building or buildings so insured become vacant or unoccupied, notice of the same shall be given to the company that the directors may decide whether it would be prudent to retain the risk.
Canada Credit Co. v. *Canada Agricultural Insurance* (1870), 17 Grant, 418.

Policy void if premises unoccupied.

The policy shall be void in case the premises insured shall become vacant and unoccupied.
Herrman v. *Merchants* (1880), 81 N. Y. 184; *Woodruff* v. *Imperial Fire* (1880), 83 N. Y. 133; *Brighton Manufacturing Co.* v. *Reading Fire* (1887), 33 Fed. Rep. 232; *De Mories Ice Co.* v. *Insurance Co.* (1896), 99 Iowa, 193; *Whitney* v. *Black River* (1878), 72 N. Y. 117.

Vacant or unoccupied.
Herrmann v. *Adriatic* (1881), 85 N. Y. 162; *Hanscorn* v. *Home Insurance* (1897), 90 Me. 333; *Foster* v. *Council Bluffs* (1885), 74 Iowa, 676; *Fitch* v. *North British and Mercantile* (1884), 136 Mass. 491; *Corrigan* v. *Connecticut Fire* (1877), 122 Mass. 298; *Sugden* v. *Fireman's Fund* (1859), 78 Iowa, 146; *Dennison* v. *Phœnix* (1879), 52 Iowa 457; *Limburg* v. *Ferman Fire* (1894). 90 Iowa, 709; *Eddy* v. *Hawkeye Insurance* (1886), 70 Iowa, 472; *Roe* v. *Dwelling House* (1892), 149 Pa. 94; *M'Murray* v. *Capital* (1893), 87 Iowa, 453; *Clifton Coal Co.* v. *The Scottish Union* (1897), 102 Iowa, 300.

Unoccupied.
Keith v. *Quincy Mutual* (1865), 92 Mass. 228; *Albion Lead Works* v. *Williamsburg* (1880), 3 Fed. Rep. 479; *Harrington* v. *Fitchburg Insurance* (1878), 124 Mass. 126.

If premises should be vacated.
Doud v. *Citizens' Insurance* (1891), 141 Pa. 47; *Franklin Fire* v. *Kepler* (1880), 95 Pa. 492; *Harrison* v. *City Fire* (1864), 91 Mass. 231.

Become vacant.
Ashworth v. *Builders' Mutual* (1873), 112 Mass. 422; *Sottenberg* v. *Continental* (1898), 106 Iowa, 565; *Kimball* v. *Monarch* (1900), 175 Mass. 529; *Johnson* v. *Norwalk Fire* (1900), 175 Mass. 529.

Warranted a family to live in said house throughout the year.
Poor v. *Humboldt Insurance* (1878), 125 Mass. 274; *Poor* v. *Hudson Insurance* (1880), 2 Fed. Rep. 432.

The policy shall be void . . . if the premises remain unoccupied for 30 days unless notice be given to the company and its consent obtained in writing.
Adams v. *Greenwich Insurance* (1876), 9 Hun. 45.

If property be idle or shut down for more than 30 days at any one time.
Kentucky Vermillion Co. v. *Norwich Union Fire* (1906), 146 Fed. Rep. 695.

If saw mill ceases to be operated for more than 10 consecutive days.
Sadd v. *Aetna* (1893), 70 Hun. 490.

Caretaker or watchman.

Warranted at all times when the property herein described shall be idle or inoperative, a constant day and night watchman shall be kept on duty.
Kentucky Vermillion Co. v. *Norwich Union* (1906), 146 Fed. Rep. 195.

Q. Is a watch kept on the premises during the night? *A.* The building is never left alone, there being always a watchman left in the building when not running.
Worswick v. *Canada Fire* (1878), 3 Ont. A. R. 487.

Caretaker shall be kept in charge.
Nicholson v. *Colonial* (1887), 12 Vict. L. R. 58.

Clerk sleeps in store.
Frisbie v. *Fayette Mutual* (1856), 27 Pa. 325.

Building risk, notice of occupation to be given.

It is understood that the above buildings are in course of construction and privilege is hereby given to complete the same; this company to be notified as soon as the assured are ready to commence manufacturing and the rate to be adjusted.
Franklin v. *Phœnix* (1894), 64 Fed. Rep. 773.

It is warranted that the premises hereby insured shall not be occupied for a longer period than 30 days without special permission being granted in writing hereon and readjustment of rate.
Scottish Union v. *Encampment Co.* (1908), 166 Fed. Rep. 231.

9. Conditions avoiding the Policy upon Alteration or Change of Risk

See Chapter V., Section VI., pp. 360–375.

Conditions which have been judicially construed.

Alteration increasing risk or any other increase of risk to be allowed by indorsement.

If any alteration or addition be made in or to any building insured or in which any insured property is contained or in or to any building adjoining or near to the property insured belonging to or occupied by the party insured by which the risk of fire to which the building or property insured, or the building containing such property is or may be exposed, be increased; or if such risk be increased either by any of the means adverted to in the third condition, or in any other manner; or if any property insured be removed into other premises such alteration or addition, increase of risk or removal must be immediately notified to the Society in order to its being allowed by indorsement on the policy, such indorsement being signed by one of the Society's secretaries or agents otherwise the policy will be void.
Baxendale v. *Harvey* (1859), 4 H. & N. 445; *Barrett* v. *Jermy* (1849), 3 Ex. 535; *Shaw* v. *Robberds* (1837), 6 Ad. & E. 75.

If the premises shall be occupied or used so as to increase the risk or the risk be increased by the erection or occupation of neighbouring buildings or by any means whatever [within the control of the assured] without the assent of this company endorsed hereon then and in every such case this policy shall be void.
Long v. *Beeber* (1884), 106 Pa. 466; *Plinsky* v. *Germania Fire* (1887), 32 Fed. Rep. 47; *Martin* v. *Capital Insurance* (1892), 85 Iowa, 643; *Crane* v. *City Insurance* (1880), 3 Fed. Rep. 558.

If after insurance the risk shall be increased by any means whatsoever or if the property be used or occupied so as to render the risk more hazardous than at the time of insuring and the assured shall neglect to notify the company of said increased risk or fails to pay such additional premium as the company shall

determine and obtain the written consent of the secretary to a continuance of the policy such insurance shall be void and of no effect.

Pottsville Mutual v. *Horan* (1879), 89 Pa. 438; *Manley* v. *Insurance Co.* (1869), 1 Lans. 20.

If the use or occupation of the above-mentioned premises shall at any time during the period for which this policy would otherwise continue in force without the consent of the company enclosed thereon be so changed or appropriated applied or used to or for the purpose of carrying on or exercising therein any trade business or vocation which would increase the risk or hazard or the risk be increased in any manner by means within or not within the control of the award; thenceforth and immediately upon the same being so changed this policy shall cease and be of no force or effect.

Naughter v. *Ottawa Agricultural Insurance* (1878), 43 U. C. Q. B. 121; *Esch* v. *Home Insurance* (1889), 78 Iowa, 334.

In case of any material increase of risk to the property insured, such increase of risk must be notified to the company and written permission therefor obtained. All material alterations and additions to building, a change of ownership, change of business, or occupant, or the act of renting or vacating the property occupied by the owner when insured shall vitiate the policy issued on the same unless such alteration or change shall be first notified to the board of directors in writing.

Martin v. *Mutual Fire* (1876), 45 Ind. 51.

Any increase of risk to be allowed by indorsement.

And in case of any circumstance happening after an insurance has been effected whereby the risk shall in any way be increased, the insured is required to give notice thereof in writing to the company and the same must, previous to a loss occurring, be allowed by indorsement on the policy, otherwise the policy is void and all title to any benefit from the insurance become forfeited.

Glen v. *Lewis* (1853), 8 Ex. 607.

Increase of risk within knowledge of assured.

In case of any circumstances happening to or occurring on the premises of the assured or on those adjacent thereto, within the knowledge of the assured after an insurance has been effected. . . .

Hillerman v. *National Insurance* (1870), 1 Vict. (Law), 155.

If during the existence of this policy or any renewal thereof the risk shall be increased by any means whatever with the knowledge of the insured, and he shall neglect to notify the company thereof and have the same indorsed hereon, paying therefor such additional premium as shall be demanded . . . this policy shall be null and void.

Brighton Manufacturing Co. v. *Reading Fire* (1887), 33 Fed. Rep. 232; *Franklin Fire* v. *Gruver* (1882), 100 Pa. 266; *Peoria Sugar* v. *People's Fire* (1885), 24 Fed. Rep. 773.

If there be any change in the exposure by the erection or occupation of adjacent buildings or by any means whatever in the control or knowledge of the assured,

Davis v *Western Home Insurance* (1890), 81 Iowa, 496.

Alteration or any other increase of risk by the Act or with the knowledge or consent of assured.

Whenever a building hereby insured shall be altered, enlarged or appropriated to any other purpose than those herein mentioned or the risk otherwise increased by the act or with the knowledge or consent of the assured, the consent of the directors not being first obtained and signified by the secretary in writing, then this policy shall be void.

Luce v. *Dorchester Mutual* (1872), 110 Mass. 361.

If after insurance is effected . . . the risk be increased by any means within the control of the assured; or if such buildings or premises shall be with the assent of the assured occupied in any way so as to render the risk more hazardous than at the time of insuring such insurance shall be void and of no effect.

Any increase of risk within control of assured to avoid policy.

Foy v. *Aetna Insurance* (1854), 3 Allen (N. Br.) 29; *Fourdrinier* v. *Hartford Fire* (1865), 15 U. C. Q. B. 403; *Gill* v. *Canada Fire Co.* (1882), 1 Ont. R. 341; *Hervey* v. *Mutual Fire* (1861), 11 U. C. C. P. 394; *Henekor* v. *British America Assurance* (1864), 14 U. C. C. P. 57; *Albion* v. *Williamsburg City Fire* (1880), 2 Fed. Rep. 479; *Crittenden* v. *Insurance Co.* (1892), 85 Iowa, 652; *Murdock* v. *Chenango Mutual* (1849), 2 N. Y. 210; *Townsend* v. *North-Western Insurance* (1858), 18 N. Y. 168; *Bentley* v. *Lumbermen's Insurance* (1899), 191 Pa. 276.

Within control or knowledge of assured.

If the hazard be increased by any means within the control or knowledge of the assured.

Des Moines v. *Insurance Co.* (1896), 99 Iowa, 193; *Collins* v. *Insurance Co.* (1895), 165 Pa. 298.

Any increase of risk by or with the advice, agency, or consent of assured.

If the situation or circumstances affecting the risk thereupon shall be so altered or changed, by or with the advice agency or consent of the assured, as to increase the risk thereupon . . . the risk hereupon shall cease and determine and the policy be null and void.

Commonwealth v. *Hide, etc., Insurance* (1873), 112 Mass. 136; *First Congregational* v. *Holyoke Fire* (1893), 158 Mass. 475; *Jones Manufacturing Co.* v. *Manufacturers' Fire* (1851), 62 Mass. 82.

Any alteration in building, introduction of fire heat or new business to be allowed by indorsement and extra premium paid.

In case of any alteration being made in a building insured or containing any property insured or of any steam engine, stove, kiln, furnace, oven, or any other description of fire-heat being introduced or of any trade, business, process, or operation being carried on or goods deposited therein, not comprised in the original insurance or allowed by indorsement thereon or the making of any communication from one building to another notice thereof must be given; and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be duly given such premium paid and such indorsement made no benefit will arise to the insured in case of loss.

Glen v. *Lewis* (1853), 8 Ex. 607; *Stokes* v. *Cox* (1856), 1 H. & N. 320, 533; *Todd* v. *Liverpool, etc., Insurance* (1868), 18 U. C. C. P. 192.

Any change material to risk within control or knowledge of assured to be notified with option to company to cancel or require extra premium.

Any change material to the risk and within the control or knowledge of the assured shall avoid the policy as to the part affected thereby unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy or may demand in writing an additional premium which the assured shall if he desires the continuance of the policy forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand the policy shall be no longer in force.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, sec. 168; *M'Kay* v. *Norwich Union* (1895), 27 Ont. R. 251; *Guerin* v. *Manchester Fire* (1898), 29 Can. S. C. 139; *Johnston* v. *Dominion Grange Fire* (1896), 23 Ont. A. R. 729; *Peck* v. *Phœnix Mutual* (1881), 45 U. C. Q. B. 620; *Howes* v. *Dominion Fire, etc.* (1883), 8 Ont. A. R. 644; *Lount* v. *London Mutual Fire* (1905), 9 Ont. L. R. 699; *London, etc., Trusts Co.* v. *Canada Fire* (1908), 16 Ont. L. R. 217.

Removal of property, alterations, or change of occupancy without consent indorsed on policy will vitiate insurance.

The following circumstances will vitiate a policy unless written notice containing full particulars shall be given to the secretary of this company and the consent of the board obtained thereto endorsed on the policy and signed by the president and secretary, the board reserving to themselves the power to approve or reject such. 1. Of the removal of goods or other personal property insured in this company. 2. Of alienation by mortgage or otherwise or any change in title or ownership of property insured in this company. 3. Of any insurance subsisting or that shall be effected in any other company on property insured in this company without the consent of the board. 4. Of any alteration or addition to the building insured in this company. 5. Of the erection or alteration of any building within the limits described in the application. 6. Of any misrepresentation in the answers given to the several queries in the application. 7. Any change in the occupancy of the premises assured.

Lindsay v. *Niagara District Fire* (1869), 28 U. C. Q. B. 326.

Alterations or additions to be notified, and if they increase risk company may cancel or charge extra premium.

When any alterations or additions are made to any building insured with this company, notice of the same shall be forthwith given to the secretary in writing and the agent shall, if so directed, survey the same and report to the board whether such alterations or additions have increased the risk; and if so an additional premium note shall be taken for such amount as shall be determined upon by the board, and it may be optional with the company to reject such alterations and to cancel the policy. And in the event of any alterations to any adjacent buildings or by the erection of others or of any other thing deemed dangerous within the limits described in the application of the insured a similar notice shall be forthwith given and the company may in like manner cancel the policy, the same to be recorded on the policy by the secretary.

Lindsay v. *Niagara District Fire* (1869), 28 U. C. Q. B. 326; *Diehl* v. *Adams Mutual* (1868), 58 Pa. 443; *Sykes* v. *Perry Mutual* (1859), 34 Pa. 79.

The policy shall cease and be of no effect if the property shall be so altered or appropriated or used for the purpose of carrying on therein any trade or business which, according to the class of hazards hereto annexed, would increase the risk unless it be by the consent of the company in writing endorsed upon the policy.

. . Whenever any alteration is made in the property the assured shall make application to the secretary or agent who shall examine the property and certify whether the hazard be thereby increased or not. If the property shall be rendered more hazardous by any means within or not within the control of the assured notice shall he given to the secretary and the directors may elect either to continue the insurance upon the same terms or at higher rates or may cancel the policy.

Planters' Mutual v. *Rowland* (1886), 66 Ind. 236; *Gates* v. *Madiston Mutual* (1851), 5 N. Y. 469.

If any property hereby described be removed from the building or place in which it is herein described as being contained without in such and every such cases the assent or sanction of the society signified by endorsement hereon the insurance as to the property affected thereby ceases to attach.

Gorman v. *Hand-in-Hand* (1877), Ir. R. 11 C. L. 224.

This policy shall be void and of no effect if without notice to this company and permission therefor in writing endorsed hereon . . . the premises shall he used or occupied so as to increase the risk . . . or the risk be increased . . . by any means within the knowledge or control of the assured or if mechanics are employed in building, altering, or repairing premises named herein except in dwelling houses where not exceeding five days in one year are allowed for repairs.

Imperial Fire v. *Coos County* (1893), 151 U. S. 452; *German Insurance* v. *Hearne* (1902), 117 Fed. Rep. 289.

The working of carpenters and other mechanics in building, altering, or repairing the building shall cause forfeiture unless with written consent given.

Imperial Fire v. *Coos County* (1893), 151 U. S. 452; *Newport* v. *House Insurance* (1900), 163 N. Y. 237; *Mack* v. *Rochester* (1887), 106 N. Y. 560; *Summerfield* v. *Phœnix Insurance* (1894), 65 Fed. Rep. 292; *Franklin Fire* v. *Chicago Insurance* (1872), 36 Ind. 102; *James* v. *Lycoming* (1874), 4 Cliff. 272.

Five days for incidental repairs.

Rann v. *Home Insurance* (1874), 59 N. Y. 387.

10. Conditions reserving Liberty to terminate the Risk

It is not uncommon in fire policies to provide that either party shall have the right to terminate the risk at any time during the currency thereof subject to the return of a proportionate part of the premium for the unexpired term. In some policies the return of the unearned portion of the premium is made a condition precedent to the insurer's right to terminate the risk (*n*), but in others the risk is determined either immediately upon or within a specified number of days after notice by the insurers and the obligation to return the premium is merely collateral (*o*). The right of the insurers to terminate the risk may be limited to cases where there is an increase of hazard but as a rule the policy reserves to them an absolute discretion to terminate in any circumstances (*p*). If the policy is already voidable at the option of the insurers by reason of some breach of warranty on the part of the assured the assured cannot elect to cancel the policy and claim a return of unearned premium (*q*). The notice to terminate the risk must be given

(*n*) *Caldwell* v. *Stradacona Fire, etc.* (1883), 11 Can. S. C. 212.
(*o*) *Swarzschild* v. *Phœnix Insurance* (1903), 124 Fed. Rep. 52.
(*p*) *Sun Fire* v. *Hart* (1889), 14 A. C. 98.
(*q*) *Colby* v. *Cedar Rapids Insurance* (1885), 66 Iowa, 577.

to the contracting party or to some person who has, or is held out as having, sufficient authority to receive such notice on his behalf (*r*).

Conditions which have been judicially construed.

Liberty to company to terminate the risk.

The insurance may be terminated by the company by giving notice to that effect, and if on the cash plan, by tendering therewith a rateable proportion of the premium for the unexpired term, calculated from the termination of the notice. In the case of personal service of the notice, five days' notice, excluding Sunday, shall be given. Notice may be given by any company having an agency in Ontario by registered letter addressed to the assured at his last post office address notified to the company, or where no address notified, then to the post office address of the agency from which the application was received; and where such notice is by letter then seven days from the arrival at any post office in Ontario shall be deemed good notice. And the policy shall cease after such tender and notice aforesaid and the expiration of the five or seven days as the case may be.

(*a*) The insurance if for cash may also be terminated by the assured by giving written notice to that effect to the company or its authorised agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, sec. 168; *Barnes* v. *Dominion Grange* (1895), 22 Ont. A. R. 68.

(*a*) *Skillings* v. *Royal Insurance* (1903), 6 Ont. L. R. 401; *Merchants' Fire* v. *Equity Fire* (1905), 9 Ont. L. R. 241.

And if by reason of such alteration or addition, or from any other cause whatever, the company or its agent shall desire to terminate the insurance effected by this policy, it shall be lawful for the company or its agent so to do by notice to the assured or his representative, and to require this policy to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the assured a rateable proportion for the unexpired term thereof of the premium received for the insurance.

Caldwell v. *Stradacona Fire, etc.* (1883), 11 Can. S. C. 212; *Sun Fire* v. *Hart* (1889), 14 A. C. 98.

Liberty to either to terminate insurance subject to apportionment of premium.

This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company on giving notice to that effect and refunding a rateable proportion of the premium for the unexpired term.

Grace v. *American Central* (1883), 109 U. S. 278; *Royal Insurance* v. *Wight* (1893), 55 Fed. Rep. 455; *Colby* v. *Cedar Rapids Insurance* (1885), 66 Iowa, 577.

This policy shall be cancelled at any time at the request of the insured or by the company giving five days' notice of such cancellation. If this policy shall be cancelled as herein-before provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, the company retaining the customary short rate, except that when this policy is cancelled by the company giving notice they shall retain only the *pro rata* premium.

Swarzschild & Co. v. *Phœnix Insurance* (1903), 124 Fed. Rep. 52; *Northern Assurance* v. *Standard Leather Co.* (1908), 165 Fed. Rep. 602; *Insurance Co.* v. *Wisconsin Central* (1905), 134 Fed. Rep. 794.

(*r*) *Grace* v. *American Central* (1883), 109 U. S. 278; *Northern Assurance* v. *Standard Leather* (1908), 165 Fed. Rep. 602; *Insurance Co.* v. *Wisconsin Central* (1905), 134 Fed. Rep. 794; *Royal Insurance* v. *Wight* (1893), 55 Fed. Rep. 455.

11. Conditions requiring Interest to be stated and prohibiting Incumbrances

See Chapter II., Section II., pp. 126, 128; and Chapter V., Section III., p. 310, and Section VII., p. 372.

Conditions which have been judicially construed.

Interest other than unconditional and sole ownership to be disclosed.

If the interest of the insured in the property be not truly stated herein, or if the interest of the assured be other than unconditional and sole ownership . . . this policy shall be void.

Dupuy v. *Delaware Insurance* (1894), 63 Fed. Rep. 680; *Citizens' Fire* v. *Doll* (1871), 35 Md. 89; *Lewis* v. *New England Fire* (1886), 29 Fed. Rep. 496; *Schroedal* v. *Humboldt Fire* (1893), 158 Pa. 459.

If the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not stated in the policy.

Dakin v. *Liverpool, etc., Insurance* (1879), 77 N. Y. 600; *De Armand* v. *Home Insurance* (1886), 28 Fed. Rep. 603; *Westchester Fire* v. *Weaver* (1889), 70 Md. 536.

If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or is incumbered by any lien, whether by deed of trust, mortgage, or otherwise, or if the building insured stands on leased ground, it must be so represented to the company, or so expressed in the written part of the policy, otherwise the policy shall be void.

Washington Mills v. *Commercial Fire* (1882), 13 Fed. Rep. 646; 135 Mass. 503; *Hosford* v. *Germania Fire* (1888), 127 U. S. 399; *London and Liverpool Fire* v. *Fischer* (1899), 92 Fed. Rep. 500; *M'Elroy* v. *British American Assurance* (1899), 94 Fed. Rep. 990; *Imperial Fire* v. *Dunham* (1888), 117 Pa. 460; *O'Neill* v. *Ottawa Agricultural Insurance* (1879), 30 U. C. C. P. 151; *Dolliver* v. *St. Joseph Fire, etc.* (1880), 128 Mass. 315; *Dakin* v. *Liverpool, etc., Insurance* (1879), 77 N. Y. 600; *Millville Mutual* v. *Wilgus* (1878), 88 Pa. 107; *Chandler* v. *Commerce Fire* (1878), 88 Pa. 223; *Kronk* v. *Birmingham Fire* (1879), 91 Pa. 300; *Watertown Fire* v. *Simons* (1880), 96 Pa. 520; *Insurance Co.* v. *Haven* (1877), 95 U. S. 242; *Waller* v. *Northern Assurance* (1881), 10 Fed. Rep. 232.

Meaning of unconditional and sole ownership.

Unconditional and sole ownership.

Erb v. *Fidelity* (1896), 99 Iowa, 727; *Western Assurance* v. *Temple* (1901), 31 Can. S. C. 373; *Hubbard* v. *Hartford Fire* (1871), 33 Iowa, 325; *De Witt* v. *Agricultural Insurance* (1898), 157 N. Y. 353; *Lumber Exchange* v. *American Central* (1898), 183 Pa. 366; *Rochester German Insurance* v. *Schmidt* (1908), 162 Fed. Rep. 447; *Phœnix Insurance* v. *Kerr* (1904), 129 Fed. Rep. 723; *Milwaukee Mechanics' Insurance* v. *Rhea* (1903), 123 Fed. Rep. 9; *Manchester Fire Assurance* v. *Abrams* (1898), 89 Fed. Rep. 932; *Syndicate Insurance* v. *Bohn* (1894), 65 Fed. Rep. 165; *Wood* v. *American Fire* (1896), 149 N. Y. 382; *Burson* v. *Fire Association* (1890), 136 Pa. 267; *Walter* v. *Sun Fire* (1895), 165 Pa. 381; *Collins* v. *London Assurance* (1895), 165 Pa. 298; *Yost* v. *Dwelling House Insurance* (1897), 179 Pa. 381; *Williams* v. *Buffalo German Insurance* (1883), 17 Fed. Rep. 63; *Rumsey* v. *Phœnix Insurance* (1880), 1 Fed. Rep. 396.

Entire, unconditional, and sole ownership.

American Basket Co. v. *Farmville* (1878), 3 Hughes, 251; *Pelton* v. *Westchester Fire* (1879), 77 N. Y. 605.

Sole, absolute, and unconditional owner.

Grandin v. *Rochester German Insurance* (1884), 107 Pa. 26.

Sole and undisputed owner of the land and the property to be insured.

Garver v. *Hawkeye Insurance* (1886), 69 Iowa, 202.

Unconditional owner.

Mattocks v. *Des Moines Insurance* (1888), 74 Iowa, 233.

Owner.

Compton v. *Mercantile Insurance* (1880), 27 Grant, 334; *Sinclair* v. *Canadian Mutual* (1876), 40 U. C. Q. B. 206; *Pennsylvania Fire* v. *Dougherty* (1883), 102 Pa. 568.

Entire, absolute, unconditional, unincumbered, fee simple ownership.
Brecht v. *Law Union and Crown* (1907), 153 Fed. Rep. 452; *Cross* v. *National Fire* (1892), 132 N. Y. 133; *Hartford* v. *Keating* (1898), 86 Md. 130; *Carpenter* v. *German American* (1892), 135 N. Y. 298; *Brooks* v. *Erie Fire* (1902), 76 App. Div. N. Y. 275; *Traders' Insurance* v. *Pacaud* (1894), 150 Ill. 245; *Western* v. *Home Insurance* (1891), 145 Pa. 346; *Hanover Fire* v. *Bohn* (1896), 48 Neb. 743.

Interest not absolute.
Washington Fire v. *Kelly* (1870), 32 Md. 421.

Leasehold interest to be disclosed.

If the interest of the property to be insured be a leasehold interest or other interest not [fee simple] absolute, it must be so stated in the policy, otherwise the same shall be void.
Davis v. *Iowa State Insurance* (1885), 67 Iowa, 494; *Elliott* v. *Insurance Co.* (1888), 117 Pa. 548; *Dohn* v. *Farmers' Joint Stock Insurance* (1871), 5 Lans. 275.

If insurance is desired on property on leased ground, or on property of any kind in which the interest of the applicant for insurance does not amount to the entire, sole, and absolute ownership, it must in every such case be represented to the company and clearly expressed in the body of the policy, otherwise there will be no liability hereunder as to such property or limited interest.
Ellis v. *Insurance Co.* (1887), 32 Fed. Rep. 646.

Goods held in trust to be insured as such.

Goods held in trust or on commission must be insured as such, otherwise the policy will not extend to cover them.
London and North Western v. *Glyn* (1859), 1 El. & El. 652; *South Australian Insurance* v. *Randall* (1869), 3 L. R. 101.

If the property to be insured be held in trust or on commission, or be leasehold or other interest not amounting to absolute or sole ownership . . . it must be so represented to the company and expressed in the policy in writing, otherwise the insurance as to such property shall be void.
Lebanon Mutual v. *Erb* (1886), 112 Pa. 149.

Warranty against incumbrances.

No incumbrance.
Dohn v. *Farmers' Joint Stock Insurance* (1871), 5 Lans. 275; *Franklin Fire* v. *Vaughan* (1875), 92 U. S. 516; *Hosford* v. *Hartford Fire* (1887), 127 U. S. 404.

Concealment of any incumbrance on the insured property.
Gore District Mutual v. *Samo* (1878), 2 Can. S. C. 411; *Lount* v. *Mutual Fire* (1905), 9 Ont. L. R. 549.

If the said property should be or become encumbered by a chattel mortgage.
Hunt v. *Springfield Fire* (1904), 196 U. S. 47; *Atlas Reduction Co.* v. *New Zealand Insurance* (1905), 138 Fed. Rep. 497; *Fries Breslin Co.* v. *Star Fire* (1907), 154 Fed. Rep. 35; *Pennsylvania Fire Insurance* v. *Hughes* (1901), 108 Fed. Rep. 497; *Perry* v. *London Assurance* (1909), 167 Fed. Rep. 902; *Mulrooney* v. *Royal Insurance* (1908), 163 Fed. Rep. 833.

Are there any incumbrances?
Franklin v. *Vaughan* (1875), 92 Vid. 516; *Dohn* v. *The Farmers' Joint Stock* (1871), 5 Lans. 275.

If incumbrance be placed thereon.
Lodge v. *Capital Insurance* (1894), 91 Iowa, 103.

12. Conditions prohibiting Transfer of Property or Change of Title, Interest, or Possession

See Chapter II., Section II., pp. 128, 129.

Conditions which have been judicially construed.

Warranty against transfer of property.

This policy shall cease to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law unless notice thereof be given to the company and the subsistence of the insurance in favour of such other person be declared by a memorandum endorsed hereon by or on behalf of the company.
Royal Insurance v. *Martin* (1903), 192 U. S. 149; *Forbes & Co.* v. *Border Counties Fire* (1873), 11 M. 278; *Liverpool, &c.* v. *McNeill* (1898), 89 Fed. Rep. 131.

Against assignment of property.

If the property insured is assigned without a written permission indorsed hereon by an agent of the company duly authorised for such purpose the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law or by reason of death.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, sec. 168 (4); *Penchen* v. *City Mutual* (1891), 18 Ont. A. R. 446; *Bull* v. *North British Insurance* (1888), 15 Ont. A. R. 421; *Ardill* v. *Citizens' Insurance* (1893), 20 Ont. A. R. 605; *May* v. *Standard Fire* (1880), 5 Ont. A. R. 605; *Dunlop* v. *Usborne, &c. Fire* (1895), 22 Ont. A. R. 364.

If the property insured is assigned without a written permission endorsed on the policy by an agent of the company duly authorised for such purpose the policy shall be void.

McQueen v. *Phœnix Mutual* (1879), 4 Can. S. C. 660; *Sovereign Fire Insurance* v. *Peters* (1886), 12 Can. S. C. 33.

Against sale or change of interest.

If the said property should be sold or conveyed or the interest of the parties therein be changed in any manner whether by act of the parties or by operation of law.

Dacey Agricultural Insurance (1880), 21 Hun. 83; *Torrop* v. *Imperial Fire* (1896), 26 Can. S. C. 585; *Walton* v. *Agricultural Insurance* (1889), 116 N. Y. 317; *Hine* v. *Woolworth* (1883), 93 N. Y. 75; *Sherwood* v. *Agricultural Insurance* (1878), 73 N. Y. 447.

Against any change in interest, title, or possession.

If any change takes place in the interest, title, or possession (except in case of succession by the death of the assured) whether by legal process or judicial decree or voluntary transfer or conveyance.

Thompson v. *Phœnix* (1889), 136 U. S. 287; *Vancouver Bank* v. *Law Union and Crown* (1907), 153 Fed. Rep. 440; *Scottish Union* v. *Hagan*, [1900] 102 Fed. Rep. 919; *Small* v. *Westchester Fire* (1892), 51 Fed. Rep. 789; *Mussbaum* v. *Northern Insurance* (1889), 37 Fed. Rep. 524; *Wood* v. *American Fire* (1896), 149 N. Y. 382; *Burson* v. *Fire Association* (1890), 136 Pa. 267; *Collins* v. *London Assurance* (1895), 165 Pa. 298; *Roby* v. *American Central* (1890), 120 N. Y. 510; *Barry* v. *Hamburg-Bremen Fire* (1888), 110 N. Y. 1; *Keeney* v. *Home Insurance* (1877), 71 N. Y. 396; *Erb* v. *Insurance Co.* (1896), 98 Iowa, 606.

If the property be sold or transferred or any change take place in title or possession whether by legal process or judicial decree or voluntary transfer or conveyance.

Insurance Companies v. *Thompson* (1877), 95 U. S. 547; *Mussbaum* v. *Northern Insurance* (1889), 37 Fed. Rep. 524; *Friezen* v. *Almania Fire* (1887), 30 Fed. Rep. 352; *London Assurance* v. *Drennen* (1885), 166 U. S. 461; *Bailey* v. *American Central* (1882), 13 Fed. Rep. 250; *Runkle* v. *Citizens' Insurance* (1881), 6 Fed. Rep. 143; *California Insurance* v. *Union Compress* (1889), 133 U. S. 388; *Germania Insurance* v. *Home Insurance* (1894), 144 N. Y. 195; *Browning* v. *Home Insurance* (1877), 71 N. Y. 508; *Girard Fire* v. *Hebard* (1880), 95 Pa. 45; *Oldham* v. *Anchor Fire* (1894), 90 Iowa, 225; *Bishop* v. *Clay Insurance* (1878), 45 Conn. 430; *Brunswick* v. *Commercial Union Insurance* (1878), 68 Me. 313.

Or if any change other than by the death of the insured takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise.

Walradt v. *Phœnix Insurance* (1893), 136 N. Y. 375; *Greenlee* v. *Mercantile Insurance* (1897), 102 Iowa, 427.

If the said property shall be sold or this policy assigned, or if the title or possession of the property, or any part thereof, is transferred or changed (other than by succession by reason of the death of the assured) whether by legal process, judicial decree, voluntary transfer, conveyance or otherwise.

Jones v. *Phœnix Insurance* (1896), 97 Iowa, 275.

In case of any transfer, partial transfer, or change of title in property insured by this company . . . or if the property herein insured, or any part of it, shall be transferred by any contract or change of partnership or ownership, the policy shall be void.

West Branch v. *Halfenstein* (1861), 40 Pa. 289.

In case of any transfer or termination of the interest of the assured in the property insured, or in the policy either by sale or transfer.

Grosvenor v. *Atlantic Fire* (1858), 17 N. Y. 391.

It is agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the insurers.

Atherton v. *Phœnix Insurance* (1871), 109 Mass. 32.

If any change takes place in the title, ownership or possession.

Lodge v. *Capital Insurance* (1894), 91 Iowa, 103; *Taylor* v. *Merchants, etc. Insurance* (1891), 83 Iowa, 402.

If this policy be assigned before a loss; or if any change take place in the title, interest, location, or possession of the property insured thereby.

Imperial Fire v. *Dunham* (1888), 117 Pa. 460.

If the property be sold or transferred or upon the passing or entry of a decree of foreclosure, or if any change takes place in title or possession, or if the interest of the assured whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise be not truly stated in the policy, the policy is void.

Dolliver v. *St. Joseph Fire* (1880), 128 Mass. 315; *Judge* v. *Connecticut Fire* (1882), 132 Mass. 521; *Malley* v. *Atlantic Insurance* (1883), 51 Conn. 222.

If the title of the property is transferred incumbered or charged.

Hathaway v. *State Insurance* (1884), 64 Iowa, 229.

When the property insured shall become alienated the policy thereon shall become void unless assigned by the consent of the president and secretary to the alienee.

M'Kissick v. *Mill Owners' Mutual* (1878), 50 Iowa, 116.

Change in title.

Citizens' Insurance v. *Salteris* (1894), 23 Can. S. C. 155; *Springfield Fire* v. *Allen* (1871), 43 N. Y. 389.

Parted with his interest.

Planters' Mutual v. *Rowland* (1886), 66 Ind. 236; *Manley* v. *Insurance Company* (1869), 1 Lans. 20.

If the property shall be sold.

Brown v. *Cotton, etc., Insurance* (1892), 156 Mass. 587; *Bryan* v. *Traders' Insurance* (1888), 145 Mass. 389; *Smith* v. *Union Insurance* (1876), 120 Mass. 90.

Sold or conveyed.

Washington Fire v. *Kelly* (1870), 32 Ind. 421; *Strong* v. *Manufacturers' Insurance* (1830), 27 Mass. 40.

Alienated by sale or otherwise.

Tillon v. *Kingston Mutual* (1851), 5 N. Y. 405.

Change in possession.

California Insurance v. *Union Compress* (1889), 133 U. S. 387.

Without a written permission.

Bates v. *Equitable* (1869), 10 Wall. 33.

Provision for transfer of policy to assignee.

In case any property real or personal be alienated by sale insolvency, or otherwise the policy shall be void . . . but the assignee may have the policy transferred to him . . . and shall be entitled to all the rights and privileges and be subject to all the liabilities and conditions to which the original party insured was subject. Provided however in cases where the assignee is a mortgagee the directors may permit the policy to remain in force and to be transferred to him by way of additional security . . . without his becoming in any manner personally liable for premium.

Mechanics v. *Gore District Mutual* (1878), 3 Ont. A. R. 151.

Warranty against foreclosure proceedings.

If with the knowledge of the assured foreclosure proceedings be commenced or notice of sale of any property covered by this policy be given by virtue of any mortgage or trust deed.

Collins v. *London Assurance* (1895), 165 Pa. 298.

If with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by the death of the insured take place in the interest title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment.

Fries Breslin Co. v. *Star Fire* (1907), 154 Fed. Rep. 35; *Brecht* v. *Law Union and Crown* (1907), 153 Fed. Rep. 452; *Perry* v. *London Assurance* (1909), 167 Fed. Rep. 902.

Foreclosure proceedings.
Delaware Insurance v. *Greer* (1903), 120 Fed. Rep. 916.

If the insured property should be levied upon or taken into possession or custody under any legal process or the title should be disputed in any proceeding in law or equity the policy shall cease to be binding. Legal process against property.
May v. *Standard Fire* (1880), 5 Ont. A. R. 605.

If the title or possession be now or hereafter become involved in litigation. Litigation as to title.
Small v. *Westchester Fire* (1892), 51 Fed. Rep. 789.

13. Condition prohibiting Assignment of Policy

See Chapter VII., Section VIII., pp. 764, 766.

Conditions which have been judicially construed.

If the assured shall assign part with or in any way encumber the policy or any interest therein without the consent of the company endorsed on the policy this policy shall be void. Conditions against assigning or charging assured's interest in the policy.
Salterio v. *City of London Fire* (1894), 23 Can. S. C. 32; *Jackson* v. *Boylston Mutual* (1885), 139 Mass. 508; *West Branch* v. *Halfenstein* (1861), 40 Pa. 289; *Small* v. *Westchester Fire Insurance* (1892), 51 Fed. Rep. 789; *Washington Fire* v. *Kelly* (1870), 32 Md. 421; *Manley* v. *Insurance of North America* (1869), 1 Lans. 20; *Lazarus* v. *Commonwealth Insurance* (1837), 36 Mass. 81.

If this policy should be assigned the assignment must be entered within 21 days after the making thereof.
Sadlers Co. v. *Badcock* (1743), 2 Atk. 364.

The interest of the policy may be transferred by endorsement made with the consent of the agent but not otherwise.
Crozier v. *Phœnix* (1870), 2 Han. N. Br. 200.

14. Mortgagee Clause and other Conditions in favour of Mortgagee or other Assignee

See Chapter II., Section III., pp. 139–143; and Chapter VII., Section VIII., pp. 772–776.

Conditions which have been judicially construed.

If this policy shall be made payable to a mortgagee of the insured real estate no act or default of any person other than such mortgagee or his agents, or those claiming under him shall affect such mortgagee's right to recover in case of loss on such real estate provided that the mortgagee shall on demand pay according to the established scale of rates for any increase of risk not paid for by the insured; and whenever this company shall be liable to a mortgagee for any loss under this policy for which no liability exists as to the mortgagor or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the company interested upon such payment the said mortgage together with the note and debt thereby secured. Mortgagee responsible for his own acts and defaults only; subrogation to mortgage.
Attleborough Bank v. *Security* (1897), 168 Mass. 147; *Newhampshire Fire* v. *National Life* (1901), 112 Fed. Rep. 199.

It is hereby specially agreed that this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is also provided and agreed that the mortgagee shall notify the company of any change of ownership or increase of hazard not permitted by their policy to the mortgagor or owner as soon as the same shall come to his or her knowledge, and shall on reasonable demand pay the additional charge for the same according to the established scale of rates for the time such increased hazard may be or shall have been assumed by this company during the continuance of this insurance. And it is further agreed that whenever the company shall pay the mortgagee any sum for loss under this policy and shall claim that as to the mortgagor or owner

no liability therefor existed, said company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt to the extent of such payment, but such subrogation shall not impair the right of the mortagee to recover the full amount of his claim or at its option said company may pay to the mortgagee the whole principal due or to grow due on the mortgage with the interest then accrued and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt.

Hastings v. *Westchester Fire* (1878), 73 N. Y. 141; *Klein* v. *Union Fire* (1883), 3 Ont. 234; *Imperial Fire* v. *Bull* (1889), 18 Can. S. C. 697; *Anderson* v. *Saugeen Mutual* (1899), 18 Ont. 355; *Liverpool, London and Globe* v. *Agricultural* (1908), 33 Can. S. C. 94; *Howes* v. *Dominion Fire* (1883), 8 Ont. A. R. 644; *Syndicate Insurance* v. *Bohn* (1894), 65 Fed. Rep. 165; *Hartford Fire* v. *Williams* (1894), 63 Fed. Rep. 925; *Mutual Fire* v. *Alvord* (1894), 61 Fed. Rep. 752; *Ulster Co.* v. *Leake* (1878), 73 N. Y. 161; *Phœnix* v. *Lloyd* (1879), 19 Hun. 287; *Eddy* v. *London Assurance* (1892), 65 Hun. 307; *Lett* v. *Guardian Life* (1889), 52 Hun. 570.

Mortgagee not responsible for acts of assured; company's option to pay debt to mortgagee.

Where a ground rent mortgage or other lien on real estate is specifically insured such insurance shall not be affected by any sale or change of occupation or use of the premises mortgaged or charged without the knowledge of the insured though the risk may be thereby increased. . . . In all such cases upon any loss the company shall have the option of paying to the insured either such proportion of the sum insured as the damage by fire to the premises mortgaged or charged shall bear to their value immediately before the fire but not exceeding such value or else the full amount of such lien or mortgaged debt or the principal of such ground rent in which latter cases this company shall be entitled to require an assignment of such ground rent mortgage or other lien in due form.

Thornton v. *Enterprise* (1872), 71 Pa. 234.

Application of conditions in case of transfer to mortgagee.

If with the consent of this company an interest under the policy shall exist in favour of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein the conditions herein-before contained [*i.e.* as regards title alienation and change of possession] shall apply in manner expressed in such provisions and conditions of insurance relating to such interest as shall be within, upon, attached or appended hereto.

Brecht v. *Law Union and Crown* (1908), 160 Fed. Rep. 399; *Delaware Insurance* v. *Greer* (1903), 120 Fed. Rep. 916.

Loss payable to mortgagee.

Payable in case of loss to A B mortgagee as his interest shall appear.

Guerin v. *Manchester Fire* (1898), 29 Can. S. C. 139; *Wyman* v. *Imperial Insurance* (1888), 16 Can. S. C. 715; *Agricultural Savings Co.* v. *Liverpool, London and Globe* (1901), 3 Ont. L. R. 127; *Haslem* v. *Equity Fire* (1904), 8 Ont. L. R. 246; *Mitchell* v. *City of London Assurance* (1888), 15 Ont. A. R. 262; *Marrie* v. *Stadacona Insurance* (1879), 4 Ont. A. R. 330; *Brecht* v. *Law Union and Crown* (1908), 160 Fed. Rep. 399; *Delaware Insurance* v. *Greer* (1903), 120 Fed. Rep. 916.

Loss payable to mortgagee.

Heilmann v. *Westchester* (1878), 75 N. Y. 7; *Wyman* v. *Imperial Insurance* (1868), 16 Can. S. C. 715.

Loss payable to A B as his interest may appear.

Atlas Reduction v. *New Zealand Insurance* (1905), 138 Fed. Rep. 497.

15. Conditions relating to Average Double Insurance and Contribution

These clauses are fully discussed in Chapter VII., dealing with fire insurance claims (*s*). The contribution and average clauses in British policies are mostly of a uniform type, and where a Lloyd's policy was merely expressed as being "subject to average" the Court had no difficulty in applying the usual first condition

(*s*) *Vide infra*, pp. 705-733.

of the average clause (*t*). In America there are many variations from the forms used in this country, and in one case where a slip was pasted on the policy "subject to co-insurance clause," it was held that it was impossible in the absence of any universal form of such clause to give any effect to the slip (*u*). If the company's ordinary forms of policy contain contribution average or similar clauses, and a contract to insure is made such clauses bind the assured even before the policy is issued (*v*). In America the clause avoiding the policy in case of any double insurance without consent has been held to be a reasonable clause (*x*). In Canada a clause differing from the statutory condition, and providing that all policies, floating or otherwise, attaching in whole or in part to property insured should be considered as contributing insurance for the full amount was held to be unreasonable and, therefore, void as a variation from the statutory condition (*y*).

Conditions which have been judicially construed.

Policy void in case of other insurance without consent.

If the assured shall have or shall hereafter make any other insurance [whether valid or not] upon the property hereby insured [or any part thereof] without the consent of the company written hereon in such case this policy shall be void.

Hubbard v. *Hartford Fire* (1871), 33 Iowa, 325; *Mead* v. *American Fire* (1897), 13 Hun. App. 474; *Russell* v. *Fidelity Fire* (1891), 84 Iowa, 93; *Cannon* v. *Home Insurance* (1897), 49 La. 1367; *M'Master* v. *North American Insurance* (1873), 55 N. Y. 222; *Northern Assurance* v. *Grand View Building Co.* (1901), 183 U. S. 308; *United Fireman's Insurance* v. *Thomas* (1897), 82 Fed. Rep. 406; *Palatine Insurance* v. *M'Elroy* (1900), 100 Fed. Rep. 391; *M'Elroy* v. *British American Insurance* (1899), 94 Fed. Rep. 990; *Noad* v. *Provincial* (1859), 18 U. C. Q. B. 584; *De Witt* v. *Agricultural Insurance* (1898), 157 N. Y. 353; *Ramsay* v. *Mutual Fire* (1854), 11 U. C. Q. B. 517; *Hatton* v. *Beacon Insurance* (1859), 16 U. C. Q. B. 316; *Dafoe* v. *District Mutual* (1858), 7 U. C. C. P. 55; *Park* v. *Phœnix Insurance* (1859), 19 U. C. Q. B. 106; *Mason* v. *Andes Insurance* (1893), 23 U. C. C. P. 37; *Morrow* v. *Lancashire Insurance* (1899), 26 Ont. A. R. 173; *Foster* v. *Equitable Mutual* (1854), 68 Mass. 216; *Union National* v. *German Insurance* (1896), 71 Fed. Rep. 473; *Georgia Home Insurance* v. *Rosenfield* (1899), 95 Fed. Rep. 358; *Palatine Insurance* v. *Ewing* (1899), 92 Fed. Rep. 111; *Firemen's Fund Insurance* v. *Norwood* (1895), 69 Fed. Rep. 71; *Druce* v. *Gore District Mutual* (1869), 20 U. C. Q. B. 207; *Erb* v. *Fidelity Insurance* (1896), 99 Iowa, 728; *Burton* v. *Gore District Mutual* (1865), 12 Grant, 156; *Taylor* v. *State Insurance* (1899), 107 Iowa, 275; *Planters' Mutual* v. *Rowland* (1886), 66 Ind. 236; *Hayes* v. *Milford Mutual* (1898), 170 Mass. 492; *Hartford Fire* v. *Small* (1895), 66 Fed. Rep. 490.

The company is not liable for loss if there is any prior insurance in any other company unless the company's assent thereto appears herein or is endorsed hereon nor if any subsequent insurance is effected in any other company unless and until the company assents thereto or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance or does not dissent in writing after that time and before the subsequent or further insurance is effected.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, s. 168 (8); *Manitoba Assurance* v. *Whitla* (1903), 34 Can. S. C. 191; *Fair* v. *Niagara*

(*t*) *Aetna Wood Paving Co.* v. *Ross* (1910), 15 Com. Cas. 24.
(*u*) *Phœnix Insurance* v. *Wilcox* (1895), 65 Fed. Rep. 724.
(*v*) *Jacobs* v. *Equitable* (1858), 7 U. C. Q. B. 35.
(*x*) *Northern Assurance* v. *Grand View* (1901), 183 U. S. 308.
(*y*) *Graham* v. *Ontario Mutual* (1887), 14 Ont. R. 358.

District (1876), 26 U. C. C. P. 398; *M'Crea* v. *Waterloo County* (1877), 1 Ont. A. R. 218; *Gauthier* v. *Waterloo Mutual* (1881), 6 Ont. A. R. 231; *M'Intyre* v. *East Williams Mutual* (1889), 18 Ont. R. 79; *Moore* v. *Citizens' Fire* (1888), 14 Ont. A. R. 582; *Mutchmoor* v. *Waterloo Insurance* (1902), 4 Ont. L. R. 606; *Imperial Bank* v. *Royal Insurance* (1906), 12 Ont. L. R. 519; *Thompson* v. *Equity Fire* (1907), 17 Ont. L. R. 214.

Notice of other insurance to be given.

The insured must at the time of effecting the insurance give notice to the company of any insurance or insurances already made elsewhere on the property hereby insured or any part thereof, and on effecting any insurance or insurances during the currency of this policy elsewhere on the property hereby insured or any part thereof, the insured must also forthwith give notice to the company thereof so that the particulars thereof may be indorsed on the policy, and unless such notice be given the insured will not be entitled to any benefit under this policy, and on the happening of any loss or damage the insured shall forthwith declare in writing to the company all other insurances effected by him or by any other person on any of the property, and the giving of such notices at the respective times aforesaid shall be a condition precedent to the recovery of any claim under this policy.

Equitable Fire and Accident v. *The Ching Wo Hong*, [1907] A. C. 96.

Notice of other insurance to be given and indorsed on policy.

In case of subsequent insurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not) notice thereof must be given in writing at once and such subsequent insurance indorsed on the policy granted by the company or otherwise acknowledged in writing, in default whereof such policy shall thenceforth cease and be of no effect.

Western Assurance v. *Doull* (1886), 12 Can. S. C. 446.

If the assured or any other person or parties interested shall have existing during the continuance of this policy any other contract or agreement for insurance (whether valid or not) against loss or damage by fire upon the property hereby insured.

Acer v. *Merchants' Insurance* (1870), 57 Barb. 68.

If the assured or his assigns shall hereafter make any other insurance on the same property and shall not give immediate notice thereof to the secretary and have the same endorsed on this instrument or otherwise acknowledged by him in writing then this policy shall cease and be of no effect and in case the assured shall have already any other insurance against loss by fire on the property hereby insured not notified to this company and mentioned in or indorsed upon this policy then this insurance shall be void and of no effect.

Blake v. *Exchange Mutual* (1882), 78 Mass. 265; *Parsons* v. *Standard Insurance* (1880), 5 Can. S. C. 233; *Lowson* v. *Canada Farmers' Fire* (1881), 6 U. C. App. 512; *Shannon* v. *Gore District Mutual* (1878), 2 Ont. A. R. 396; *Billington* v. *Provincial* (1877), 2 Ont. A. R. 158; (1879), 3 Can. S. C. 182; *Grant* v. *Citizens* (1880), 5 Ont. A. R. 596; *Commercial Union* v. *Temple* (1898), 29 Can. S. C. 206; *Western Assurance* v. *Temple* (1901), 31 Can. S. C. 373; *Carpenter* v. *Providence Washington* (1842), 16 Pet. 495; *Traders' Insurance Co.* v. *Robert* (1832), 9 Wend. 404; *Manitoba Assurance* v. *Whitla* (1903), 34 Can. S. C. 191.

This policy shall be void if the assured or his assigns shall hereafter make any other insurance on the said property and shall not with all reasonable diligence give notice thereof and have the same endorsed on the said policies respectively.

Dickson v. *Provincial* (1874), 24 U. C. C. P. 157.

The assured must give notice to the company of any other insurance effected on the same property and have the same endorsed on this policy or otherwise acknowledged by the company in writing and failure to give such notice shall void the policy.

Citizens' Insurance v. *Parsons* (1881), 7 A. C. 96, 118; *Benjamin* v. *Saratoga Mutual* (1858), 17 N. Y. 415; *Carroll* v. *Charter Oak* (1863), 40 Barb. 292; *Jacobs* v. *Equitable* (1858), 7 U. C. Q. B. 35; *Jacobs* v. *Equitable* (1860), 9 U. C. Q. B. 250; *Weinhaugh* v. *Provincial* (1870), 20 U. C. C. P. 405.

Insurance subsisting or effected with other companies must be notified to the board and if approved of to be indorsed on the policy and signed by the secretary.

M'Bride v. *Gore District Mutual* (1870), 30 U. C. Q. B. 451.

Notice of other insur-

No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere unless the particulars of such insurance be notified to

ance to be given and company to have option to cancel.

the company in writing and allowed by endorsement hereon provided that on such notice being given after the issue of the policy it shall be optional with the company to cancel the same, returning the rateable premium for the unexpired term thereof.

Australian Agricultural Co. v. *Saunders* (1875), L. R. 10 C. P. 668; *Hendrickson* v. *Queen Insurance* (1871), 31 U. C. Q. B. 547; *Hordern* v. *Commercial Union* (1884), 5 N. S. W. R. (Law), 309.

Non-concurrent insurances prohibited.

No additional insurances even though noted hereon are to be considered as thereby sanctioned if they shall be in any respect more limited or specific than the insurance effected by this policy so as to interfere with their operating concurrently therewith

Hordern v. *Commercial Union* (1884), 5 N. S. W. R. (Law), 309.

Property covered by other insurance excepted from risk.

Shall not apply to or cover any goods which may at the time of loss be covered in whole or in part by a marine policy.

California Insurance v. *Union Compress* (1889), 133 U. S. 387.

Contribution clause.

Persons insuring property at this office must when required give notice of any other insurance made elsewhere on the same property in their behalf and cause a minute or memorandum of any other insurance to be indorsed on their policies in which case this company shall only be liable to the payment of a rateable proportion of any loss or damage which may be sustained: and unless such notice be given the assured shall not be entitled to any benefit under such policy.

Sloat v. *Royal Insurance* (1865), 49 Pa. 14; *Millaudon* v. *Western Marine* (1836), 9 La. 27; *Royal Insurance* v. *Roedel* (1875), 78 Pa. 19.

If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances [whether valid or invalid] and whether effected by the insured or by any other person covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage [and without reference to the default or repudiation of any other insurance company. And the payment of premium of such other insurance shall be held conclusive evidence that the same has been effected within the meaning of this clause].

Andrews v. *Patriotic Assurance* (1886), 18 L. R. Ir. 355; *Traders' Insurance* v. *Pacaud* (1894), 150 Ill. 245; *Nicols* v. *London and Provincial* (1884), 5 N. S. W. R. (Law), 333; *Hordern* v. *Commercial Union* (1884), 5 N. S. W. R. (Law), 309; *Nicholls* v. *Scottish Union* (1885), 2 T. L. R.; 14 R. 1094; *Glasgow Provident* v. *Westminster Fire* (1887), 14 R. 947; (1888), 13 A. C. 699; *Scottish Amicable* v. *Northern Assurance* (1883), 11 R. 287; *North British and Mercantile* v. *London, Liverpool and Globe* (1877), 5 Ch. D. 569.

In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall if such other insurance remains in force on the happening of any loss or damage, only be liable for the payment of a rateable proportion of such loss or damage without reference to the dates of the different policies.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, s. 168 (9); *Eacrett* v. *Gore District Mutual* (1903), 6 Ont. L. R. 592.

This company shall not be liable under this policy for a greater proportion of any loss on the property described than the amount hereby insured, shall bear to the whole insurance whether valid or invalid, or by solvent or insolvent insurers covering such property.

Bateman v. *Lumberman's Insurance* (1899), 189 Pa. 465; *Golde* v. *Whipple & Co.* (1896), 7 Hun. 48; *Lisene* v. *Lumber Insurance* (1897), 101 Iowa, 514; *Hoffmann* v. *Manufacturers'* (1889), 38 Fed. Rep. 487; *Erb* v. *Fidelity* (1896), 99 Iowa, 727; *Dickenson* v. *German American* (1896), 6 Hun. 550; *Bardwell* v. *Conway Mutual* (1877), 122 Mass. 90; *Home Insurance* v. *Baltimore* (1876), 93 U. S. 527; *Page* v. *Sun Insurance* (1896), 74 Fed. Rep. 203; *Hough* v. *People's Fire* (1872), 36 Md. 398; *Robbins* v. *Firemen's Fund* (1879), 16 Blatchf. 122; *Ogden* v. *East River* (1872), 50 N. Y. 388; *Clarke* v. *Western* (1891), 146 Pa. 561; *Howard Insurance* v. *Scribner* (1843), 5 Hill, N. Y. 298; *Lumber Exchange* v. *American Central* (1898), 183 Pa. 366; *Liebrandt* v. *M'Dowell Stove Co.* (1888), 35 Fed. Rep. 30; *Tuck* v. *Insurance Co.* (1876), 56 N. H. 326; *Unitarian Congregation* v. *Western* (1866), 26 U. C. Q. B. 175; *Hartford Fire* v. *Peebles Hotel Co.* (1897), 82 Fed. Rep. 546; *Lebanon Insurance* v. *Kepler* (1884), 106 Pa. 28.

It is further agreed that in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater proportion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein.

Hartford Fire v. *Williams* (1894), 63 Fed. Rep. 925.

Other insurance attaching in whole or in part to be deemed contributing.

In case of any other current insurance upon the property hereby insured whether valid or not . . . such insurance, so long as it attaches in whole or in part to the property covered by this policy, shall as between the insured and this company be considered as contributing insurance for the full amount of such policy, and liable as such to pay *pro rata* any loss total or partial on the property hereby insured.

Hammond v. *Citizens* (1886), 26 N. Br. 371.

Any policy floating or otherwise attaching in whole or in part to the property covered by this policy shall as between the assured and this company be considered as contributing insurance for the full amount of such policy and liable as such to pay *pro rata* any loss total or partial on the property hereby insured.

Graham v. *Ontario Mutual* (1887), 14 Ont. R. 358; *Lowell Manufacturing Co.* v. *Safeguard Fire* (1882), 88 N. Y. 591; *Fire Insurance* v. *Merchants'* (1886), 66 Md. 339.

Pro rata average condition.

It is hereby declared and agreed that where a sum insured is declared subject to the conditions of average if the property so covered shall at the breaking out of any fire be collectively of greater value than the sum insured thereon then the company shall pay and make good such proportion only of the loss or damage as the sum so insured shall bear to the whole value of the said property at the time when the fire shall first happen.

Australian Agricultural Co. v. *Saunders* (1875), L. R. 10 C. P. 668.

This company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property herein described.

Barnes v. *Hartford Fire* (1882), 9 Fed. Rep. 813.

To pay only such proportion of the sum insured as the damage by fire to the premises mortgaged or charged shall bear to their value immediately before the fire.

Teutonia Insurance v. *Mund* (1883), 102 Pa. 89.

Second condition of average.

But it is at the same time declared and agreed that if any property included in such average shall at the breaking out of any fire be insured by any other policy which, whether subject to average or not, shall apply to part only of the buildings or places or of the property to which such average extends, then this policy shall not cover the same excepting as regards any excess of value beyond the amount of such more specific insurance which said excess is said to be under the protection of this policy and subject to average as aforesaid.

Australian Agricultural Co. v. *Saunders* (1875), L. R. 10 C. P. 668.

If at the happening of any fire the assured shall have insurance under a floating policy or policies not specific but covering goods generally in various places not designated and yet within limits which include the property insured such policy as between the insured and this company shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon.

Merrick v. *Germania Fire* (1867), 54 Pa. 277.

To be subject to average in like manner as concurrent insurance.

In case of the assured holding any other policy on the same property, subject to average, then this policy is declared subject to average in the same manner, and in no case where any property insured by this company is insured elsewhere, shall this company be liable to pay more than their rateable proportion of the loss or damage.

Australian Agricultural Co. v. *Saunders* (1875), L. R. 10 C. P. 668.

In case of any other insurance upon the property hereby insured whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon whether such insurance be by specific or by general or floating policies: and it is hereby declared that in case of the assured holding any other policy in this or any company on the property insured subject to the conditions of average, this policy shall be subject to average in like manner.

Adams v. *Greenwich Insurance* (1876), 9 Hun. 45; *Hastings* v. *Westchester Fire* (1878), 73 N. Y. 141.

American co-insurance clause.

Seventy-five per cent. co-insurance clause. It is a part of the consideration of this policy and the basis upon which the rate of premium is fixed that the insured shall maintain insurance on the property covered by this policy of not less than seventy-five per cent. of the actual cash value thereof, and that failing so to do the assured shall be a co-insurer to the extent of such deficit and in that capacity shall bear his her or their proportion of any loss.

Wanless v. *Lancashire Insurance* (1896), 23 Ont. A. R. 224; *Eckardt* v. *Lancashire Insurance* (1900), 31 Can. S. C. 72.

Limit of liability to fixed proportion of property or loss.

The company will in no case pay more than two-thirds on personal property and three-quarters on real estate of the actual cash value of the property at risk at the time of the fire.

Huchins v. *People's Mutual* (1855), 31 N. H. 238; *Snowden* v. *Kittanning Insurance* (1888), 122 Pa. 502; *Williamson* v. *Gore District Mutual* (1866), 26 U. C. Q. B. 145.

The company shall be liable to pay two-thirds of all such loss or damage by fire as shall happen to the above-mentioned property [amounting to no more in the whole than $ and to pay no more on any of the different properties above described than two-thirds of the whole cash value of each at the time of such loss and not exceeding on each the sum it is insured for in this policy].

King v. *Prince Edward Mutual* (1868), 19 U. C. C. P. 134; *M'Intyre* v. *East Williams Mutual* (1889), 18 Ont. R. 79.

The assured shall not be entitled to recover from the company more than two-thirds of the actual cash value of any building and in case of further insurance then only the rateable proportion of such two-thirds of the actual cash value unless more than such two-thirds value as represented in the application shall have been insured in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found by arbitration or otherwise to have been overvalued in the application for the policy the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application.

Eacrett v. *Gore District Mutual* (1903), 6 Ont. L. R. 592.

Limit of liability to fixed proportion of assured's interest after deducting incumbrances.

In case any of the property covered by this policy shall have any liens or incumbrances thereon either by mortgage or otherwise the company will not insure or pay in any event to exceed two-thirds of the amount of the interest of the assured in such property and such interest is declared to be the difference between the actual cash value of such property and the aggregate amount of such liens and incumbrances.

Hopkins v. *Hawkye Insurance* (1881), 57 Iowa, 203.

16. Conditions relating to Notice and Proof of Loss

See Chapter III., Section VI., p. 204; and Chapter V., Section I., p. 273.

Conditions which have been judicially construed.

Statutory conditions in Ontario.

Proof of loss must be made by the assured although the loss be payable to a third party.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, sec. 168 (12); *Anderson* v. *Saugeen Mutual* (1889), 18 Ont. R. 355.

Any person entitled to make a claim under this policy is to observe the following directions:—

(*a*) He is forthwith after loss to give notice in writing to the company;

(*b*) He is to deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits;

(*c*) He is also to furnish therewith a statutory declaration declaring—

That the said account is just and true;

When and how the fire originated so far as the declarant knows or believes;

That the fire was not caused through his wilful act or neglect, procurement, means, or contrivance;

The amount of other insurances;

All liens and incumbrances on the subject of insurance;

The place where the property insured if moveable was deposited at the time of the fire.

(*d*) He is in support of his claims if required and if practicable to produce books of account . . . warehouse receipts and stock lists, and furnish invoices and other vouchers; to furnish copies of the written portion of all policies; to separate as far as reasonably may be the damaged from the undamaged goods, and to exhibit for examination all that remains of the property which was covered by the policy.

(*e*) He is to produce if required a certificate under the hand of a magistrate, notary public, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified.

Statutory Condition, Revised Statutes of Ontario, 1897, ch. 203, sec. 168 (13).

(*e*) *Logan* v. *Commercial Union* (1886), 13 Can. S. C. 270.

Immediate notice, particulars within specified period, and further information and proof as required.

On the happening of any loss or damage the assured shall forthwith give notice thereof in writing to the company and shall within thirty days or such further time as the company may allow deliver to the company a claim in writing containing as particular an account as may be reasonably practicable of the several items of property and articles destroyed or damaged, and of the amount of the loss or damage thereto respectively, and shall give to the company such further particulars, proof and information, as may be reasonably required: and if such a claim be not so delivered and such requirements be not complied with the company shall not be liable for any loss or damage: and if the claim be in any respect fraudulent or any fraudulent devices are used by the assured or any one acting on his behalf to obtain any benefit under this policy all benefit thereunder shall be forfeited.

Gaw v. *British Law Fire*, [1908] 1 Ir. R. 245; *Weir* v. *Northern Counties* (1879), 4 L. R. Ir. 689,

All persons insured by the company sustaining any loss or damage by fire are immediately to give notice to the company or its agents and within five days after such loss or damage has occurred are to deliver as particular an account of their loss or damage as the nature of the case will admit of and make proof of the same by their declaration or affirmation and by their books of accounts or such other proper evidence as the directors of this company or its agents may reasonably require.

Caldwell v. *Stradacona Fire* (1883), 11 Can. S. C. 212; *Nixon* v. *The Queen* (1893), 23 Can. S. C. 26.

All persons insured by the company and sustaining loss or damage by fire are forthwith to give notice thereof to the company, and apply for its blank claim forms which must be executed and filed within fifteen days from occurrence of fire.

Hammond v. *Citizens' Insurance* (1886), 26 N. Br. 371.

Notice of loss.

Shall give immediate notice of loss.

White v. *Western* (1875), 22 Low. Can. J. 215; *Northern Assurance* v. *Standard Leather Co.* (1908), 165 Fed. Rep. 602; *Petit* v. *German Insurance* (1898), 98 Fed. Rep. 800; *Ermentrout* v. *Girard Fire* (1895), 63 Minn. 305.

Shall within sixty days next after the loss give notice thereof in writing to the directors.

Campbell v. *Monmouth Mutual* (1871), 59 Me. 430.

Particulars.

Shall furnish to the insurers a full and detailed statement of the loss and the amount claimed.

Fuller v. *District Fire and Marine* (1888), 36 Fed. Rep. 469.

If a fire occurs the assured shall within sixty days thereafter . . . render a statement, signed and sworn to by him, setting forth his knowledge and belief as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon.

Aetna Insurance v. *People's Bank* (1894), 62 Fed. Rep. 222.

Certificate of magistrate.

A particular statement of the loss shall be rendered to the company at their office as soon after the fire as possible, signed and sworn to by the assured, stating such knowledge or information as the assured has been able to obtain as to the

time, origin, and circumstances of the fire, and shall, if required, furnish a certificate . . . under the hand and seal of a magistrate nearest to the place of fire. . . .

Worsley v. *Wood* (1796), 6 T. R. 710; *Routledge* v. *Burrell* (1789), 1 Hen. Bl. 255; *Oldham* v. *Bewicke* (1786), 2 Hen. Bl. 577 n.; *Williams* v. *Queen Insurance* (1889), 39 Fed. Rep. 167; *Columbian Insurance* v. *Lawrence* (1836), 10 Pet. 507; *M'Nally* v. *The Phœnix* (1893), 137 N. Y. 389.

The assured shall give written notice of loss accompanied by an affidavit . . . and shall as soon as possible thereafter deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of . . . and shall procure a certificate under the hand of a magistrate . . . and until such affidavit and certificate are produced the claim shall not be payable.

Columbian Insurance v. *Lawrence* (1829), 2 Pet. 25; *Kelly* v. *Sun Fire* (1891), 141 Pa. 10; *Russell* v. *Fidelity Fire* (1891), 84 Iowa, 93.

Proofs, declarations, evidences, and examinations.

In case of fire the assured shall give notice forthwith and the proofs declarations evidences and examinations called for by or under the policy must be furnished to the company within 30 days after said loss and upon receipt of notice and proofs of claim as aforesaid . . . the amount shall be payable in three months after the receipt by the company of such proofs.

Mutual Fire v. *Frey* (1880), 5 Can. S. C. 82.

Immediate notice, protect property, full particulars, examination under oath, production of books and vouchers.

If a fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged goods and personal property, put it in the best possible order, make a complete inventory of the same stating the quality and cost of each article and the amount claimed thereon; and within 60 days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by the said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon . . . and the insured as often as required shall exhibit to any person designated by this company all that remains of any property herein described and submit to examinations under oath by any person named by this company and subscribe the same: and as often as required shall produce for examination all books of account bills invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative and shall permit extracts and copies thereof to be made.

Hyde v. *Lefaivre* (1902), 32 Can. S. C. 474; *Astrich* v. *German American* (1904), 131 Fed. Rep. 13.

Condition that assured shall keep proper books and deposit them in fireproof safe at night.

The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted including all purchases and sales both for cash and credit together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory and in the event of the failure to produce the same this policy shall be deemed null and void and no suit or action at law shall be maintained thereon for any loss.

Liverpool, London and Globe v. *Kearnay* (1900), 180 U. S. 132; *Lozano* v. *Palatine Insurance* (1896), 78 Fed. Rep. 278; *Western Assurance* v. *Redding* (1895), 68 Fed. Rep. 708; *Jones* v. *Southern Insurance* (1889), 38 Fed. Rep. 19.

Assured to produce books and vouchers and submit to examination.

Assured if required shall produce his books of account and other proper vouchers and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made and submit to an examination by the agent representative or attorney of the company and answer all questions touching his knowledge of anything relating to such loss or damage or to his claim thereupon and subscribe affirm or declare to such examination as may be required, the same being reduced to writing.

Hammond v. *Citizens' Insurance* (1886), 26 N. Br. 371; *Insurance Co.* v. *Weides* (1871), 14 Wall. 375; *Claflin* v. *Commonwealth Insurance* (1883), 110 U. S. 81.

Assured to submit to examination;

The assured shall if required submit to an examination or examinations under oath by any person appointed by the company and subscribe thereto when the same is reduced to writing . . . all fraud or attempt at fraud by false swearing

False swearing a bar to recovery.

or otherwise shall forfeit all claims on this company and be a perpetual bar to any recovery under this policy.

Claflin v. *Commonwealth Insurance* (1883), 110 U. S. 81.

Proof of loss may be by agent of assured.

The above proofs of loss may be made by the agent of the assured in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (14).

Fraud or false statement to vitiate claim.

Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (15); *Reddick* v. *Saugeen Mutual* (1888), 15 Ont. A. R. 363.

And if there appears any fraud overcharge or imposition or any false swearing the claimant shall forfeit all claim to restitution or payment by virtue of his policy.

Newcastle Fire v. *MacMorran* (1815), 3 Dow. 255, 262; *Chapman* v. *Pole* (1870), 22 L. T. 306; *Britton* v. *Royal Insurance* (1866), 4 F. & F. 905; *Levy* v. *Baillie* (1831), 7 Bing. 349; *Goulstone* v. *Royal Insurance* (1858), 1 F. & F. 276; *Park* v. *Phœnix Insurance* (1859), 19 U. C. Q. B. 110; *Insurance Co.* v. *Weides* (1871), 14 Wall. 375; *Hilton* v. *Phœnix Insurance* (1893), 72 Me. 272; *Daul* v. *Firemen's Insurance* (1883), 35 La. Ann. 98; *Balestracci* v. *Firemen's Insurance* (1882), 34 La. Ann. 844; *Hoffman* v. *Western Marine* (1846), 1 La. Ann. 216; *Marchesseau* v. *The Merchants'* (1842), 1 Rob. (La.) 438; *Claflin* v. *Commonwealth Insurance* (1883), 110 U. S. 81; *Schuster* v. *Dutchess County Insurance* (1886), 102 N. Y. 260.

Loss payable after complete proof.

Payment of losses shall be made 90 days after complete proofs and adjustments thereof at the office of the company.

Snowden v. *Kittanning Insurance* (1888), 122 Pa. 502.

Loss payable 60 days after notice thereof and proofs of loss have been received by the company.

Clover v. *Greenwich Insurance* (1886), 101 N. Y. 277; *Morrow* v. *Lancashire Insurance* (1899), 26 Ont. App. 173; *Hamilton* v. *Phœnix Insurance* (1894), 61 Fed. Rep. 379; *Hastings* v. *Westchester Fire* (1878), 73 N. Y. 141.

The loss shall not be payable until 60 days after the completion of the proofs of loss unless otherwise provided for by the contract of insurance.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (17); *City of London Fire* v. *Smith* (1887), 15 Can. S. C. 69.

17. Conditions relating to Arbitration

Different forms of arbitration clause.

The arbitration clause in a policy may take one or other of these three forms: (1) a reference of all disputes to arbitration, the award of the arbitrators to be a condition precedent to any action on the policy; (2) a reference of any difference as to the amount of loss to arbitration and no action to be brought except for such amount as may be awarded by the arbitrators; (3) a reference either of all matters in dispute or of the amount of loss to arbitration but without any stipulation that such reference shall be a condition precedent to legal proceedings.

How far jurisdiction of Court may be ousted.

There is a rule of law that parties cannot by their private contract oust the jurisdiction of the Court (*z*); but it has been held that parties may nevertheless agree that no cause of action shall arise upon the contract until any matter in dispute shall have been determined by arbitration and that then action will

(*z*) *Scott* v. *Avery* (1856), 5 H. L. C. 811. But an arbitration clause contained in a private Act of Parliament may operate to oust the jurisdiction of the Court so completely that even the assent of the parties could not give power to the Court to hear and determine the matters in dispute. *Joseph Crosfield & Sons* v. *Manchester Ship Canal*, [1905] A. C. 421.

only lie in accordance with the arbitrators' award (*a*). Thus it is competent to agree that any question between assured and insurers shall be referred to arbitration and that the reference shall be a condition precedent to action, and even where the question at issue is whether one of the parties has been guilty of fraud the determination of the matter by arbitration is still a condition precedent to the accrual of any right of action (*b*).

Scope of submission to arbitration.

It is not always easy to determine whether the arbitration clause is intended to refer all questions to arbitration or merely questions as to the amount of loss or damage. Some policies clearly refer all questions in dispute (*b*), others are ambiguous (*c*), and others clearly confine the scope of the reference to the issue of the amount of loss (*d*).

Question whether arbitration is a condition precedent to action.

There may also be difficulty in determining whether arbitration is made a condition precedent to any action on the policy or is merely a collateral agreement which does not directly affect the promise to pay. If it is the former then any action brought before the matter has been referred may be dismissed, but if there is merely a collateral agreement to refer the utmost the Court will do is to stay and suspend the proceedings pending the reference to and decision of the arbitrators. Where there is an express promise to pay the amount of loss, and then a bare agreement that the amount of loss shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the promise to pay the loss (*e*); but if the insurers only agree to pay such amount as may be awarded by the arbitration, arbitration does become a condition precedent to action (*f*). Thus if the loss is expressed to be payable after adjustment and the policy provides arbitration as the proper method of adjustment in case of dispute, then no action can be brought until the loss is adjusted by arbitration (*g*). Where the policy of a mutual insurance association contained no express promise to pay the loss and there was provision for the settlement of disputed claims by a reference to a general meeting of the association, it was held that the only promise to pay which could be implied was a promise to pay such sum as a general meeting of the association found to be due (*h*).

Where arbitration clause is confined to differences touching the amount of loss or damage.

As a rule where the amount of the loss or damage is the only

(*a*) *Scott* v. *Avery* (1856), 5 H. L. C. 811.

(*b*) *Spurrier* v. *La Cloche*, [1902] A. C. 446; *Gaw* v. *British Law Fire*, [1908] 1 Ir. R. 245; *Scott* v. *Mercantile Accident* (1892), 66 L. T. 811.

(*c*) *Scott* v. *Avery* (1855), 5 H. L. C. 811; *Hercules Insurance* v. *Hunter* (1835), 14 S. 147.

(*d*) *Caledonian Insurance* v. *Gilmour*, [1893] A. C. 85; *Viney* v. *Bignold* (1887), 20 Q. B. D. 172.

(*e*) *Collins* v. *Locke* (1879), 4 A. C. 674: *Gorman* v. *Hand-in-Hand* (1877), Ir. R. 11 C. L. 224; *Hamilton* v. *Home Insurance* (1890), 137 U. S. 370.

(*f*) *Braunstein* v. *Accidental Death* (1861), 1 B. & S. 782.

(*g*) *Viney* v. *Bignold* (1887), 20 Q. B. D. 172; *Elliott* v. *Royal Exchange* (1867), L. R. 2 Ex. 237.

(*h*) *Edwards* v. *Aberayron Mutual* (1875), 1 Q. B. D. 563.

matter which the parties agree to refer to arbitration, then if the insurers entirely repudiate liability on the policy there is no obligation on the assured to arbitrate as to the amount before commencing an action on the policy (*i*). Sometimes the policy provides that the settlement by arbitration of any difference as to amount shall be a condition precedent to the commencement of any action on the policy whether or not the right to recover on the policy be disputed, and where this is so the company may apparently by disputing the amount of the loss claimed as well as the liability on the policy compel the assured to incur the costs of what will be a fruitless arbitration if the company are justified in their denial of all liability (*k*).

Waiver of arbitration by company.

The company may in certain circumstances be held to have waived their right to arbitration or to be estopped by their conduct from insisting in such right as where they have not demanded arbitration within a reasonable time or have obstructed or delayed the arbitration proceedings (*l*).

Where company elect to reinstate.

An agreement to refer to arbitration any difference which should arise in the adjustment of a loss has been held not to apply to a case where the company had elected to reinstate and the only dispute was as to the sufficiency of the reinstatement (*m*).

Company may waive condition precedent and apply for stay.

Where arbitration is made a condition precedent to the commencement of any action and the assured declines arbitration and commences an action the company may either set up the clause as an absolute defence to the action or waive the condition precedent and, treating the clause as merely a collateral agreement to refer, apply for a stay of proceedings pending a reference, and this latter is the safer course if there is any possible doubt as to the construction of the arbitration clause, or any reason to suppose that the company may have already waived their right to insist on arbitration as a condition precedent to action (*n*).

Arbitration clause binding although not signed by assured.

An arbitration clause is binding on the assured and is a valid submission to arbitration on his part as well as on the part of the company notwithstanding that the policy is executed by the company only and contains no signature by or on behalf of the assured (*o*).

Submission to foreign jurisdiction.

When there is a condition in the policy to the affect that the parties agree to submit to the jurisdiction of a foreign Court that

(*i*) *Kahn* v. *Travellers' Insurance* (1893), 4 Wy. 419.

(*k*) *Viney* v. *Bignold* (1887), 20 Q. B. D. 172.

(*l*) *Lesure* v. *Lumber Co.* (1897), 101 Iowa, 514; *M'Intyre* v. *National Insurance* (1880), 5 Ont. A. R. 580; *Kahnweiler* v. *Phœnix Assurance* (1895), 67 Fed. Rep. 480; *Connecticut Fire* v. *Hamilton* (1894), 59 Fed. Rep. 258; *Hamilton* v. *Phœnix Assurance* (1894), 61 Fed. Rep. 379; *British American Assurance* v. *Darragh* (1904), 128 Fed. Rep. 890.

(*m*) *Wynkoop* v. *Niagara Fire* (1883), 91 N. Y. 478.

(*n*) *Hodson* v. *Railway Passengers*, [1904] 2 K. B. 833.

(*o*) *Baker* v. *Yorkshire Fire and Life*, [1892] 1 Q. B. 144; *Nolan* v. *Ocean Accident* (1903), 5 Ont. L. R. 544.

is a reference to the arbitration of such foreign Court and any action commenced in England may be stayed (*p*).

Arbitration clause in Scotland.

In Scotland a simple agreement to refer future differences to the arbitration of persons unnamed is not binding on the parties and the Court will not stay an action on the policy merely on the ground that it contains such a clause (*q*). But it is competent in Scotland, as well as in England, for the parties to agree that no cause of action on the policy shall accrue until all matters in dispute have been referred to the arbitration of persons named or unnamed, and therefore where such a clause is contained in a Scottish policy the company may plead it as an absolute defence to an action which is commenced without regard to their demand for arbitration (*r*).

English policy issued in Scotland.

Where an insurance is effected in Scotland upon property in Scotland belonging to a domiciled Scotsman it is competent for the parties to agree that they shall be bound not by the Scottish but by the English law relating to arbitration. Thus where an English company grants an insurance in Scotland upon an English form of policy with an arbitration clause referring differences to unnamed arbitrators and an action is brought upon such policy in a Scottish Court the Court will stay or sist the proceedings in accordance with English law (*s*).

Stay of proceedings under Arbitration Act, 1889, s. 4.

The jurisdiction of the Court to stay proceedings where there is an agreement to arbitrate is conferred by section 4 of the Arbitration Act, 1889 (*t*), which provides that if any party to a submission commences any legal proceedings against any other party to the submission any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other step in the proceedings apply to the Court to stay the proceedings, and that the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. The Court has a judicial discretion and may grant or withhold a stay accordingly (*u*). The onus of proof lies on the party who desires to keep out of arbitration (*x*). The Court will not as a rule grant a stay where serious and difficult questions of law are involved (*y*). But even where difficult questions of law may have to be determined the Court may nevertheless grant a stay if there are also substantial issues of fact which can be

(*p*) *Austrian Lloyd* v. *Gresham Life*, [1903] 1 K. B. 249; *Kirshner & Co.* v. *Truban*, [1909] 1 Ch. 413.
(*q*) *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (1890), 15 A. C. 125.
(*r*) *Caledonian Insurance* v. *Gilmour*, [1893] A. C. 85.
(*s*) *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202.
(*t*) 52 & 53 Vict. c. 49.
(*u*) *Walmsley* v. *White* (1892), 40 W. R. 675.
(*x*) *Skinner* v. *Uzielli & Co.* (1908), 24 T. L. R. 266.
(*y*) *Workman* v. *Belfast Harbour Commissioners*, [1899] 2 Ir. R. 234.

satisfactorily decided by arbitration and the decision of which may dispose of the whole case (*z*). The Court will not as a rule grant a stay where charges of fraud or dishonesty have been made (*a*). Application for a stay must be made after appearance and before any step has been taken in the proceedings. Attending before the master on a summons for directions is taking a step in the proceedings which will disentitle a plaintiff from afterwards applying for a stay (*b*). A County Court judge has jurisdiction to stay proceedings in an action brought in the County Court (*c*).

Reference to County Court judge.

Where it was agreed that all differences should be referred and decided by the judge of the County Court for the district within which the claimant might reside and that the judge or his deputy should alone have jurisdiction to hear and determine any dispute and an action on the policy was commenced in the County Court, it was held that the clause did not disentitle the judge from trying the case with a jury. The proper course if the defendants desired to insist on the reference to the judge alone was to apply at the proper stage to stay the proceedings (*d*).

How far finding of arbitrators as to value of property is conclusive.

In a Scottish case where there was a valid submission to arbitration as to the amount of loss only it was held that the finding of the arbitrators as to the value of the property before and after the fire was conclusive not only as to the amount recoverable but also on the question whether there had been a fraudulent over-valuation. It was held however that on the defence that the policy was effected with a fraudulent intention of destroying the property evidence as to the actual value of such property was admissible notwithstanding the finding of the arbitrators as to the value (*e*).

Conditions which have been judicially construed.

Reference of all differences condition precedent to action.

If any difference shall at any time arise between the company and the insured or any claimant under this policy as to the liability or the amount or extent of the liability of the company in respect of any claim for loss or damage under this policy every such difference as and when the same arises shall be referred to the arbitration of. . . . And it is hereby expressly declared to be a condition of the making of this policy and part of the contract . . . that the party insured shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided and then only for the sum so awarded and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy.

Spurrier v. *La Cloche*, [1902] A. C. 446; *Gaw* v. *British Law Fire*, [1908] 1 Ir. R. 245; *Scott v. Mercantile Accident* (1892), 66 L. T. 811; *Hodson* v. *Railway Passengers*, [1904] 2 K. B. 833; *Nolan* v. *Ocean Accident* (1903), 5 Ont. L. R. 544.

(*z*) *Skinner* v. *Uzielli & Co.* (1908), 24 T. L. R. 266.
(*a*) *Vawdry* v. *Simpson*, [1906] 1 Ch. 166.
(*b*) *Ochs* v. *Ochs Bros.*, [1909] 2 Ch. 121, and cases there cited.
(*c*) *Morriston Tinplate Co.* v. *Brodker, Dore & Co.*, [1908] 1 K. B. 403.
(*d*) *Cowell* v. *Yorkshire Provident Life* (1901), 17 T. L. R. 452.
(*e*) *Hercules Insurance* v. *Hunter* (1835), 14 S. 147.

Reference condition precedent.

The sum to be paid by this association to any suffering member for any loss or damage shall in the first instance be ascertained and settled by the committee . . . and if a difference shall arise between the committee and any suffering member relative to the settling any loss or damage . . . or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf and the committee shall select another. And if the committee refuse for 14 days to make such selection the suffering member shall select two and in either case the two selected shall forthwith select a third which three arbitrators or any two of them shall decide upon the claims and matters in dispute . . . provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association) that no member who refuses to accept the amount of any loss as settled by the committee hereinbefore specified shall be entitled to maintain any action at law or suit in equity on his policy until the matters in dispute shall have been referred to and decided by arbitrators appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.

Scott v. *Avery* (1856), 5 H. L. C. 811.

Reference not made condition precedent.

All persons assured . . . are upon any loss or damage by fire forthwith to give notice thereof . . . which loss or damage after the same shall be adjusted shall immediately be paid in money by the said corporation without any deduction. . . . In case any difference shall arise touching any loss or damage such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen whose award in writing shall be conclusive and binding on all parties.

Elliott v. *Royal Exchange* (1867), L. R. 6 Ex. 237; *London and Lancashire Insurance* v. *Honey* (1876), 2 Vict. L. R. 7.

In case any difference shall arise upon the claims made on the office such difference shall be submitted to arbitrators mutually chosen whose award or that of their umpire shall be final . . . the arbitrators or valuators shall fix the original value and the value after the fire and this company shall pay and make good the difference between these two sums.

Hercules Insurance v. *Hunter* (1835), 14 S. 147.

Reference of difference as to amount condition precedent where company does not allege fraud or breach of warranty.

When the company does not claim to avoid its liability under the policy on the ground of fraud or nonfulfilment of any of the conditions hereinbefore set forth but a difference at any time arises between the company and the insured, or any claimant under the policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference when and as the same arise shall be referred to the arbitration of one person to be chosen by both parties or of two independent persons. . . . And it is hereby expressly declared to be a condition of the making of this policy and part of the contract between the company and the insured that when the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment as aforesaid the party insured or claimant shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided and then only for the sum so awarded and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy.

Caledonian Insurance v. *Gilmour*, [1893] A. C. 85.

Reference of difference as to amount condition precedent even although company repudiates all liability.

If any difference shall arise in the adjustment of a loss the amount (if any) to be paid by the society shall, whether the right to recover on the policy be disputed or not and independently of all other questions, be submitted to the arbitration of . . . and the award of the arbitrators or umpire (as the case may be) shall be conclusive evidence of the amount of the loss, and the party insured shall not be entitled to commence or maintain any action at law or suit in equity upon his policy until the amount of the loss shall have been referred and determined as hereinbefore provided, and then only for the amount so awarded.

Viney v. *Bignold* (1887), 20 Q. B. D. 172; *Guerin* v. *Manchester Fire* (1898), 29 Can. S. C. 139; *M'Intyre* v. *National Insurance* (1880), 5 Ont. A. R. 580; *Wynkop* v. *Niagara Fire* (1883), 91 N. Y. 478.

Reference of difference as to amount

In case any difference or dispute shall arise between the assured and this company touching the amount of any loss or damage sustained by him such difference shall be submitted to the judgment of arbitrators . . . whose decision

condition precedent.

thereupon shall be final and conclusive and no action suit or proceeding at law or in equity shall be maintained on this policy unless the amount of loss or damage in case of difference or dispute shall be first thus ascertained.

Hamilton v. *Liverpool, London and Globe* (1889), 136 U. S. 242; *Williamson* v. *Liverpool, London and Globe* (1904), 122 Fed. Rep. 59; *Kahn* v. *Traders' Insurance* (1893), 4 Wy. 419.

No claim except for such amount as arbitrators may award.

The company shall be liable to make the following payment or compensation . . . in case such accident should not cause the immediate death of the assured but should cause any bodily injury to the assured of a serious nature such sum by way of compensation as should appear just and reasonable and in proportion to the injury received, such sum to be ascertained in case of difference or dispute in manner provided by the stipulations and conditions indorsed hereon . . . in case of difference of opinion as to the amount of compensation payable in any case the question shall be referred to the arbitration of the secretary for the time being of the Master of the Rolls and all expenses and costs shall be subject to the decision of such arbitrator and the award made on such arbitration shall be taken as a final settlement of the question and may be made a rule of Court.

Braunstein v. *Accidental Death* (1861), 1 B. & S. 782.

If any member of the society shall be dissatisfied with the decision of the directors as to the settlement of any loss or damage sustained by such member or as to any claim or other matter settled adjusted or decided by the directors, and such members so dissatisfied shall procure ten other members of the society not being directors to join with him in a written requisition to the directors to reconsider and revise their decision, the directors shall thereupon call a board of directors not less than ten and reconsider and revise such decision; and in case such member shall be dissatisfied with the further decision of such board of directors such member so dissatisfied together with twenty other members of the society may by writing under their hands require the secretary to summon a special general meeting of the society to be held at any time not exceeding fourteen days from the receipt of such writing by the secretary and such special general meeting shall have full power to confirm or vary the decision of the directors and whatever shall be decided by the special general meeting shall be final and binding as well upon the society as upon all the parties interested in the decision.

Edwards v. *Aberayron Mutual* (1875), 1 Q. B. D. 563.

Assured's compliance with arbitration clause condition precedent to action.

In the event of disagreement as to the amount of loss the same shall . . . be ascertained by two competent and disinterested appraisers the assured and the company each selecting one . . . and the two so chosen shall first select a competent and disinterested umpire . . . and the award in writing of any two shall determine the amount of such loss. . . . No suit or action in this policy for the recovery of any claim shall be sustained . . . until after full compliance by the assured of all the foregoing requirements.

Lesure v. *Lumber Co.* (1897), 101 Iowa, 514; *British American Insurance* v. *Darragh* (1904), 128 Fed. Rep. 890; *Western Assurance* v. *Decker* (1899), 98 Fed. Rep. 381; *Kahnweiler* v. *Phœnix Co.* (1895), 67 Fed. Rep. 483; *Connecticut Fire* v. *Hamilton* (1894), 59 Fed. Rep. 258; *Hamilton* v. *Phœnix Insurance* (1894), 61 Fed. Rep. 379.

Collateral agreement to refer question of amount.

If any difference as to the amount of loss payable shall arise it shall be referred to arbitration . . . or to an umpire whose decision shall be final and binding on all parties . . . and this condition shall be deemed and taken to be an agreement to refer as aforesaid.

Gorman v. *Hand-in-Hand* (1877), Ir. R. 11 C. L. 224: *Mutual Fire* v. *Alvord* (1894), 61 Fed. Rep. 752; *Gere* v. *Council Bluffs* (1885), 67 Iowa, 272; *Hamilton* v. *Home Insurance* (1890), 137 U. S. 370.

If any difference arises as to the value of the property insured, of the property saved or of amount of the loss, such value and amount and the proportion thereof if any to be paid by the company shall whether the right to recover on the policy is disputed or not and independently of all other questions be submitted to the arbitration of some person to be chosen by both parties or if they cannot agree on one person then to two persons one to be chosen by the party assured and the other by the company and a third to be appointed by the persons so chosen or on their failing to agree then by the County Judge of the county wherein the loss has happened; and such reference shall be subject to the provisions of the Arbitration Act; and the award shall if the company is in other respects liable be conclusive as to the amount of the loss and proportion to be paid by the company; where the full amount of the claim is awarded the costs

shall follow the event and in other cases all questions of costs shall be in the discretion of the arbitrators.

Statutory Condition, Revised Statutes, Ontario, 1897, c. 203, s. 168 (16); *M'Intyre* v. *National Insurance* (1880), 5 Ont. A. R. 580; *Haslem* v. *Equity Fire* (1904), 8 Ont. L. R. 246; *Cole* v. *London Mutual Fire* (1907), 15 Ont. L. R. 619; *Cole* v. *Canadian Fire* (1907), 15 Ont. L. R. 336.

Submission to foreign jurisdiction.

For all disputes which may arise out of the contract of insurance all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters.

Austrian Lloyd Steamship Co. v. *Gresham Life*, [1903] 1 K. B. 249.

18. Conditions relating to Valuation of Property and Adjustment of Loss

See Chapter VII., Section II., pp. 671-676.

Conditions which have been judicially construed.

Actual cash value.

The said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen.

Liverpool, London, and Globe v. *M'Fadden* (1909), 170 Fed. Rep. 179; *Commonwealth Insurance* v. *Sennett* (1860), 37 Pa. 205; *Foley* v. *Manufacturers' Fire* (1897), 152 N. Y. 131.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured of replacing it.

Fisher v. *Crescent Insurance* (1887), 33 Fed. Rep. 544; *Clover* v. *Greenwich Insurance* (1886), 101 N. Y. 277.

Loss to be adjusted by committee of three managers.

Any member who shall sustain loss by fire shall give immediate notice to the president of the company who shall appoint a committee of three of the managers that shall examine and inquire into the same; and the said managers with all convenient expedition shall inquire into the same and after ascertaining the sum which said party shall be lawfully entitled to shall make provision and payment as specified.

Insurance Co. v. *Rupp* (1858), 29 Pa. 526.

19. Conditions relating to Reinstatement

See Chapter VII., Section III., pp. 687-694.

Conditions which have been judicially construed.

Option to reinstate by giving notice within sixty days after proof of loss.

It shall be optional with the company to repair rebuild or replace the property lost or damaged with other of like kind or quality within a reasonable time, giving notice of their intention so to do within sixty days after the completion of the proofs herein required.

Langan v. *Aetna Insurance* (1899), 96 Fed. Rep. 705; (1900), 99 Fed. Rep. 374; *Wynkoop* v. *Niagara Fire* (1883), 91 N. Y. 478; *Beals* v. *Home Insurance* (1867), 36 N. Y. 522; *Kelly* v. *Sun Fire* (1891), 141 Pa. 10: *M'Allaster* v. *Niagara Fire* (1898), 156 N. Y. 80; *Maryland Home Insurance* v. *Kimmell* (1899), 89 Md. 443; *Dant* v. *Fireman's Insurance* (1883), 35 La. Ann. 99; *Hedger* v. *Union* (1883), 17 Fed. Rep. 498; *Zaleska* v. *Iowa State Insurance* (1899), 108 Iowa, 392; *Fire Assurance* v. *Rosenthal* (1885), 108 Pa. 474; *Ryder* v. *Commonwealth Fire* (1868), 52 Barb. 447; *Henderson* v. *Insurance Co.* (1896), 48 La. 1031; *Morrell* v. *Irving Fire Co.* (1865), 33 N. Y. 429; *Parker* v. *Eagle Fire* (1857), 75 Mass. 152; *Hartford Fire* v. *Peebles Hotel* (1897), 82 Fed. Rep. 546; *Heilmann* v. *Westchester Fire* (1878), 75 N. Y. 7; *Lancashire Insurance* v. *Barnard* (1901), 111 Fed. Rep. 702.

The company instead of making payment may repair rebuild or replace, within a reasonable time, the property damaged or lost, giving notice of their intention within fifteen days after receipt of the proofs herein required.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (18).

Option to reinstate by replacing the property

Unless within sixty days after notice of such loss or damage the said company shall have replaced the said property lost or damaged with other of the like kind or quality.

Tolman v. *Manufacturers'* (1848), 55 Mass. 73.

within sixty days after notice of loss.

Or the said corporation shall, at the end and expiration of sixty days after notice of the loss shall be given, provide and supply the assured with the like quantity of goods of the same sort and kind and of equal value and goodness with those burned or damnified by fire or expend in rebuilding or repairing any building damaged or destroyed by fire the sum assured thereon under the direction of able and experienced workmen if the loss or damage shall in their opinion amount thereto.

Bisset v. *Royal Exchange Assurance* (1821), 1 S. 174.

Option to reinstate by commencing operations sixty days after notice of loss.

(Promise to pay within sixty days after claim) unless the directors shall at the charge of the society on reasonable notice given of the loss by fire of the said building or buildings begin to rebuild within the said sixty days, and procure the said building or buildings to be built and put into as good condition as the same was or were before the fire happened; and in case the said building or buildings be not demolished but only damaged by fire to repair or cause to be repaired the damage so happening and the same to be put in as good condition as before the fire happened.

Alchorne v. *Favill* (1825), 4 L. J. (O. S.) Ch. 47.

Right to elect within a reasonable time.

The directors may within a reasonable time rebuild repair or replace the property lost or damaged.

Haskins v. *Hamilton Mutual* (1855), 71 Mass. 432.

And in every case of loss the company reserves the right of re-instatement in preference to the payment of claims if it should judge the former course to be more expedient.

Sutherland v. *Sun Fire* (1852), 14 D. 775; *Brown* v. *Royal Insurance* (1859), 1 El. & El. 853.

Right to join with other companies in reinstatement.

The company may if it think fit re-instate or replace property damaged or destroyed instead of paying the amount of the loss or damage and may join with any other company or insurers in doing so in cases where the property is also insured elsewhere.

Scottish Amicable v. *Northern Assurance* (1883), 11 R. 287; *Anderson* v. *Commercial Union* (1885), 55 L. J. Q. B. 146.

Company's right to contribution in respect of new for old.

In case of any depreciation the assured shall pay to the company the difference between the new and the old property such difference to be determined in default of agreement by arbitration.

Zaleska v. *Iowa State Insurance* (1899), 108 Iowa, 392.

And the insured shall contribute one fourth of the expense of rebuilding.

Parker v. *Eagle Fire* (1857), 75 Mass. 152.

And when they rebuild or replace any whole subject or item of insurance the assured shall contribute one third of the expense.

Haskins v. *Hamilton Mutual* (1855), 71 Mass. 432.

Security for assured's contribution to be furnished before company bound to rebuild.

And the directors shall not be authorised to proceed therein until the assured shall have furnished them satisfactory security . . . for the payment of the amount which he shall be found liable to contribute; nor shall the company be found liable to any action for the loss until such security shall have been furnished, nor unless the company shall neglect for thirty days thereafter to proceed to rebuild, repair or replace.

Haskins v. *Hamilton Mutual* (1855), 71 Mass. 432.

20. Conditions relating to Limitation of Action

Effect of condition.

A limitation of the period within which action can be brought after loss is valid notwithstanding that it gives a shorter period than the Statutes of Limitations (*f*). The limitation sometimes runs from the time when the money becomes payable as where it is payable so many days after proof of loss (*g*), but more usually the limitation runs from the date of loss. If the insurers cause delay in the settlement of the loss, or induce the assured to refrain from commencing proceedings by promise of

(*f*) *Riddlesburger* v. *Hartford Insurance* (1868), 7 Wall. 386.
(*g*) *Steel* v. *Phœnix Insurance* (1893), 51 Fed. Rep. 715

payment, or definite hopes of settlement, the condition may be held to be waived (*h*), or the period may be held to have been enlarged by suspension of the condition during the negotiations for settlement (*i*).

Conditions which have been judicially construed.

Twelve months' limitation from date of fire.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery . . . unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken as conclusive evidence against the validity of such claim any statute of limitations to the contrary notwithstanding.

Thompson v. *Phœnix Insurance* (1889), 136 U. S. 287; *Steel* v. *Phœnix Insurance* (1893), 51 Fed. Rep. 715; *Riddlesburger* v. *Hartford Insurance* (1868), 7 Wall. 386; *Lynchburg Cotton Mills* v. *Travellers' Insurance* (1905), 140 Fed. Rep. 718; *Rosenbaum* v. *Council Bluffs Insurance* (1889), 37 Fed. Rep. 724; *Curtis* v. *Home Insurance* (1865), 1 Biss. 485.

Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred unless commenced within the term of one year after the loss or damage occurs.

Statutory Condition, Revised Statutes of Ontario (1897), ch. 203, sect. 168 (22); *Merchants' Fire* v. *Equity Fire* (1905), 9 Ont. L. R. 241; *Preoria Sugar Refining Co.* v. *Canada Fire, etc.* (1885), 12 Ont. A. R. 418.

21. Conditions relating to Subrogation

See Chapter VII., Section VII., pp. 733–764.

Conditions which have been judicially construed.

In the event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said merchandise not exceeding the amount paid by said insurers. . . . In case of any agreement or act past or future by the insured whereby any right of recovery of the assured against any person or corporation is released or lost which would on acceptance of abandonment or payment of loss by this company belong to this company but for such agreement or act or in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured the company shall not be bound to pay any loss; but its right to retain or recover the premium shall not be effected.

Fayerweather v. *Phœnix* (1890), 118 N. Y. 324; *Inman* v. *South Carolina Railway* (1888), 129 U. S. 128.

When this company shall claim that the fire was caused by an act or omission of any person town or corporation which created a cause of action the party to whom the loss is payable under this policy shall on receiving payment assign to this company such cause of action.

Niagara Fire v. *Fidelity* (1888), 123 Pa. 516; *St. Paul Fire, etc.* v. *Kidd* (1893), 55 Fed. Rep. 238.

22. Conditions relating to Authority of Agents

Object and effect of such conditions.

These conditions are designed to protect the company from responsibility for the unauthorised acts of persons who but for such conditions might be held to be acting for and on behalf of

(*h*) *Curtis* v. *Home Insurance* (1865), 1 Biss. 485; *Thompson* v. *Phœnix Insurance* (1893), 51 Fed. Rep. 715.

(*i*) *Lynchburg Cotton Mills* v. *Travellers' Insurance* (1905), 140 Fed. Rep. 718.

the company and within the scope of their actual or apparent authority. The substantial effect of the conditions is to make it more difficult for the assured to prove that any act, or waiver of a condition, upon which he relies was done or made by an agent of the company and within the scope of his authority as such agent. The conditions relate either to the question whether any particular person is an agent of the company at all, that is to say they lay down a test upon which the question of agency or no agency is to be determined, or to the question of the extent of any particular agent's authority. In cases where the company have in no way recognised any irregularity on the part of an agent the conditions prove a valuable protection (*k*), but their weakness lies in the fact that the company cannot by any conceivable form of condition contract itself out of the right to waive any condition in the policy or prevent the application of the rules of estoppel which will prevent the company relying upon any particular condition when its conduct has been such as to render it inequitable that it should do so (*l*). Thus where a company has consistently dealt with some person on the footing that such person was its agent it cannot afterwards disavow his acts by mere reliance on the condition that no person shall be deemed an agent unless authorised in writing (*m*). And where an agent has, with the knowledge and acquiescence of the company, assumed authority to waive forfeitures, and grant privileges in a manner not authorised by the conditions of the policy, the company may be estopped from relying on such conditions as against the assured (*n*). The knowledge or conduct of the company in this connexion means the knowledge or conduct of the directors acting within their powers as defined in the memorandum and articles, deed of settlement or other instrument constituting the company. The acts however of the responsible officials such as the secretary and actuary at the head office must be deemed to have been done with the consent of the directors unless it is shown that there was an express limitation upon their authority contained in the conditions of the policy, or otherwise known to the assured, and it is proved that the directors did not in fact know of or consent to the particular acts (*o*).

(*k*) *Sowden* v. *Standard Fire* (1880), 5 Ont. A. R. 290; *Northern Assurance* v. *Grand View* (1901), 183 U. S. 308; *Scottish National Insurance* v. *Encampment Smelting Co.* (1908), 166 Fed. Rep. 231; *Commercial Union Assurance* v. *Margeson* (1899), 29 Can. S. C. 601; *St. Paul Fire, etc.* v. *Penman* (1907), 151 Fed. Rep. 961.

(*l*) *Aetna Life* v. *Frierson* (1902), 114 Fed. Rep. 56; *Northern Assurance* v. *Grand View* (1900), 101 Fed. Rep. 77; *Blake* v. *Exchange Mutual* (1882), 78 Mass. 265; *Caldwell* v. *Stradacona Fire* (1883), 11 Can. S. C. 112.

(*m*) *McElroy* v. *British American Assurance* (1899), 94 Fed. Rep. 990.

(*n*) *Caldwell* v. *Stradacona Fire* (1883), 11 Can. S. C. 112.

(*o*) *Aetna Life* v. *Frierson* (1902), 114 Fed. Rep. 56.

Conditions which have been judicially construed.

Person procuring policy to be agent of assured.

It is part of this contract that any person other than the assured who may have procured the insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy and not of the company under any circumstances whatever or in any transactions relating to this insurance.

Grace v. *American Central Insurance* (1883), 109 U. S. 278.

Agent to be authorised in writing.

In any matter relating to this insurance no person unless duly authorised in writing shall be deemed an agent of this company.

M'Elroy v. *British American Assurance* (1899), 94 Fed. Rep. 990.

Agent filling up application.

If the agent of the company fills up the application he shall in that case be the agent of the applicant and not of the company.

Hastings Mutual Fire v. *Shannon* (1878), 2 Can. S. C. 394; *Sowden* v. *Standard Fire* (1880), 5 Ont. A. R. 290.

But the company will be responsible for all surveys made by their agents personally.

Hastings Mutual Fire v. *Shannon* (1878), 2 Can. S. C. 394.

No agent or officer of company to alter contract or waive condition otherwise than in manner specified.

This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions agreements or conditions as may be indorsed hereon or added hereto and no officer agent or other representative of this company shall have power to waive any provision or condition of the policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added thereto and as to such provisions and conditions no officer agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached.

Northern Assurance v. *Grand View* (1901), 183 U. S. 308; *Hartford Fire* v. *Small* (1895), 66 Fed. Rep. 490; *Scottish National Insurance* v. *Encampment Smelting Co.* (1908), 166 Fed. Rep. 231; *Becker* v. *Exchange Mutual Fire* (1908), 165 Fed. Rep. 816; *Mulrooney* v. *Royal Insurance* (1908), 163 Fed. Rep. 833; *St. Paul Fire, etc.* v. *Penman* (1907), 151 Fed. Rep. 961; *Atlas Reduction* v. *New Zealand Co.* (1905), 138 Fed. Rep. 497; *Aetna Life Insurance* v. *Frierson* (1902), 114 Fed. Rep. 56.

It is agreed and declared by the parties aforesaid that no condition stipulation covenant or clause hereinbefore contained shall be altered annulled or waived or any clause added to these presents except by writing endorsed hereon or annexed hereto by the president or secretary with their signatures affixed thereto.

Blake v. *Exchange Mutual* (1882), 78 Mass. 265; *Caldwell* v. *Stradacona Fire* (1883), 11 Can. S. C. 112; *Commercial Union Assurance* v. *Margeson* (1899), 29 Can. S. C. 601; *Logan* v. *Commercial Union* (1886), 13 Can. S. C. 270.

No condition of the policy either in whole or in part shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing signed by an agent of the company.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (20).

An officer or agent of the company who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance shall be deemed *primâ facie* to be the agent of the company for the purpose.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 209, s. 168 (21).

23. Conditions relating to Re-insurance

Conditions which have been judicially construed.

To follow terms and conditions of risk re-insured.

This re-insurance is subject to the same specifications terms and conditions as policy No. of the X. Co. which it re-insures; it being well understood that the X. Co. do not retain any sum or risk on the property covered by this policy but retain an amount equal at least thereto on other parts of the same property.

Canada Fire v. *Northern Insurance* (1878), 2 Ont. A. R. 373.

This policy is subject to and liable for the same risks conditions valuations privileges mode of settlement indorsement and assignments as are or may be assumed or adopted by the Home Insurance Co. and covers such property as may

be protected by the said company and the loss if any is payable ten days after presentation of proofs of payment.

Victoria Montreal Fire v. *Home Insurance* (1904), 35 Can. S. C. 208; *Imperial Fire* v. *Home Insurance* (1895), 68 Fed. Rep. 698.

Each entry under this compact unless otherwise provided in this compact shall be subject to the same conditions stipulations risks and valuation as may be assumed by the said re-insured company under its original contracts hereunder re-insured and losses if any shall be payable *pro rata* with in the same manner and upon the same terms and conditions as paid by the said re-insured company under its contracts hereunder re-insured and in no event shall this company be liable for an amount in excess of a rateable proportion of the sum actually paid to the assured or re-insured by the said re-insured company under its original contracts hereunder re-insured after deducting therefrom any and all liability of other re-insurers of said contracts or any part thereof.

Allemannia Fire v. *Firemen's Insurance* (1907), 209 U. S. 326.

24. Condition relating to Form of Notice

Notice by registered post.

Any written notice to a company for any purpose of the statutory conditions where the mode thereof is not expressly provided may be by letter delivered at the head office of the company in Ontario or by registered post letter addressed to the company, its manager or agent, at such head office or by such written notice given in any other manner to an authorised agent of the company.

Statutory Condition, Revised Statutes of Ontario, 1897, c. 203, s. 168 (23).

Section IV.—Accident Policies

1. Clauses defining Injury caused by Accidental Means

Bodily injury caused by violent accidental external means.

Insurance companies have experienced great difficulty in defining the risk in an accident policy so as to exclude injuries and death resulting from what are generally known as natural causes. The word "accidental," as applied to death or injury, is very vague, because in a sense every death or injury, unless intentionally inflicted by the assured upon himself is accidental, that is to say the time, manner, and cause of it is unforeseen and unexpected. Insurers have, therefore, been compelled to define the risk much more narrowly, with the result that the modern accident policy bristles with limitations and qualifications. The general risk is now usually defined in British policies as "bodily injury caused by violent accidental, external, and visible means." This definition postulates not merely an "accidental injury" or an "injury caused by accident," but an "injury caused by accidental means." The distinction is of considerable importance because, although the injury or death may be accidental in the sense that it was the unforeseen and unexpected result of some act of the assured, the means may not have been accidental, because externally nothing may have been done by or happened to the assured, except what he deliberately planned to do precisely in the time and manner in which he did it. The unforeseen and unexpected result is brought about by the fact that the physical condition of the insured was not equal to the strain which he put upon himself either because unknown to him his organs had been weakened by disease, or because he miscalculated the capacity of his organs or the extent of the strain to which he was subjecting them.

Where the injury is due to the fact that the assured had some pre-existing weakness or anatomical defect, the existence or extent of which was unknown to him, and his physical structure gave way under an effort voluntarily undertaken, there is no "injury caused by accidental means." Thus a claim under an accident policy failed where the assured, who was proved to have been suffering from fatty degeneration of the heart, attempted to eject a drunken man from his office, and the effort and excitement operating upon the defective condition of the heart caused dilatation and subsequently death (*r*). In a Scottish case (*s*) the assured had stooped down to put on his stocking and, owing to the attitude voluntarily assumed by him combined with the peculiar structure of his intestines, the colon slipped in front of his liver and became strangulated, causing death. Here again there was no accident. And so in an American case (*t*), where the assured took a long bicycle ride and the natural action of the psoas muscle rubbing against certain abnormal concretions in the appendix set up inflammation and caused death, the death was due to natural and not accidental means. In all these cases the only accidental element was that the assured was unaware of his own condition or of the natural consequence which would ensue from the voluntary effort which he made. Neither of the combined causes operating to cause the injury was accidental.

Pre-existing latent weakness or defect.

A somewhat more difficult class of case is that where the assured is free from any weakness or defect, but exerts himself beyond his natural strength either because he miscalculates his own strength or the extent of the strain to which he is voluntarily subjecting himself.

Where assured exerts himself beyond his natural strength.

In the case of *Fenton* v. *Thorley* (*u*), a workman was operating a machine for pressing cattle cakes. The machine jammed and the workman in his effort to move it ruptured himself. There was no previous weakness, and there was no evidence of any slip or unintentional movement on the part of the workman. This was held to be an "injury caused by accident" within the meaning of the Workmen's Compensation Act, 1897. The accidental element was considered to be either the jamming of the machine or the miscalculation by the workman of his own strength and the effort required to remove the obstruction. The case, however, was distinguished from some of the accident insurance cases, and it is submitted that a similar injury would not be covered under the ordinary accident policy (*x*). In so far as the accidental element lay in the miscalculation by the workman of his own strength that would apply equally to the case of a man suffering from an unknown weakness or defect; and although the injury was accidental, and therefore might be deemed to be

(*r*) *Scarr* v. *General Accident Assurance*, [1905] 1 K. B. 387; *Shauberg* v. *Fidelity and Casualty* (1907), 158 Fed. Rep. 1.
(*s*) *Clidero* v. *Scottish Accident* (1892), 19 R. 355.
(*t*) *Appel* v. *Aetna Life* (1903), 86 Hun. App. 83.
(*u*) [1903] A. C. 443; *Boardman* v. *Scott*, [1902] 1 K. B. 43.
(*x*) But see *Martin* v. *Travellers'* (1859), 1 F. & F. 505.

an "injury caused by accident," it was not an "injury caused by accidental means," because the means were not accidental and the injury resulted from an effort voluntarily and deliberately applied. In so far as the accidental element lay in the jamming of the machine, the answer to a claim on a policy of insurance would be that although that was undoubtedly an accidental cause or means contributing to the injury it was not the immediate but a remote cause, and in ascertaining the cause of loss in an insurance policy the immediate cause alone is to be considered, whereas the scope of the Workmen's Compensation Act permits a construction much more favourable to the claimant.

There are several American cases where the assured having no previous weakness has been injured by a voluntary effort, and the decisions are somewhat conflicting (*y*); but the law is probably most accurately stated in *Southard* v. *Railway Passengers* (*z*) and *Feder* v. *Iowa State Travelling Men's* (*a*). In the former case the assured jumped off a car and ran to catch a train, and was subsequently found to be ruptured from the effort. There was no previous weakness and no evidence of any slip, twist, fall, or unintentional movement, and the Court held it was not an "injury caused by accidental means."

Evidence must show some unintentional act or movement.

Where therefore the assured, whether sound or weakened by disease, is injured in consequence of some violent effort on his part, he must show that his action was not purely voluntary but that he made some movement which he had not intended or that something unexpected happened externally to himself which interfered with his voluntary action. Thus, where the assured stooped down to pick up a marble, and the evidence showed that he did it awkwardly, and thereby got into a position which he had not intended and dislocated his knee joint, the injury was caused by accidental means (*b*). Where the assured jumped from a high platform and injured his duodenum, which became strictured, the Supreme Court in America held that if there was any involuntary movement or twist in taking the jump the risk was covered, and that evidence that the jump was clumsy and awkward was sufficient to go to the jury and to support a finding that the injury was caused by accidental means (*c*).

Disease not an accident.

The definition of the risk is so framed as to exclude all cases where disease is the sole and immediate cause of the injury or death. In one sense disease is an accidental means of injury or death, and particularly in the case of infectious or contagious disease where the exposure to the infection or contagion is

(*y*) *Globe Accident* v. *Gerisch* (1896), 136 Ill. 625; *North American Life, etc.* v. *Burroughs* (1871), 69 Pa. 43.

(*z*) (1868), 34 Conn. 574.

(*a*) (1899), 107 Iowa, 538; *McCarthy* v. *Travellers'* (1878), 8 Biss. 362; *Fidelity and Casualty* v. *Stacey* (1906), 143 Fed. Rep. 271.

(*b*) *Hamlyn* v. *Crown Accidental*, [1893] 1 Q. B. 750.

(*c*) *Mutual Accident* v. *Barry* (1888), 131 U. S. 100; *Standard Life* v. *Schmaltz* (1899), 66 Ark. 588; *Horsfall* v. *Pacific Mutual Life* (1903), 32 Wash. 132; *Rodey* v. *Travellers'* (1886), 9 Pac. Rep. 348.

unknown to the assured and therefore wholly involuntary. But injury or death engendered by what is ordinarily known as disease would never be referred to in ordinary parlance as an injury or death from accident, and insurance simply against injury or death caused by accident would not cover consequences resulting solely from disease. Thus in *Sinclair* v. *Maritime Passengers'* (*d*) it was held that death from sunstroke resulting from exposure to the heat on board ship was not covered by a policy insuring against "injury caused by accident." There is a suggestion in that case that if the exposure itself had been due to accidental circumstances, the risk might have been covered. If, for instance, a man insured against injury or death caused by accidental means were to lose his way upon a mountain or be unable to retrace his steps owing to his retreat being cut off by an avalanche or heavy snowfall, and death result from consequent exposure to the cold, the assured's representatives might be entitled to recover.

Disease caused by accidental alighting of definite germ.

Where disease is caused by some definite germ or bacillus alighting on the person or introduced internally with food or drink, there is clearly an accidental element in the fact that the assured came in contact with the particular germ which caused the mischief.

Brintons v. *Turvey*.

In *Brintons* v. *Turvey* (*e*) the House of Lords held, by a majority, that where a workman engaged in sorting wool became infected by anthrax owing to the bacillus from the wool alighting on the tender membrane of the eye, it was an "injury caused by accident" within the Workmen's Compensation Act, 1897. There was no evidence of any abrasion or wound, and the only accidental element was the alighting of the bacillus on the most susceptible part of the body.

Steel v. *Cammell Laird*.

In *Steel* v. *Cammell, Laird, & Co.* (*f*), the Court of Appeal, very shortly after the decision of the House of Lords in *Brintons* v. *Turvey*, held that lead poisoning resulting from gradual absorption into the system of a workman employed in working with lead was not an injury caused by accident, since the injury was the result of a gradual process and not of any definite accidental event of which notice could be given.

Above cases not applicable to claim on accident policy.

It is submitted that no disease of the nature of anthrax or lead poisoning would be covered by an accident policy, even if the insurance were simply against injury caused by accident without any further definition of the risk. In *Sinclair* v. *Maritime Passengers'* (*g*), Cockburn, C.J., said that the term "accident" as used in an accident policy necessarily involved some violence, casualty, or *vis major*. But, however this may be, the consequences of disease of all kinds are clearly excluded where the insurance is restricted to "injuries caused by violent accidental external and visible means," except where such disease supervenes upon or gives rise to some distinct accidental injury

(*d*) 3 El. & El. 478.
(*e*) [1905] A. C. 230.
(*f*) [1905] 2 K. B. 202.
(*g*) (1861), 3 El. & El. 478.

within the meaning of the definition. In America an injury from a malignant pustule, caused by the introduction of bacilli by contact with putrid matter or carried by insects, was held not to be an injury caused by external violent or accidental means (*h*).

Disease supervening on accident.

There are many cases where disease supervenes upon an accidental injury such as a wound (*i*). This class of case, however, will be considered under the clause dealing, not with the cause, but the consequence of the injury (*j*).

Accident supervening on disease.

Where disease is the cause of a violent accident, and the accident results in injury, the rule applies that the immediate and not the remote cause must be considered, and the injury is therefore caused by accidental means and not by disease. Thus, where the assured was seized by a fit while crossing a stream, and consequently fell in and was drowned, the injury and death were due to accidental external and visible means (*k*).

Death or injury from taking poison or inhaling gas.

Most policies contain express exceptions excluding death or injury resulting from taking poison or inhaling gas, etc., but where there is no such express exception the question arises whether such occurrences are within the general risk. Where the assured took an overdose of morphia, it was held that if he believed it to be a proper dose there was no accidental cause, but merely ignorance of the natural effect of a voluntary and deliberate act, but that if he mistook the measure and poured out and drank a larger dose than he intended to take, there was an accidental cause, and as the evidence was equally consistent with either inference, the claimant's case was not proved (*l*). In New York it was held in some cases that, although the taking of poison was an accidental cause of injury, the means were not violent, and therefore there was no injury caused by external violent and accidental means; but these cases have been overruled (*m*), and the action of the poison upon the intestines is now held to afford a sufficient element of violence to satisfy the definition (*n*). Where the assured is accidentally suffocated by

(*h*) *Bacon* v. *U. S. Mutual Accident* (1890), 123 N. Y. 304. Where a policy issued to a dentist was endorsed to cover "blood poisoning sustained by physicians or surgeons resulting from septic matter introduced into the system through wounds suffered in professional operations," and while the dentist was operating the patient coughed and septic matter entered the dentist's eye through the mucous membrane, causing blood poisoning, it was held that the injury was not covered: *Fidelity and Casualty* v. *Thompson* (1907), 154 Fed. Rep. 484.

(*i*) *Isitt* v. *Railway Passengers'* (1899), 22 Q. B. D. 504; *Baily* v. *Interstate Casualty* (1896), 8 App. Div. 127.

(*j*) *Vide infra*, p. 932.

(*k*) *Winspear v. Accident* (1880), 6 Q. B. D. 42; *Wicks* v. *Dowell*, [1905] 2 K. B. 225; *Lawrence* v. *Accidental* (1881), 7 Q. B. D. 216; *Reynolds* v. *Accidental* (1870), 22 L. T. 820.

(*l*) *Carnes* v. *Iowa States Travelling Men's* (1898), 106 Iowa, 281.

(*m*) *Paul* v. *Travellers'* (1889), 112 N. Y. 472.

(*n*) *Dezell* v. *Fidelity and Casualty* (1903), 176 Mo. 253; *Mutual Accident* v. *Tuggle* (1891), 39 Ill. App. 509; *Henley* v. *Mutual Accident* (1890), 133 Ill. 556.

coal gas or other poisonous fumes, the operation of the gas in arresting the action of the lungs is held to be violent (*o*).

Death caused by choking owing to some particle of food blocking the windpipe has been held to be death caused by external violent and accidental means (*p*), and so was death caused by perforation of the stomach owing to some hard particles of food having been passed into an intestine weakened by disease (*q*). Death by choking, etc.

Intentional injuries inflicted by another are accidental from the point of view of the assured, and are therefore covered unless they were invited or provoked by the assured (*r*). Intentional injuries inflicted by third person.

The fact that an accident arises from the negligence of the assured does not disentitle him to recover on the policy (*s*). Negligence of assured.

In *Pugh* v. *London, Brighton, and South Coast Railway* (*t*), injury was caused from nervous shock, and not from any physical contact with the cause of injury. The assured was a signalman, and noticed some defect in a passing train which might have caused an immediate accident. He leaned out of his box and waved violently to the driver to stop. The excitement caused severe nervous shock, and it was held that the assured was "incapacitated through accident," and probably he could also have recovered on a policy insuring against "injury caused by violent accidental external and visible means." Injury caused by shock without physical contact.

Where death or injury is caused by exposure to the ordinary course of the elements such as sun or rain, wind or snow there is no accidental means, although as has been pointed out where the exposure is unintentional and has been brought about by accidental means the case may be different (*u*). Where death or injury is caused by some sudden and unexpected action of the elements taking a man unawares it is caused by accidental means as where a man is struck by lightning (*x*). Death or injury caused by direct action of the elements.

Death caused by drowning where the assured has accidentally fallen into the water, or being voluntarily in the water has miscalculated the depth of the water or strength of the tide or Drowning.

(*o*) *Pickett* v. *Pacific Mutual* (1891), 144 Pa. 79; *Paul* v. *Travellers'* (1889), 112 N. Y. 472.

(*p*) *American Accident* v. *Reizart* (1893), 94 Ky. 547.

(*q*) *Miller* v. *Fidelity and Casualty* (1899), 97 Fed. Rep. 836.

(*r*) *Robinson* v. *U. S. Mutual Accident* (1895), 68 Fed. Rep. 825; *Supreme Council* v. *Garrigas* (1885), 104 Ind. 133; *Railway Officials' Accident* v. *Drummond* (1898), 56 Neb. 235; *American Accident* v. *Carson* (1896), 99 Ky. 441; *Hutchcraft* v. *Travellers'* (1888), 87 Ky. 300; *Union Casualty* v. *Haroll* (1897), 98 Tenn. 591; *Taliaferro* v. *Travellers' Protective* (1897), 80 Fed. Rep. 368; *Lovelace* v. *Travellers' Protective* (1894), 126 Mo. 104; *Richards* v. *Travellers'* (1891), 89 Col. 170; *Accident Insurance* v. *Bennett* (1891), 90 Tex. 256.

(*s*) *Champlin* v. *Railway Passengers'* (1872), 6 Lans. 71.

(*t*) [1896] 2 Q. B. 248.

(*u*) *Supra*, p. 921; *Sinclair* v. *Maritime Passengers'* (1861), 3 El. & El. 478; *Dozier* v. *Fidelity and Casualty* (1891), 46 Fed. Rep. 446; *Warner* v. *Couchman* (1911), The Times, Nov. 11.

(*x*) *Andrew* v. *Failsworth*, [1904] 2 K. B. 32.

currents, is death caused by violent accidental external and visible means (*y*).

Clauses which have been judicially construed.

Injury caused by accident.

Isitt v. *Railway Passengers'* (1889), 22 Q. B. D. 504; *Sinclair* v. *Maritime Passengers'* (1861), 3 El. & El. 478; *Pugh* v. *London, Brighton, and South Coast Railway Co.*, [1896] 2 Q. B. 248; *Fenwick* v. *Schmaltz* (1868), L. R. 3 C. P. 313; *Brintons* v. *Turvey*, [1905] A. C. 230; *Steel* v. *Cammell Laird & Co.*, [1905] 2 K. B. 232; *Fenton* v. *Thorley*, [1903] A. C. 443; *Wicks* v. *Dowell*, [1905] 2 K. B. 225; *Boardman* v. *Scott*, [1902] 1 K. B. 43; *Andrew* v. *Failsworth*, [1904] 2 K. B. 32; *Robin* v. *Clay* (1898), 27 U. C. Q. B. 438; *American Accident* v. *Carson* (1896), 99 Kz. 441; *Railway Officials' Accident* v. *Drummond* (1898), 56 Neb. 235; *Supreme Council* v. *Garrigas* (1885), 104 Md. 133; *Lovelace* v. *Travellers' Protective* (1894), 126 Mo. 104; *Union Casualty* v. *Harroll* (1897), 98 Tenn. 591; *Taliaferro* v. *Travellers' Protective* (1897), 80 Fed. Rep. 368; *Robinson* v. *U. S. Mutual Accident* (1895), 68 Fed. Rep. 825; *Globe Accident* v. *Gerisch* (1896), 163 Ill. 625; *North American Life and Accident* v. *Burroughs* (1871), 69 Pa. St. 43; *Peele* v. *Provident Fund* (1897), 147 Md. 543; *Carnes* v. *Iowa State Travelling* (1898), 106 Iowa, 281; *Bender* v. *Owners of SS. Zent*, [1909] 2 K. B. 41; *Marshall* v. *Owners of SS. Wild Rose*, [1909] 2 K. B. 46.

Bodily / Personal } injury { caused by / sustained through / arising from } violent and accidental means.

Southard v. *Railway Passengers'* (1868), 34 Conn. 574; *Shauberg* v. *Fidelity and Casualty* (1907), 158 Fed. Rep. 1; *Fidelity and Casualty* v. *Stacey's Executors* (1906), 143 Fed. Rep. 271; *Taliaferro* v. *Travellers' Protective* (1897), 80 Fed. Rep. 368.

. . . external violent and accidental means.

Mutual Accident v. *Barry* (1888), 131 U. S. 100; *M'Cartly* v. *Travellers'* (1878), 8 Biss. 362; *Feder* v. *Iowa State Travelling Men's* (1899), 107 Iowa, 538; *Standard Life* v. *Schmaltz* (1899), Ark. 588; *Appel* v. *Aetna Life* (1903), 86 Hun. App. 83; *Horsfall* v. *Pacific Mutual Life* (1903), 32 Wash. 132; *Bayless* v. *The Travellers'* (1877), 14 Blatchf. 143; *Hill* v. *Hartford* (1880), 22 Hun. 187; *Pickett* v. *Pacific Mutual* (1891), 144 Pa. 79; *Paul* v. *Travellers'* (1889), 112 N. Y. 472; *Dezell* v. *Fidelity and Casualty* (1903), 176 Mo. 253; *Mutual Accident* v. *Tuggle* (1891), 39 Ill. App. 509; *Henley* v. *Mutual Accident* (1890), 133 Ill. 556; *Bacon* v. *U. S. Mutual Accident* (1890), 123 N. Y. 304; *American Accident* v. *Reizart* (1893), 94 Kz. 547; *Miller* v. *Fidelity Casualty* (1899), 97 Fed. Rep. 836; *Baily* v. *Interstate Casualty* (1896), 8 App. Div. 127; *Rodey* v. *Travellers'* (1886), 9 Pac. R. 348; *Dozier* v. *Fidelity and Casualty* (1891), 46 Fed. Rep. 446; *Wehle* v. *U. S. Mutual Accident* (1897), 153 N. Y. 116; *U. S. Mutual Accident* v. *Hubbell* (1897), 56 Ohio St. 516; *Hutchcraft* v. *Travellers'* (1888), 87 Kz. 300; *Richards* v. *Travellers'* (1891), 89 Col. 170; *Accident Insurance Co.* v. *Bennett* (1891), 90 Ten. 256.

. . . accidental external and visible means.

Winspear v. *Accident* (1880), 6 Q. B. D. 42.

. . . violent accidental external and visible means.

Hamlyn v. *Crown Accidental*, [1893] 1 Q. B. 730; *Clidero* v. *Scottish Accident* (1892), 19 R. 355; *Scarr* v. *General Accident Assurance*, [1905] 1 K. B. 387.

. . . accidental and external violence . . . payment only in case of injuries accidentally occurring from material and external causes operating upon the person of the assured.

Lawrence v. *Accidental* (1881), 7 Q. B. D. 216.

(*y*) *Winspear* v. *Accident* (1880), 6 Q. B. D. 42; *Reynolds* v. *Accidental* (1870), 22 L. T. 820; *Trew* v. *Railway Passengers'* (1861), 6 H. & N. 839; *Macdonald* v. *Refuge* (1890), 17 R. 955; *Ballantyne* v. *Employers'* (1891), 21 R. 305; *Harvey* v. *Ocean Accident* (1905), 2 Ir. R. 1; *Wehle* v. *U. S. Mutual Accident* (1897), 153 N. Y. 116; *U. S. Mutual Accident* v. *Hubbell* (1897), 56 Ohio, 516; *Peele* v. *Provident Fund* (1897), 147 Md. 543.

. . . accident or violence . . . occasioned by some external and material cause operating upon the person of the assured.
Martin v. *Travellers'* (1859), 1 F. &. F. 505; *Reynolds* v. *Accidental* (1870), 22 L. T. 820.

. . . accident or violence . . . no claim unless the injury shall be caused by some outward and visible means.
Trew v. *Railway Passengers'* (1861), 6 H. & N. 839.

Outward external and visible cause.
Harvey v. *Ocean Accident* (1905), 2 Ir. R. 1.

2. Clauses limiting the Risk to Accidents happening in a Particular Place or Manner

Accidents happening while travelling by railway or otherwise.

Insurance against the risks of transit on a railway or other public conveyance are frequently contained on a very incomplete form of policy or insurance ticket. In *Theobald* v. *Railway Passengers'* (*z*) the insurance was against "injury by reason of a railway accident" and the assured slipped and injured himself whilst alighting from a train. The insurers on the one hand contended that the risk was confined to accidents happening to the train in which the assured was travelling while the assured on the other hand contended that the insurance extended to all accidents which might happen to him while in the prosecution of a railway journey. The assured was held entitled to recover on the ground that the risk at any rate included all accidents which were incidental to the journey and attributable to the fact that the assured was travelling as a passenger on a railway. The Court did not completely indorse the argument of the assured, although one of the judges appeared to be inclined to take that view, and it is doubtful if an accident wholly unconnected with the journey, for instance if the assured whilst sitting in the carriage had cut his finger with a penknife, would have been covered. As a result of this case most of the railway insurances insure only against "injury by reason of an accident to the passenger train in which the assured is travelling" thereby eliminating a large percentage of the risks of railway travelling.

Travelling as a passenger.

The risk is frequently confined to accidents happening "whilst the assured is travelling as a passenger." This would appear to exclude (1) cases where the assured is travelling on duty as a servant of the railway company or other carrier (*a*) and (2) cases where the assured, although a passenger, is travelling on a part of the vehicle not intended for the conveyance of passengers (*b*). The risks of alighting from and boarding the vehicle in a proper manner are however covered (*c*). Where the

(*z*) (1854), 10 Ex. 45.
(*a*) *Travellers' Insurance* v. *Austin* (1902), 116 Ga. 264; *Wood* v. *General Accident* (1908), 160 Fed. Rep. 926.
(*b*) *Van Bokkelen* v. *Travellers'* (1901), 167 N. Y. 590; *Aetna Life* v. *Vandecar* (1898), 86 Fed. Rep. 282; *Berliner* v. *Travellers'* (1898), 121 Cal. 458.
(*c*) *Champlin* v. *Railway Passengers'* (1872), 6 Lans. 71; *Powis* v. *Ontario Accident* (1901), 1 Ont. L. R. 54; *King* v. *Travellers'* (1897), 101 Ga. 64.

risk insured was "whilst travelling by public or private conveyances" a passenger walking from a wharf to a railway station in prosecution of a continuous journey by steamer and rail was held to be covered (*d*). But if the assured deviates from the journey he is not covered, as where a passenger having arrived at the station which was his destination crossed the platform of one of the carriages to speak to an acquaintance in another train (*e*). A deviation rendered necessary by temporary illness is covered as where the assured being ill went on to the platform of the train to vomit (*f*).

Public or private conveyance.

Unless the risk is limited to travelling by public conveyance provided by a common carrier it may include all sorts of private conveyances (*g*), and the risk may thus be extended far beyond the limits contemplated by the insurers (*h*). It has been held, however, that a person riding a bicycle is not travelling in a vehicle as an ordinary passenger (*i*).

In compliance with carriers' rules and regulations.

If the risk is limited to travelling in a public conveyance in compliance with the rules and regulations of the railway company or other carrier then any accident happening when the assured is contravening such rules, as where he is riding on an open platform or leaving the train while in motion, will be excluded (*k*).

Risk limited to United Kingdom.

Where the risk was limited to accidents happening in the United Kingdom it was held nevertheless to cover an accident which happened in Jersey (*l*).

Clauses which have been judicially construed.

Injury by reason of a railway accident whilst travelling in any class carriage on any line of railway.

Theobald v. *Railway Passengers'* (1854), 10 Ex. 45.

Accident whilst riding as a passenger in a public conveyance.

Powis v. *Ontario Accident* (1901), 1 Ont. L. R. 54; *Preferred Accident* v. *Muir* (1904), 126 Fed. Rep. 926; *Travellers' Insurance* v. *Austin* (1902), 116 Ga. 264.

By any accident to the passenger train, passenger steamer, omnibus, tramcar, dog-cart, wagonette, coach, carriage or other vehicle in which the deceased was travelling as an ordinary passenger.

Shanks v. *Sun Life* (1896), 4 S. L. T. 66; *M'Millan* v. *Sun Life* (1896), 4 S. L. T. 66.

. . . Whilst travelling by public or private conveyances provided for the transportation of passengers.

Northrup v. *Railway Passengers'* (1869), 2 Lans. 166; *Champlin* v. *Railway Passengers'* (1872), 6 Lans. 71.

. . . Whilst travelling as a passenger in a public conveyance provided by a common carrier and in compliance with the rules and regulations of such carrier.

Hendrick v. *Employers' Liability* (1894), 62 Fed. Rep. 893; *Box* v. *Railway Passengers'* (1881), 56 Iowa, 664; *Wood* v. *General Accident* (1908), 160 Fed. Rep. 926.

(*d*) *Northrup* v. *Railway Passengers'* (1869), 2 Lans. 168.
(*e*) *Hendrick* v. *Employers' Liability* (1894), 62 Fed. Rep. 893.
(*f*) *Preferred Accident* v. *Muir* (1904), 126 Fed. Rep. 926.
(*g*) *Shanks* v. *Sun Life* (1896), 4 S. L. T. 66.
(*h*) *Aetna Life* v. *Frierson* (1902), 114 Fed. Rep. 56.
(*i*) *M'Millan* v. *Sun Life* (1896), 4 S. L. T. 66.
(*k*) *Box* v. *Railway Passengers'* (1881), 56 Iowa, 664.
(*l*) *Stoneham* v. *Ocean Railway, etc.* (1887), 19 Q. B. D. 237.

Injuries sustained whilst riding as a passenger in any passenger conveyance using steam cable or electricity as a motive power.

Van Bokkelen v. *Travellers'* (1898), 34 App. Div. 393 (1901), 167 N. Y. 590; *Aetna Life* v. *Vandecar* (1898), 86 Fed. Rep. 282: *Berliner* v. *Travellers'* (1898), 121 Cal. 458; *King* v. *Travellers'* (1897), 101 Ga. 64: *Aetna Life* v. *Frierson* (1902), 114 Fed. Rep. 56.

Accident within the United Kingdom.

Stoneham v. *Ocean Railway and General Accident* (1887), 19 Q. B. D. 237.

While in a passenger elevator.

Depue v. *Travellers' Insurance* (1909), 166 Fed. Rep. 183.

3. Clauses excluding Injuries of which there is no External Mark upon the Body

Such clauses are common in American but not in British policies. The original object of the clause was no doubt to exclude proof of injury depending entirely on the testimony of the assured and so to exclude many fraudulent claims. When an accidental injury can be satisfactorily proved by independent evidence the further requirement that there shall be some external and visible mark upon the body is no longer a proper protection to the insurance company against fraud but becomes merely a possible means of escape from an otherwise clear liability. The American Courts have accordingly construed these clauses very strictly limiting them as far as possible to their original object as a protection against simulated injuries and being astute to prevent their unfair use where the claimant's case is otherwise clearly proved (*m*).

Such clauses very strictly construed.

Where the clause does not expressly postulate external marks upon the body but merely some "symptom or visible sign" or "external and visible marks" of the accident and injury it may be satisfied by the evidence of a post mortem examination or even by the mere production of the dead body of the assured (*n*).

Visible sign.

Even where the clause demands an external and visible mark on the body it has been held that it is satisfied where the injury results in death, the body itself being then a sufficient external and visible mark (*o*).

Dead body.

Some clauses expressly state that "the body itself shall not be deemed such a mark"; but even where that is so any symptom appearing on the body either before or after death will be sufficient as where after the alleged accident the assured became pallid in his complexion and showed signs of pain (*p*).

Pallid complexion.

(*m*) Lewis, J., *Gale* v. *Mutual Aid and Accident* (1893), 66 Hun. 600, 602; Peters, C.J., *M'Glinchey* v. *Fidelity and Casualty* (1888), 80 Mc. 251, 257; Spring, J., *Root* v. *London Guarantee and Accident* (1904), 92 App. Div. 578; Pike, J., *Thayer* v. *Standard Life and Accident* (1896), 68 N. H. 577, 578.

(*n*) *Freeman* v. *Mercantile Accident* (1892), 156 Mass. 351; *Menneiley* v. *Employers' Liability* (1896), 148 N. Y. 596.

(o) *M'Glinchey* v. *Fidelity and Casualty* (1888), 80 Mc. 251; *Eggenberger* v. *Guarantee Mutual Accident* (1889), 41 Fed. Rep. 172; *Union Casualty* v. *Mondy* (1903), 71 Pac. Rep. 677.

(*p*) *Horsfall* v. *Pacific Mutual Life* (1903), 32 Wash. 132; *Root* v. *London Guarantee, etc.* (1904), 92 App. D. N. Y. 578.

Discoloration of skin.

Even although there is no mark at the time of the accident subsequent discoloration of the skin owing to a strain of the muscle is sufficient (*q*), and in one case it was held that even although there was nothing visible to the eye yet if upon pressure a physician could detect a rigidity of the muscle there was "an external and visible sign upon the body" within the meaning of the clause (*r*).

Clauses which have been judicially construed.

Not to extend to injuries of which there is no visible mark on the body.
Thayer v. *Standard Life and Accident* (1896), 68 N. H. 577; *Bernays* v. *U. S. Mutual Accident* (1891), 45 Fed. Rep. 455; *Eggenberger* v. *Guarantee Mutual Accident* (1889), 41 Fed. Rep. 172; *Union Casualty* v. *Mondy* (1903), 71 Pac. Rep. 677.

. . . of which there shall be no external and visible mark upon the body.
Pennington v. *Pacific Mutual Life* (1892), 85 Iowa, 468.

. . . of which there shall be no external and visible sign upon the body.
Mutual Accident v. *Barry* (1888), 131 U. S. 100; *Gale* v. *Mutual Accident* (1893), 66 Hun. 600; *Paul* v. *Travellers'* (1889), 112 N. Y. 472; *M'Glinchey* v. *Fidelity and Casualty* (1888), 80 Me. 251.

. . . of which there is no visible external mark upon the body (the body itself not being considered such mark) produced at the time of and by the accident.
Horsfall v. *Pacific Mutual Life* (1903), 32 Wash. 132.

. . . of which there is no visible mark on the body (the body itself in case of death not being deemed such a mark).
Root v. *London Guarantee and Accident* (1904), 92 App. D. N. Y. 578.

Not to extend to any case in which there should be no symptom or visible sign of bodily injury.
Freeman v. *Mercantile Accident* (1892), 156 Mass. 351.

Does not insure against death or disablement from accidents that shall bear no external and visible marks.
Menneiley v. *Employers' Liability* (1896), 148 N. Y. 596.

4. Conditions relating to Proof of Claim

Direct and positive proof includes circumstantial evidence.

The clause requiring direct and positive proof of the accident or of the nature, cause or manner of the injury has been considered in several American cases, with the result that the Courts have refused to permit the parties to restrict by their contract the ordinary methods of proof in a court of law (*s*). The requirement of direct and positive proof of certain matters does not make it necessary to establish the facts by persons who were present and can give their testimony as eye witnesses, but the facts may be proved by circumstantial evidence, and inferences may be drawn according to the ordinary rules of law (*t*). The clause therefore, in America at any rate, is of practically no value, and it is submitted that the Courts in this country would interpret it in the same sense.

(*q*) *Thayer* v. *Standard Life, etc.* (1896), 68 N. H. 577; *Pennington* v. *Pacific Mutual Life* (1892), 85 Iowa, 468.
(*r*) *Gale* v. *Mutual Accident* (1893), 66 Hun. 600.
(*s*) Harlan, J., *Travellers'* v. *McConkey* (1887), 127 U. S. 661; Morse, J., *Utter* v. *Travellers'* (1887), 65 Mich. 545.
(*t*) Hagarty, C.J., *Wright* v. *Sun Mutual* (1878), 29 U. C. C. P. 221, 233; *Insurance Co.* v. *Bennett* (1891), 90 Tenn. 256.

Admissibility of statements made by deceased with regard to alleged accident.

Where the assured has died from the effects of an injury the claimant is frequently placed in a difficulty as to proof of an accident of which there were no independent witnesses. Hearsay evidence is admissible to prove what the assured said to his medical attendant or friends as to his state of health before or after the alleged accident, but hearsay evidence is not generally admissible to prove what the assured said as to the manner in which he received certain injuries (*tt*). Statements however made by him at or about the time of the alleged accident may be admitted to show the nature of an act proved by independent evidence but ambiguous in its nature. It was apparently under this exception that the United States Supreme Court held that, where a man was found at night by his son lying at the foot of the stairs, evidence was admissible to prove that he then stated to his son that he had fallen downstairs, and that on returning to his room he repeated the same statement to his wife (*u*). On the other hand, a statement made by a man on returning from a walk that when out he had fallen over a heap of stones (*x*), and a statement made by a man to his friend three hours after the event that he had accidentally fallen in the street, were clearly inadmissible (*y*).

Nature of injury may be *primâ facie* proof of accidental cause.

Certain injuries afford by themselves *primâ facie* proof of accidental means. If a man is found with a pistol shot in his heart (*z*), or if his body is found in the water bearing symptoms of death by drowning (*a*), or if he is found with marks of violence on his back (*b*) or with a fractured arm (*c*) or cut to pieces on a railway (*d*), or if he fell out of a railway train (*e*), there is direct evidence of injury by violence, and the law will presume that the violence was accidental (*f*) rather than that it was intentionally self-inflicted, and therefore in the absence of other evidence there is proof of injury by violent and accidental means. On the other hand, if the facts proved point to suicide as the only reasonable conclusion, the fact that there is some possible explanation consistent with accidental death will not justify a finding of accidental death (*g*).

Evidence equally consistent with accidental and non-accidental cause.

Where the evidence is equally consistent with an accidental

(*tt*) *Amys* v. *Barton* (1911), 46 Law Journal 683.
(*u*) *Insurance Company* v. *Mosley* (1869), 8 Wall. 397.
(*x*) *Keefer* v. *Pacific Mutual Life* (1902), 201 Pa. St. 448; 88 Am. S. R. 822.
(*y*) *National Masonic Accident* v. *Shryock* (1896), 36 U. S. App. 658.
(*z*) *Travellers'* v. *M'Conkey* (1887), 127 U. S. 661; *Insurance Co.* v. *Bennett* (1891), 90 Tenn. 256.
(*a*) *Macdonald* v. *Refuge* (1890), 17 R. 955, 957; *Ballantyne* v. *Employers'* (1893), 21 R. 305; *Mallory* v. *Travellers'* (1871), 47 N. Y. 52.
(*b*) *Cronkhite* v. *Travellers'* (1889), 75 Wis. 116; 17 Am. S. R. 184.
(*c*) *Peck* v. *Equitable Accident* (1889), 52 Hun. 255.
(*d*) *Meadows* v. *Pacific Mutual Life* (1895), 50 Am. S. R. 427.
(*e*) *Standard Life and Accident* v. *Thornton* (1900), 100 Fed. Rep. 582.
(*f*) Lyon, J., *Cronkhite* v. *Travellers'* (1889), 75 Wis. 116; Macdonald, L.J.C., *Macdonald* v. *Refuge*, 17 R. 955, 957; Farwell, L.J., *Bender* v. *Owners of SS. Zent*, [1909] 2 K. B. 41; but see *Fowlie* v. *Ocean Accident*, [1901] 4 Ont. L. R. 146; 33 Can. S. C. R. 253.
(*g*) *Williams* v. *U. S. Mutual Accident* (1892), 133 N. Y. 366.

and a non-accidental cause of death, not involving suicide or breach of the law, there is no presumption in favour of accidental death, as for instance where the question is between death by accident and death from natural causes (*h*). Thus where the assured died from an overdose of opium and the facts proved were equally consistent with the assured having taken more than he intended and with his having taken exactly what he intended, erroneously believing it to be a proper dose, the Court held that the first alternative would entitle the claimant to recover and the second would not, and that as the evidence was equally consistent with either view the claimant was not entitled to recover (*i*). But the evidence, although consistent with either an accidental or a non-accidental cause, may be such that there is a distinct balance of probability in favour of an accidental cause, and when that is the case there is evidence on which a finding of death by accident may be supported. Thus where the body of the assured was found in the water but was so far decomposed as to afford no direct proof of actual death by drowning and the facts proved were entirely consistent with the assured having died from natural causes such as heart failure while bathing, it was held that there was evidence upon which the jury might properly find a verdict of death by accidental drowning (*k*). And so where a man fell from a buggy whilst driving it and was picked up dead, it was left to the jury upon the medical evidence to say whether the immediate cause of death was apoplexy or the fall from the buggy (*l*).

Proof satisfactory to the directors.

The policy frequently stipulates that there shall be no claim unless the injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished. This is an attempt to make the directors judges in their own case, and as it would be manifestly unfair to permit the company to resist a claim merely on the ground that the directors were not satisfied with the proof, the Courts have held that if on the evidence before the Court the directors ought to have been satisfied the claim must be allowed and that evidence which satisfies a jury is evidence which ought to have satisfied the directors (*m*). This renders the clause practically ineffective except on a question of costs where the preliminary proofs are insufficient and leave the matter in so much doubt that the insurers are reasonably entitled to have the matter investigated in a Court of law.

Power of directors to call for all reasonable information and evidence.

The further requirement that the claimant shall furnish all

(*h*) *Bender* v. *Owner of SS. Zent*, [1909] 2 K. B. 41; *Marshall* v. *Owner of SS. Wild Rose*, [1909] 2 K. B. 46.

(*i*) *Carnes* v. *Iowa State Travelling Men's* (1898), 106 Iowa, 281; see *Wakelin* v. *L. and S.W. Ry.* (1886), 12 A. C. 41.

(*k*) *Trew* v. *Railway Passengers'* (1861), 6 H. & N. 839.

(*l*) *M'Cormack* v. *Illinois Commercial, etc.* (1907), 159 Fed. Rep. 114.

(*m*) *Trew* v. *Railway Passengers'* (1861), 6 H. & N. 839; 6 Jur. N. S. 759; *Winspear* v. *Accident* (1880), 6 Q. B. D. 42; *Macdonald* v. *Refuge* (1890), 17 R. 955; *North American Life, etc.* v. *Burroughs* (1871), 69 Pa. 43; *Preferred Accident* v. *Barker* (1899), 93 Fed. Rep. 158.

such information and evidence as the directors may require from time to time is a much more valuable one to the company. It is clear under this clause that the directors may ask for evidence and information which may not be absolutely necessary to prove the claimant's case. That is to say, the claimant may have furnished such evidence as would satisfy a jury if no further evidence was adduced, but the directors have nevertheless the right to call for further evidence to corroborate or test the evidence before them (*n*). The evidence or information asked for however must not be unreasonably required (*n*). In a Scottish case the judges of the Inner House differed in opinion on the question whether a request for a post mortem examination was a reasonable requirement (*o*). The demand for evidence must be made directly on the claimant or some person or persons who have been acting for him in the matter of the claim (*o*). It is submitted that if the claimant is merely required to "furnish" evidence or information the evidence or information asked for must be such as is in the possession of the claimant, and that he cannot be required to procure evidence or information from other persons unless the clause expressly requires him to do so.

Power of directors to call for examination of body.

Where a clause is inserted to the effect that the company's medical adviser shall be permitted to examine the person of the assured in respect of any alleged injury or cause of death this does not entitle the company to call for an exhumation after burial if they have had an opportunity of examining the body before burial but did not do so (*p*). In one case even although notice of the accident was not given to the company until after burial it was held that they had no right under this clause to call for an exhumation (*q*).

No claim unless the injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished.
Winspear v. *Accident* (1880), 6 Q. B. D. 42.

. . . of which satisfactory proof can be furnished to the directors.
Trew v. *Railway Passengers'* (1861), 6 H. & N. 839; 6 Jur. N. S. 759.

Sufficient proof shall be furnished of accidental injury and that death was caused solely by such injury.
North American Life, etc. v. *Burroughs* (1871), 69 Pa. 43.

The claimant shall establish affirmatively that the injury or death resulted from actual accident.
Meadows v. *Pacific Mutual Life* (1895), 50 Am. S. R. 427.

The policy not to extend to any death or personal injury unless the claimant shall establish by direct and positive proof that the said death or injury was caused by violent and accidental means.
Utter v. *Travellers'* (1887), 65 Mich. 545; *Travellers'* v. *McConkey* (1887), 127 U. S. 661; *Peek* v. *Equitable Accident* (1889), 52 Hun. 255.

(*n*) *Ballantyne* v. *Employers'* (1893), 21 R. 305; *A. B.* v. *Northern Accident* (1896), 24 R. 258.
(*o*) *Ballantyne* v. *Employers'* (1893), 21 R. 305.
(*p*) *American Employers' Liability* v. *Barr* (1895), 68 Fed, Rep. 873; *Wehle* v. *U. S. Mutual Accident* (1897), 153 N. Y. 116; *Root* v. *London Guarantee, etc.* (1904), 92 App. D. N. Y. 578.
(*q*) *Ewing* v. *Commercial Travellers'* (1900), 55 App. D. N. Y. 241.

. . . To any case of death the nature cause or manner of which is unknown or incapable of direct and positive proof.

Wright v. *Sun Mutual* (1878), 29 U. C. C. P. 221; *Insurance Company* v. *Bennett* (1891), 90 Tenn. 256.

No claim unless the claimant shall transmit to the company's manager satisfactory evidence of the accident.

Macdonald v. *Refuge* (1890), 17 R. 955.

. . . Unless it shall have been proved to the satisfaction of the directors . . . in case of death the legal representatives shall furnish all such other information and evidence as the directors may require from time to time or may consider necessary or proper to elucidate the case.

Ballantyne v. *Employers'* (1893), 21 R. 305.

No compensation shall be payable unless such evidence as the directors may from time to time require shall at the expense of the assured be furnished.

A. B. v. *Northern Accident* (1896), 24 R. 258.

No claim shall be payable unless any medical adviser of the association shall be allowed to examine the person of the member in respect of any alleged injury or cause of death then and so often as may be necessary or reasonably required on behalf of the association.

American Employers' Liability v. *Barr* (1895), 68 Fed. Rep. 873; *Wehle* v. *U. S. Mutual Accident* (1897), 153 N. Y. 116; *Root* v. *London Guarantee and Accident* (1904), 92 App. D. N. Y. 578; *Ewing* v. *Commerical Travellers'* (1900), 55 App. D. N. Y. 241.

5. Clauses defining the necessary Relation between the Injury and the consequent Disability or Death

Is injury the cause of death or disability?

When an injury has been sustained which comes within the general definition of injury caused by violent and accidental means it still remains for the claimant to prove that the injury has caused the disability or death in the manner provided by the policy. Where the policy provides for compensation "if the assured shall die from the effects of the injury" it is not necessary for the claimant to show that the injury was the immediate or proximate cause of death in the strictest sense. It is sufficient if the death has resulted as the natural consequence of the injury without the intervention of any extraordinary independent cause (*r*). Thus a man having dislocated his shoulder is confined to bed and has his general system weakened. He catches cold to which he has become more susceptible and dies of pneumonia. That is a death from the effects of the injury (*s*). On the other hand if a man having received an injury to his leg was run over by an omnibus and killed because he could not so readily get out of the way there would be an intervention of an extraordinary and independent cause and the death could not be said to be due to the effects of the original accidental injury to his leg (*t*). Where the condition is that the injury shall be the sole cause of disability or death that does not operate to exclude cases where the disability or death is due to disease following as a natural consequence upon the

(*r*) *Isitt* v. *Railway Passengers'* (1889), 22 Q. D. B. 504; *Western Commercial Travellers'* v. *Smith* (1898), 85 Fed. Rep. 401.

(*s*) *Isitt* v. *Railway Passengers'* (1889), 22 Q. B. D. 504.

(*t*) *Isitt* v. *Railway Passengers'* (1889), 22 Q. B. D. 504, 512; *Insurance* v. *Tweed* (1868), 7 Wall. 44, 52.

injury as in the case of tetanus, erysipelas, blood poisoning and similar maladies. Even where tetanus caused mental derangement and death was self-inflicted the original wound was held to be the sole cause of death (*u*).

The fact that the disease arises from exposure, infection or contagion, subsequent to the date of the injury, does not prevent the original wound from being the sole cause of death if such disease was a natural and probable consequence of the injury and the surrounding circumstances.

Is injury the direct cause of death or disability?

If the condition is that the injury must be not only the sole but also the direct or proximate cause of disability or death this would appear to exclude the consequences of disease arising from subsequent exposure, infection or contagion (*x*), although it covers all cases where the disease follows as an immediate result of the injury as in the case of erysipelas (*y*) or blood poisoning where the poison is communicated at the time the injury is inflicted (*z*).

Is injury the sole cause of death or disability?

Where the assured is suffering from some disease contracted independently that is to say not arising as a natural consequence of an accidental injury it is often extremely difficult to determine whether or not the injury is the sole cause of death or disability. Death or disability may be partly the consequence of disease either because (1) disease was a contributory cause of the accidental violence which caused the injury; (2) disease had weakened the body so as to render it less capable of resisting the accidental violence which caused the injury; (3) disease operating together with the injury caused death or disability; or (4) disease was aggravated by accidental violence which caused no distinct injury.

The first class of case is that where accident arises in consequence of disease as where the assured had a fit while crossing a stream and fell into the water and was drowned (*a*). Here the disease was a cause contributing to the violent and accidental means that is the fall into the water and also to the resulting injury that is to say asphyxia because but for the continuance of the fit the assured might have risen before he was drowned; but asphyxia was the sole proximate cause of death and therefore an injury caused by violent and accidental means was the sole cause of death.

The second class of case is that where disease and accidental means arising independently of one another co-operate to produce an injury for instance where the assured's kidney was in a cancerous condition and consequently more liable to rupture

(*u*) *Travellers'* v. *Robbins* (1894), 27 U. S. App. 547.

(*x*) *Smith* v. *Accident* (1870), L. R. 5 Ex. 302; *Martin* v. *Manufacturers'* (1896), 151 N. Y. 94

(*y*) *Accident Insurance of North America* v. *Young* (1891), 20 Can. S. C. 280.

(*z*) *Mardorf* v. *Accident*, [1903] 1 K. B. 584; *Martin* v. *Equitable* (1891), 61 Hun. 467; *Pēck* v. *Equitable Accident* (1889), 52 Hun. 255.

(*a*) *Winspear* v. *Accident* (1880), 6 Q. B. D. 42; *Lawrence* v. *Accidental* (1881), 7 Q. B. D. 216.

than a healthy kidney would be and the assured fell against the edge of a table and ruptured his kidney causing hemorrhage and death (*b*). A healthy kidney might not have ruptured yet the rupture was clearly caused by violent and accidental means and the rupture was the sole proximate cause of death. The disease was a cause contributing to the injury, but once the injury was caused it was not a contributing cause of death unless it could be shown that a healthy kidney would have recuperated from the rupture.

The third class of case is where disease operates as a proximate cause of death or disability and not merely as a remote cause contributing to the injury. If the disease is an independent disease, that is to say not arising as a natural consequence of the injury, it is immaterial whether it arose before or after the accident. If it operates as a proximate cause of disability or death the accidental injury cannot be the sole cause of disability or death. An instance would be that of an assured suffering from fatty degeneration of the heart. Some fall or other accidental cause places an extraordinary stress upon the functions of the heart and the valves dilate; but the dilatation does not cause immediate death, and the heart would recuperate if it were in a healthy condition. The heart does not recuperate because it is diseased, and death ultimately ensues. Here the injury is not the sole cause of death, because the diseased condition of the muscular tissue is a contributory cause operating jointly with the injury to cause death (*c*).

The fourth class of case is that where there is previous disease and the assured meets with an accident which results in no separate and distinct injury but merely aggravates the complaint from which the assured is already suffering and death or disability results, as where the assured was suffering from inflammation of the liver, and a fall resulted in acute inflammation of which he died (*d*); and in another case where the assured was suffering from a reducible hernia and an accidental lurch of a railway train aggravated the hernia and caused it to become strangulated resulting in death (*e*). In these cases the proximate cause of death was disease which was aggravated by accidental means, and therefore an injury caused by violent and accidental means was not the sole cause of death. On the other hand, if there was merely a predisposition to disease and the disease was brought on by accidental means the case might be covered (*d*).

No recovery for disability supervening after specified time.

As upon the above construction of the word "immediate" an accidental injury might be the immediate cause of disability occurring years afterwards, it is common to provide that there shall be no recovery unless disability supervenes within a specified

(*b*) *Fetter* v. *Fidelity and Casualty* (1903), 174 Mo. 256; 97 Am. S. R. 560. See also *Miller* v. *Fidelity and Casualty* (1899), 97 Fed. Rep. 836; *Thornton* v. *Travellers'* (1902), 116 Ga. 124; 94 Am. S. R. 99.

(*c*) *McCarthy* v. *Travellers'* (1878), 8 Biss. 362; *National Masonic Accident* v. *Shryock* (1896), 36 U. S. 658.

(*d*) *Freeman* v. *Mercantile Accident* (1892), 156 Mass. 351.

(*e*) *Thornton* v. *Travellers'* (1902), 116 Ga. 121; 94 Am. S. R. 99.

time after the accidental injury (*f*). For the same reason the right to compensation may be limited to cases where the disability is continuous (*g*).

Disability caused by assured's negligence.

The disability or continuation of disability may be due to the assured's negligence. The doing of some careless act which aggravates the injury may be an independent cause of disability, and might therefore be held to exclude recovery for disability on the ground that the injury was not the sole and direct cause. On the other hand, the mere neglect of the assured to take reasonable precaution or to apply proper remedies will not prevent recovery in the absence of some express clause to that effect (*h*).

Death caused by accidental means without intervening injury.

Where death results instantaneously from an accidental cause and there is no intervening external injury, for example in the case of accidental drowning, the case is covered by the policy notwithstanding that on the literal reading of the clauses the policy postulates an injury caused by accidental means and death resulting from such injury (*h*).

When disability is deemed to be immediate.

Where the policy covers disability which is the "immediate" result of accidental injury the word "immediate" is usually construed as equivalent to proximate and not as an adjective of time. Thus a man may go about his business for a day or two after an accidental injury and yet his subsequent liability may be the "immediate" consequence of the injury (*i*).

Clauses which have been judicially construed.

If the assured shall die from the effects of such injury.
Isitt v. *Railway Passengers'* (1889), 2 Q. B. D. 504; *Trew* v. *Railway Passengers'* (1861), 6 H. & N. 839; *Western, etc.* v. *Smith* (1898), 85 Fed. Rep. 401.

In case of death produced by bodily injuries effected by . . . accidental means.
Western Commercial Travellers' v. *Smith* (1898), 85 Fed. Rep. 401.

In case of death resulting solely from bodily injuries effected by . . . accidental means.
National Masonic Accident v. *Shryock* (1896), 36 U. S. App. 658.

Provided death should result from such injuries independent of all other causes.
Miller v. *Fidelity and Casualty* (1899), 97 Fed. Rep. 836; *Fetter* v. *Fidelity and Casualty* (1903), 174 Mo. 256; 97 Am. S. R. 560; *Travellers'* v. *Robbins* (1894), 27 U. S. App. 547; *New Amsterdam Casualty* v. *Shields* (1907), 155 Fed. Rep. 54; *National Association* v. *Scott* (1907), 155 Fed. Rep. 92; *Travellers' Insurance* v. *Melick* (1894), 65 Fed. Rep. 178.

Where such accidental injury is the direct and sole cause of death.
Mardorf v. *Accident Insurance*, [1903] 1 K. B. 584; *Smith* v. *Accident* (1870), L. R. 5 Ex. 302.

Not to extend to any case except where the injury was the proximate and sole cause of the disability or death.
Accident Insurance of North America v. *Young* (1891), 20 Can. S. C. 280; *Martin* v. *Manufacturers'* (1896) 151 N. Y. 94; *Martin* v. *Equitable* (1891), 61 Hun.

(*f*) *Trew* v. *Railway Passengers'* (1861), 6 H. & N. 839.

(*g*) *Brenden* v. *Traders' and Travellers'* (1903), 84 App. Div. 530; *Holm* v. *Interstate Casualty* (1897), 115 Mich. 79; *Shera* v. *Ocean Accident* (1900), 32 Ont. R. 411; *Ritter* v. *Preferred Masonic Mutual* (1898), 185 Pa. 90; *Rorick* v. *Railway Officials, etc., Accident* (1902), 119 Fed. Rep. 63.

(*h*) *Maryland Casualty* v. *Gehrmann* (1903), 96 Md. 634.

(*i*) *Hagadorn* v. *Masonic Accident* (1901), 59 App. Div. 321.

App. 467; *Peck* v. *Equitable Accident* (1889), 52 Hun. 255; *Freeman* v. *Mercantile Accident* (1892), 154 Mass. 351; *McCarthy* v. *Travellers'* (1878), 8 Biss. 362; *Hubbard* v. *Mutual Accident* (1897), 98 Fed. Rep. 930; *National Masonic* v. *Shryock* (1896), 73 Fed. Rep. 774.

Which shall independently of all other causes immediately and wholly disable.
Brendon v. *Traders' and Travellers'* (1903), 84 App. Div. 530; *Holm* v. *Interstate Casualty* (1897), 115 Mich. 79; *Sheva* v. *Ocean Accident* (1900), 32 Ont. R. 411; *Ritter* v. *Preferred Masonic Mutual* (1898), 185 Pa. 90; *Thornton* v. *Travellers'* (1902), 116 Ga. 121; 94 Am. S. R. 99; *Rorick* v. *Railway Officials and Employees' Accident* (1902), 119 Fed. Rep. 63.

Continuously and wholly disabling and preventing the assured from performing it.
Maryland Casualty v. *Gehrmann* (1903), 96 Ind. 634.

No compensation . . . unless the disability shall accrue within thirty days.
Hagadorn v. *Masonic Accident* (1901), 59 App. Div. 321.

Where death [or incapacity] results from injury.
(Workmen's Compensation Act, 1906, Sch. I.)
Shirt v. *Calico Printers' Association*, [1909] 2 K. B. 51; *Warneken* v. *R. Moreland & Son*, [1909] 2 K. B. 51; *Tutton* v. *Owners of SS. Majestic*, [1909] 2 K. B. 54.

Resulting in disability or death.
Rorick v. *Railway Officials' Accident* (1902), 119 Fed. Rep. 63.

6. Clauses defining Total or Partial Disability

Total incapacity for usual business.

These clauses must receive a reasonable construction in relation to their object. Total incapacity of the assured from following his usual business and pursuits should be construed so as to give full effect to the word "usual" (*k*). If a solicitor is so disabled that he cannot go about his business substantially in the usual way he is entitled to recover. As Pollock, C.B., put it, if a man cannot follow his usual business and pursuits he is wholly incapable of doing it. His usual pursuit is not to do a little; his usual pursuit embraces the whole scope and compass of his mode of getting his livelihood (*l*).

For any and every kind of business.

Some policies require that the assured must be disabled from performing any and every kind of business. Even this does not mean that the assured must be physically or mentally incapable of performing any piece of business whatsoever. Such a construction would reduce the clause to an absurdity, and the company would never be liable except in so far as the assured might become or remain unconscious (*m*). It is held therefore to be sufficient to satisfy such a clause to prove that the assured's injuries were of such a character that common care and prudence required him to desist from the transaction of any business (*n*). The mere fact that he might be able, with due regard to his health, occasionally to perform some single and trivial act connected with his business would not render the disability partial instead of total provided that prudence demanded that he

(*k*) *Hooper* v. *Accidental Death* (1860), 5 H. & N. 546, 556.
(*l*) *Hooper* v. *Accidental Death* (1860), 5 H. & N. 546, 556.
(*m*) *Thayer* v. *Standard Life, etc.* (1896), 68 N. H. 577, 578.
(*n*) *Young* v. *Travellers'* (1888), 80 Me. 244, 248.

should not transact business to any substantial extent (*o*). Again, a man who is not really fit to do any business does not forfeit his claim to an allowance for total disability because under the stress of some emergency he actually does some work or business (*p*).

Under this form of clause there is no total incapacity if a man, although unable to carry on the entire work or business in which he was employed, is nevertheless competent to carry on some part of it or some other substantial work or business (*q*).

Disability may be expressly defined.

Total disability may be expressly defined in the policy as the period of time during which the assured is confined to bed or to his house or is attended by a physician (*r*). Such tests however are obviously unsatisfactory (*r*).

Disability defined as meaning loss of sight, hand or foot.

Sometimes total and partial disability are defined so as to confine them to specific injuries, such as the loss of sight, hands or feet. Such a limitation however must be expressed in the most absolutely unambiguous language, and where the proviso was that partial disablement "implies" the loss of sight, etc. it was held in the Court of Session that the definition was not exhaustive but merely explanatory, and that there might be partial disablement within the meaning of the policy although the insured had suffered none of the specified injuries (*s*). Loss of hand or foot would probably not be construed as necessarily involving a loss by severance unless so expressed (*t*). Loss means the loss of the member as one of practical utility (*u*). Where loss is confined to loss by severance it is not necessary that the whole member should be severed provided there is a partial severance and a total loss of practical utility (*x*).

Insurance of one-eyed man.

Where a man who had only one eye at the time he effected the insurance lost his other eye during the currency of the policy, it was held that he was entitled to recover as for "complete and irrecoverable loss of sight in both eyes" (*y*).

(*o*) *Lobdill* v. *Labouring Men's* (1897), 69 Minn. 14; 65 Am. S. R. 542; *Wolcott* v. *United Life, etc.* (1889), 55 Hun. 98, 100; *Thayer* v. *Standard Life, etc.* (1890), 68 N. H. 577.

(*p*) *Brenden* v. *Traders' and Travellers'* (1903), 84 App. Div. N. Y. 530; *Neill* v. *Order of United Friends* (1896), 149 N. Y. 430.

(*q*) *Lyon* v. *Railway Passengers'* (1877), 46 Iowa, 631; *Neil* v. *Order of United Friends* (1896), 149 N. Y. 430; *Knapp* v. *Preferred Mutual Accident* (1889), 53 Hun. 84; *Ford* v. *U. S. Mutual Accident* (1889), 148 Mass. 153; *Young* v. *Travellers'* (1888), 80 Me. 244; *Saveland* v. *Fidelity and Casualty* (1886), 67 Wis. 174; 58 Am. Rep. 863; *U. S. Mutual Accident* v. *Millard* (1892), 43 Ill. App. 148; *Bylow & Union Casualty* (1900), 72 Vt. 325; *M'Kinley* v. *Bankers' Accident* (1898), 106 Iowa, 81; *Bean* v. *Travellers'* (1892), 94 Cal. 581; *Baltimore* v. *Ohio Employees' Relief* (1888), 122 Pa. 579.

(*r*) *Liston* v. *New York Casualty* (1897), 58 N. Y. Supp. 1090.

(*s*) *Scott* v. *Scottish Accident* (1889), 16 R. 630.

(*t*) *Lord* v. *American Mutual Accident* (1894), 89 Wis. 19; *Shearman* v. *Pacific Mutual* (1890), 77 Wis. 618; 20 Am. S. R. 151.

(*u*) *Supreme Court* v. *Turner* (1901), 99 Ill. App. 310; *Stevens* v. *People's Mutual Accident* (1892), 150 Pa. 131.

(*x*) *Sneck* v. *Travellers'* (1895), 88 Hun. 94.

(*y*) *Bawden* v. *London and Edinburgh*, [1892] 2 Q. B. 534.

Clauses which have been judicially construed.

In case of bodily injury of so serious a nature as wholly to disable him from following his usual business occupation and pursuits.
Hooper v. *Accidental* (1860), 5 H. & N. 546.

If disabled from following his usual or some other occupation.
Neil v. *Order of United Friends* (1896), 149 N. Y. 430.

As shall continuously and wholly disable the insured from performing any and every kind of business.
Brendon v. *Traders' and Travellers'* (1903), 84 App. Div. 530.

Which totally disabled and prevented him from the transaction of all kinds of business.
Lyon v. *Railway Passengers'* (1877), 46 Iowa, 631.

Which wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured.
Knapp v. *Preferred Mutual Accident* (1889), 53 Hun. 84; *Ford* v. *U. S. Mutual Accident* (1889), 148 Mass. 153; *Young* v. *Travellers'* (1888), 80 M. 244; *Saveland* v. *Fidelity and Casualty* (1886), 67 Wis. 174; 58 Am. Rep. 863.

Which shall wholly and continuously disable him from the transaction of any and every kind of duty pertaining to his occupation.
U. S. Mutual Accident v. *Millard* (1892), 43 Ill. App. 148.

Which wholly disable the assured from transacting any and every kind of business pertaining to his occupation.
Lobdill v. *Labouring Men's Mutual* (1897), 69 Minn. 14; 65 Am. S. R. 542; *Thayer* v. *Standard Life and Accident* (1890), 68 N. H. 577.

Which wholly and continuously disable him from performing any and every kind of duty pertaining to his occupation.
Bylow v. *Union Casualty* (1900), 72 Vt. 325.

Wholly and continuously disabling him from transacting any of the duties pertaining to his occupation.
M'Kinley v. *Bankers' Accident* (1898), 106 Iowa, 81.

In case of total disability to transact any business pertaining to the occupation as above stated.
Bean v. *Travellers'* (1892), 94 Cal. 581.

For the immediate continuous and total loss of such business time as may result from such injuries.
Pennington v. *Pacific Mutual Life* (1892), 85 Iowa, 468.

Totally disabled and unable to earn a livelihood.
McMahon v. *Supreme Council* (1893), 54 Mo. App. 468.

Totally unable to labour.
Baltimore v. *Ohio Employees' Relief* (1888), 122 Pa. 579.

Total disability.
Walcott v. *United Life and Accident* (1889), 55 Hun. 98.

No disability constitutes a claim when the assured is able to leave his bed or house nor while convalescent nor when the attendance of a physician is not required every second day at the bedside.
Liston v. *New York Casualty* (1897), 58 N. Y. Supp. 1090.

£500 on permanent total disablement and £250 on permanent partial disablement. . . . Permanent total disablement means . . . complete and irrecoverable loss of sight in both eyes; permanent partial disablement means . . . complete and irrecoverable loss of sight in one eye.
Bawden v. *London and Edinburgh*, [1892] 2 Q. B. 534.

Permanent partial disablement implies the loss of one hand the loss of one foot or the complete and irrecoverable loss of sight.
Scott v. *Scottish Accident* (1889), 16 R. 630.

Loss of one hand or foot or both eyes.
Stevers v. *People's Mutual Accident* (1892), 150 Pa. 132; *Supreme Court* v. *Turner* (1901), 99 Ill. App. 310.

Loss of one or both hands or feet causing an immediate continuous and total disability.
Lord v. *American Mutual Accident* (1894), 89 Wis. 19.

Loss of two entire feet.
Sheanon v. *Pacific Mutual* (1890), 77 Wis. 618; 20 Am. S. R. 151.

Loss by severance of one entire hand or foot.
Sneck v. *Travellers'* (1895), 88 Hun. 94.

7. Clauses defining the Compensation payable to the Assured

Compensation in modern policies usually a fixed sum.

In modern accident policies the compensation payable is almost invariably a fixed sum usually a lump sum in the case of death and a smaller lump sum in the case of permanent disability and a weekly payment in case of temporary disability. Sometimes as an inducement to the assured to continue his insurance instead of transferring it to another company a 5 or 10 per cent. addition to the sum assured is made annually for a specified period (*z*).

In *Theobald* v. *Railway Passengers'* (*a*) the policy insured "£1000 in the event of death and a proportionate part of the £1000 in the event of personal injury." The assured was injured and claimed £34 19*s*. as medical expenses and £1000 for loss of time and profit from business. It was held that he was entitled to damages within the ordinary rule as to remoteness up to £1000, and that he was therefore entitled to the amount claimed for medical expenses but that the claim for loss of time and profit was too remote.

Clauses which have been judiciously construed.

$10 per week for a period not exceeding 30 consecutive weeks.
Crenshaw v. *Pacific Mutual* (1895), 63 Mo. App. 678.

A sum not exceeding $25 per week for the period of continuous disability immediately following the accident and injuries not exceeding 52 consecutive weeks.
Kentucky Law and Accident v. *Franklin* (1897), 19 Ky. L. R. 1573.

In no case shall the weekly indemnity exceed the weekly salary of the assured.
Denison v. *Masonic Accident* (1901), 59 App. Div. N. Y. 294.

Compensation not to exceed the money value of the time of the assured.
Bean v. *Travellers'* (1892), 94 Cal. 581.

Weekly payment for disablement . . . payment for loss of foot . . . payment on death . . . provided that the total amount paid in one year shall not exceed the mortuary benefit.
Hart v. *National Masonic Accident* (1898), 105 Iowa, 717.

8. Clauses excepting Injuries intentionally inflicted by the Assured or some other Person

Exception of self-inflicted injuries.

In so far as this exception relates to injuries intentionally inflicted by the assured upon himself it is not really an exception because it is not accidental and therefore would not fall within the general risk. Where however the injury is inflicted under

(*z*) *Dupue* v. *Travellers' Insurance* (1909), 166 Fed. Rep. 183.
(*a*) (1854), 10 Ex. 45.

the influence of insanity or drink the injury is within the general risk and not within the exception at any rate where the assured was so insane or drunk as to be incapable of appreciating the nature or quality of the act which he was committing (*b*). Such acts must be expressly excluded from the risk by the addition to the exception of the words "sane or insane" or words to that effect.

When suicide follows as consequence of injury.

But even where the consequences of suicide sane or insane are excepted from the risk the exception does not apply where insanity supervenes as the direct result of an accidental injury as in a case where tetanus produced delirium and the assured under the influence of the delirium destroyed himself (*c*). The exception must be read as excluding suicide or attempted suicide only when it is an independent cause of death or injury and not when it is merely a link in the natural consequences of an accidental injury.

Exception of intentional injuries inflicted by third person.

It has been argued in several cases that the exception of intentional injuries inflicted by some other person than the assured should be confined to injuries inflicted with the consent of the assured such as surgical operations or injuries naturally resulting from a fight voluntarily engaged in by the assured. This argument however has usually failed and cases of wilful wounding or murder have been held to fall within the exception (*d*).

Meaning of "intentional."

The injury must be intentional in this sense (1) that it was directed against the assured (*e*), and (2) that the person inflicting the injury intended to inflict the actual injury which he did inflict (*f*) or at any rate that such injury was the natural and probable consequence of his wilful act. Thus where the assured was murdered for the purpose of highway robbery it was held that there was no intentional injury within the meaning of the exception because no act was directed against the assured as an individual but merely as a member of the public whom it was the intention of the assailant to rob without respect of persons (*g*). And so where the assailant intending to kill some other person killed the assured by mistake (*h*). The suggestion that an injury is not intentional because it is not the precise injury which the assailant intended to inflict must not be carried too far. If a man

(*b*) *Corley* v. *Travellers' Protective* (1900), 105 Fed. Rep. 854; *Accident Insurance* v. *Crandal* (1886), 120 U. S. 527.

(*c*) *Travellers'* v. *Robbins* (1894), 27 U. S. 547; *Travellers'* v. *Melick* (1894), 65 Fed. Rep. 178.

(*d*) *Travellers'* v. *M'Conkey* (1887), 127 U. S. 661; *Jarnagin* v. *Travellers' Protective* (1904), 133 Fed. Rep. 892; *Travellers' Protective* v. *Langholz* (1898), 86 Fed. Rep. 60; *Travellers'* v. *M'Carthy* (1890), 15 Col. 351; 22 Am. S. R. 410; *De Graw* v. *National Accident* (1889), 51 Hun. 142; *Butero* v. *Travellers'* (1897), 96 Wis. 536; *Brown* v. *U. S. Casualty* (1898), 88 Fed. Rep. 38; *American Accident* v. *Carson* (1896), 99 Ky. 441; 59 Am. S. R. 473.

(*e*) *Hutchcraft* v. *Travellers'* (1888), 87 Kent. 300; 12 Am. S. R. 484, 487.

(*f*) *Utter* v. *Travellers'* (1887), 65 Mich. 545; 8 Am. S. R. 913, 919.

(*g*) *Hutchcraft* v. *Travellers'* (1888), *supra.*

(*h*) *Utter* v. *Travellers'* (1887), *supra.*

aims a blow at another's head and the latter wards it off with his arm and gets his arm broken the injury is clearly intentional as the assailant intended to inflict some serious injury (*i*). But if a man merely intends to inflict some trifling injury on the assured such as tripping to cause a fall and the assured in falling hits his head against a stone and is fatally injured the fatal injury is not intentional within the meaning of the exception (*k*). An injury inflicted by a third person who is so insane or drunk that he does not know the value or quality of the act he is committing is not within the exception (*l*).

Clauses which have been judicially construed.

No claim shall be made where the death or injury may have been caused . . . by intentional injuries by the insured or any other person.

Travellers' v. *McConkey* (1887), 127 U. S. 661; *Travellers' Protective* v. *Langholz* (1898), 86 Fed. Rep. 60; *Travellers'* v. *McCarthy* (1890), 15 Col. 351; 22 Am. S. R. 410; *De Graw* v. *National Accident* (1889), 51 Hun. App. 142; *Hutchcraft* v. *Travellers'* (1888), 87 Ky. 300; 12 Am. S. R. 484; *Matson* v. *Travellers'* (1900), 93 Me. 469; *Butero* v. *Travellers'* (1897), 96 Wis. 536; 65 Am. S. R. 61; *Corley* v. *Travellers' Protective* (1900), 105 Fed. Rep. 854; *Berger* v. *Pacific Mutual* (1898), 88 Fed. Rep. 241; *North-Western Benevolent* v. *Dudley* (1901), 27 Ind. App. 327.

Intentional injuries inflicted by any person.

Brown v. *U. S. Casualty* (1898), 88 Fed. Rep. 38; *American Accident* v. *Carson* (1896), 99 Ky. 441; 59 Am. S. R. 473.

And the said death or personal injury was not the result of design either on the part of the insured or any other person.

Utter v. *Travellers'* (1887), 65 Mich. 545,: 8 Am. S. R. 913; *Richards* v. *Travellers'* (1891), 89 Cal. 170; 23 Am. S. R. 455.

Does not extend to cover death or injury caused by suicide or self-inflicted injuries.

Accident Insurance v. *Crandal* (1886), 120 U. S. 527.

. . . Caused by suicide or attempted suicide (felonious or otherwise sane or insane).

Travellers' v. *Robbins* (1894), 27 U. S. App. 547.

9. Clauses excepting Injuries received in consequence of any Breach of Law

There must be a wilful act.

Where the insurers rely upon this exception they must prove a wilful violation of the law by the assured but in the case of a public law they do not require to show that the assured knew that his act was a violation of law because every person is presumed to know the public law of the land. Thus where the assured having a claim against another took his horse which was standing in the public road and the owner of the horse shot him it was held that there was a violation of the law within the meaning of the exception if he knew that the horse did not belong to him but thought the law justified him in taking it to satisfy his debt, but there was no violation of the law if he

(*i*) *Matson* v. *Travellers'* (1900), 93 Me. 469.

(*k*) *Richards* v. *Travellers'* (1891), 89 Cal. 170; 23 Am. S. R. 455.

(*l*) *Corley* v. *Travellers' Protective* (1900), 105 Fed. Rep. 854; *Berger* v. *Pacific Mutual* (1898), 88 Fed. Rep. 241; *North-Western Benevolent* v. *Dudley* (1901), 27 Ind. App. 327.

thought the horse was his and that he was only taking his own property (*m*).

In violation of the criminal law.

Violation of the law means violation of the criminal law and not merely an infringement of some private right giving rise only to a civil action (*m*).

Violation of by-laws.

Where the exception extends to violation of the rules of a corporation such as a railway company the insurers must prove that the assured wilfully violated the rule in the sense that he knew of the existence of the rule because unless the rules have been given the effect of public law there is no presumption that the assured knew of their existence (*n*). So also if the rule has been allowed to fall into desuetude and is systematically ignored by the servants of the corporation and the public there is no wilful violation of the rule (*o*).

Natural and probable consequence of violation alone excepted.

The exception against violating the law or rules of a corporation is sometimes worded so as, if read literally, to exclude not only injuries happening in consequence of the violation but all injuries happening while violating the law or rule. The American Courts however have refused to read this absolutely literally and have held that some causal connexion must be shown between the unlawful act and the injury (*p*), and they have also held that at least where the exception is confined to the consequences of an illegal act these must be such as might naturally be expected to follow from the act done by the assured and not merely the remote and wholly unexpected consequences (*q*).

Clauses which have been judicially construed.

Not to extend to injuries received in consequence of any breach of the law.
Insurance Company v. *Seaver* (1873), 19 Wall, 531.

. . . while violating the law.
Lehman v. *Great Eastern Casualty* (1896), 7 App. D. N. Y. 424 (aff. 158 N. Y. 689); *Jones* v. *U. S. Mutual Accident* (1894), 92 Iowa, 652.

. . . while engaged in or in consequence of any unlawful act.
Accident Insurance v. *Bennett* (1891), 90 Tenn. 256; 25 Am. S. R. 685; *Utter* v. *Travellers'* (1887), 65 Mich. 545; 8 Am. S. R. 913.

. . . resulting wholly or partly directly or indirectly from violating the law.
Cornwall v. *Fraternal Accident* (1896), 6 N. D. 201; 66 Am. S. R. 601.

. . . in consequence of any violation of or attempt to violate any criminal law.
Wells v. *New England Mutual Life* (1899), 101 Pa. 207.

. . . through violation of the rules of any railroad company.
Marx v. *Travellers'* (1889), 39 Fed. Rep. 321.

. . . through violating the rules of a corporation.
Travellers' v. *Randolph* (1897), 78 Fed. Rep. 754.

(*m*) *Wells* v. *New England Mutual* (1899), 101 Pa. 207.
(*n*) *Travellers'* v. *Randolph* (1897), 78 Fed. Rep. 754.
(*o*) *Marx* v. *Travellers'* (1889), 39 Fed. Rep. 321; *Lehman* v. *Great Eastern Casualty* (1896), 158 N. Y. 689.
(*p*) *Accident Insurance* v. *Bennett* (1891), 25 Am. S. R. 685; *Jones* v. *U. S. Mutual Accident* (1894), 92 Iowa, 652; *Utter* v. *Travellers'* (1887), 65 Mich. 545; 8 Am. S. R. 913; *Cornwall* v. *Fraternal Accident* (1896), 6 N. D. 201; 66 Am. S. R. 601.
(*q*) *Accident Insurance* v. *Bennett* (1891), 25 Am. S. R. 685, 690; *Insurance* v. *Seaver* (1873), 19 Wall. 531, 542.

10. Clauses excepting Injuries resulting from Fighting or Quarrelling or Drinking

Such a provision must have a reasonable construction. It cannot be held to mean that every frivolous controversy which might in some sense be termed a quarrel, although it was not a dispute or quarrel from which the assured might reasonably have expected anger to be provoked or injury to result, is within the meaning of the term used in the policy (*r*). The injury in order to be excepted must be such as might naturally result from a fight or quarrel of the kind in which the assured voluntarily engaged and so where the assured consented to fight with fists and his opponent afterwards drew a revolver and shot him it was held that the injury was not within the exception (*s*). The exception only applies to fighting and quarrelling for which the assured is in some way to blame either as a volunteer or as a rash speaker or wrong doer. It cannot be construed as depriving the assured of the right of self-defence by the use of force (*t*). If the assured is obliged to use force in the performance of his duty or in the lawful vindication of his rights as in ejecting a trespasser the consequent struggle would probably not be deemed to be fighting or quarrelling within the meaning of the exception (*u*).

Clauses which have been judicially construed.

Not to cover injuries resulting from fighting wrestling scuffling altercations feud quarrel or assault.
Coles v. *New York Casualty* (1903), 87 App. Div. 41.

. . . from assault provoked by quarrelling.
Accident Insurance Company v. *Bennett* (1891), 90 Tenn. 256; 25 Am. S. R. 685.

. . . caused by fighting.
Gresham v. *Equitable Accident* (1891), 87 Ga. 497; 27 Am. S. R. 263.

Not to extend to any death or injury happening while the assured is under the influence of intoxicating liquor.
Mair v. *Railway Passengers'* (1877), 37 L. T. N. S. 356; *MacRobbie* v. *Accident* (1886), 23 S. L. R. 391.

11. Clauses excepting Injuries caused by Exposure to Unnecessary Danger

Exceptions not to be read too literally.

These exceptions are framed by different companies in a great variety of phrases, and if literally construed they would in many cases defeat altogether the main object of the policy. No man travels by land or sea without wilfully exposing himself to danger and if he travels for pleasure, and not because he must, the danger may be said to be unnecessary (*x*). A man who crosses an

(*r*) *Accident Insurance* v. *Bennett* (1891), 25 Am. S. R. 685, 690.
(*s*) *Gresham* v. *Equitable Accident* (1891), 27 Am. S. R. 263.
(*t*) *Gresham* v. *Equitable Accident* (1891), 27 Am. S. R. 263, 264; *Coles* v. *New York Casualty* (1903), 87 App. Div. N. Y. 41.
(*u*) *Coles* v. *New York Casualty* (1903), 87 App. Div. N. Y. 41.
(*x*) *Sangster's Trustees* v. *General Accident* (1896), 24 R. 56, 57.

ordinary crowded street is exposed to obvious risk of injury. A literal interpretation is therefore as a rule inadmissible and some qualification must be put on the words used (*y*).

Conduct of a reasonably prudent man is the test.

The exception is not to be read as excluding recovery where the conduct of the assured is that of a reasonably prudent man (*z*). Even an occasional lapse from extreme prudence will not bring the case within the exception. The ordinary prudent man is occasionally careless or thoughtless and therefore mere negligence such as might give rise to an action against the assured if his act caused injury to others will not necessarily prevent him from recovering on the policy (*a*). The act must be one of gross or wanton negligence with regard to his own security (*b*). The danger must be a substantial danger (*c*) and not merely one of those trivial dangers which are incidental to the everyday conduct of life. This is expressed by the words "unnecessary danger" and will be implied even although the word "unnecessary" is not used. Crossing a railway track (*d*), boarding a moving train (*e*), climbing a fence with a loaded gun (*f*), going too near the edge of a cliff in search of wild flowers (*g*) have all been held to be unnecessary exposure to danger within the meaning of the exception.

Does not include ordinary pursuits of life

The ordinary pleasures of a healthy man such as swimming, riding, bicycling, motoring, are not unnecessary dangers if indulged in in an ordinarily prudent manner (*h*). Where however a man fell over the cliffs at Dover while picking wild orchids on a windy day it was held that by going too near the edge of the cliffs he was running a risk which no ordinary prudent man would have run and that the accident happened by the wilful or negligent exposure of the assured to unnecessary danger or peril (*i*). The dangers and risks incidental to a man's ordinary occupation or means of livelihood are not unnecessary (*j*). A

(*y*) *Cornish* v. *Accident* (1889), 23 Q. B. D. 453, 455.

(*z*) *Cornwall* v. *Fraternal Accident* (1896), 66 Am. S. R. 601, 603.

(*a*) *Schneider* v. *Provident Life* (1869), 1 Am. R. 157, 161; *Cornish* v. *Accident* (1889), 23 Q. B. D. 453, 455; *Thomas* v. *Mason's Fraternal Accident* (1901), 64 App. Div. N. Y. 22, 23; *Keene* v. *New England Accident* (1894), 161 Mass. 149.

(*b*) *Johnson* v. *London Guarantee* (1897), 69 Am. S. R. 549, 550; *Sangster's Trustees* v. *General Accident* (1896), 24 R. 56, 57; *Travellers' and Travellers'* v. *Wagley* (1896), 74 Fed. Rep. 457; *Berliner* v. *Travellers'* (1898), 121 Cal. 458; 66 Am. S. R. 49.

(*c*) *Travellers'* v. *Randolph* (1897), 78 Fed. Rep. 754, 762.

(*d*) *Cornish* v. *Accident* (1889), 23 Q. B. D. 453; *Glass* v. *Masons' Fraternal Accident* (1901), 112 Fed. Rep. 495; *Neill* v. *Travellers'* (1888), 12 Can. S. C. 55.

(*e*) *Small* v. *Travellers'* (1903), 118 Ga. 900; *Schneider* v. *Provident Life* (1869), 24 Wis. 28; 1 Am. R. 157.

(*f*) *Sargent* v. *Central Accident* (1901), 112 Wis. 29; 88 Am. S. R. 946.

(*g*) *Walker* v. *Railway Passengers' Assurance* (1910), 129 L. T. 64.

(*h*) *Sangster's Trustees* v. *General Accident* (1896), 24 R. 56; *Insurance Co.* v. *Seaver* (1873), 19 Wall. 531; *Keiffe* v. *National Accident* (1896), 4 App. Div. N. Y. 392.

(*i*) *Walker* v. *Railway Passengers' Assurance* (1910), 129 L. T. 64.

(*j*) *Pacific Mutual Life* v. *Snowden* (1893), 58 Fed. Rep. 342, 346.

farmer must tend his cattle even although one of them is a dangerous bull (*k*), and a railway employee must couple waggons and do other more or less dangerous things (*l*). The only question is whether he performed his duty in a reasonably prudent manner or whether he went beyond it and did something reckless and foolish (*m*).

or exposure to danger from motives of humanity.

Neither are the ordinary duties of humanity unnecessary and a man may incur danger in voluntarily helping another (*n*), he may run the most extreme danger in order to save life (*o*) and yet it will not be unnecessary danger. The test is was the risk run reasonably appropriate to the end to be attained?

Hidden danger.

If a danger is a hidden danger there can be no voluntary exposure to it because the word "voluntarily" implies that the man recognised the dangerous character of the situation but nevertheless intentionally and consciously assumed the risk (*p*).

With regard to this a distinction has been drawn between two differently worded forms of the exception. Where the policy excepted injuries "happening by exposure of the assured to obvious risk of injury" it was held that this excluded two classes of accidents: (1) accidents which arise from an exposure by the insured to risk of injury which risk is obvious to him at the time he exposes himself to it; (2) accidents which arise from an exposure of the assured to risk of injury which risk would be obvious to him at the time if he was paying reasonable attention to what he was doing (*q*).

Where a man crossed a railway line where there was nothing to intercept his view of passing trains, and he was knocked down by a train in crossing, it was held that the accident was excluded from the risk under one or other of the above categories; under (1) if he saw the train coming and attempted to pass in front of it; under (2) if he crossed the line without looking whether the line was clear (*r*). On the other hand, in an American case where the policy excepted injuries "caused by voluntary exposure to unnecessary danger, hazard or perilous adventure" the Court held that class (1) alone fell within the exception and that the insurers had to prove that the actual danger which caused the injury was present to the mind of the assured when he exposed himself to it (*s*). In the case before the Court the assured was

(*k*) *Johnson* v. *London Guarantee* (1897), 15 Mich. 86; 69 Am. S. R. 549.

(*l*) *Canadian Railway Accident* v. *M'Nevin* (1902), 32 Can. S. C. 194; *DeLoy* v. *Travellers'* (1894), 50 Am. S. R. 787; *Providence Life* v. *Martin* (1869), 32 Ind. 310.

(*m*) *Ashenfelter* v. *Employers' Liability* (1898), 87 Fed. Rep. 682.

(*n*) *Canadian Railway Accident* v. *M'Nevin* (1902), 32 Can. S. C. 194.

(*o*) *Tucker* v. *Mutual Benefit* (1888), 50 Hun. 50.

(*p*) *Ashenfelten* v. *Employers' Liability* (1898), 87 Fed. Rep. 682; *Travellers' Insurance* v. *Clark* (1900), 22 Ky. 902; *Union Casualty* v. *Harroll* (1897), 98 Tenn. 591; 60 Am. S. R. 873; *Buckhard* v. *Travellers'* (1883), 102 Pa. 262.

(*q*) *Cornish* v. *Accident* (1889), 23 Q. B. D. 453, 455.

(*r*) *Cornish* v. *Accident* (1889), 23 Q. B. D. 453, 455; *Lovell* v. *Accident* (1876), cited 29 U. C. C. P. 231, 232.

(*s*) *Lehman* v. *Great Eastern Casualty* (1896), 7 App. Div. N. Y. 424.

crossing a railway track and he saw a train coming one way and while his attention was directed to observing and avoiding that train a train coming the other way which he did not see knocked him down. The Court held that the accident was not excepted because as the assured was not aware of this particular danger there was no voluntary exposure to it but they thought that if the words had been the same as in the English case cited above the accident would have been excepted because there was a risk which would have been obvious to the assured if he had exercised ordinary prudence and looked both up and down the line (*t*).

Contributory negligence of third parties.

If the assured exposes himself to obvious danger and the precise accident happens to him which there was reason to fear, the accident is none the less within the exception because it is immediately due to the contributory negligence of another. Thus in the case of the assured walking along a railway track in the dark the fact that the driver of the locomotive might have avoided an accident by blowing his whistle or applying his brakes does not take the case out of the exception (*u*).

Burden of proof.

Difficult questions may arise as to how far the burden of proof with regard to this exception lies on the insurer or the assured. Being an exception from the risk the rule applies that once the assured has proved that the case comes within the general risk it lies with the insurers to prove that it comes within an exception. But where the exception as in the case of "voluntary exposure to unnecessary danger" involves an inquiry into the state of mind of the assured and the motives from which he acted this burden of proof may not be easily discharged. It has been suggested that where the insurers prove nothing but that the assured exposed himself to danger and there is no evidence to show why he did so they do not succeed in establishing their case within the exception because they must prove further that it was voluntary and unnecessary (*v*). The answer to this seems to be that the Court will presume that a man acted voluntarily and that where he does an apparently dangerous and foolish thing they will presume that it was unnecessary until the contrary be shown (*x*). The onus therefore does practically fall upon the claimant to explain the conduct of the assured where he has without apparent reason exposed himself to an obvious danger (*y*).

(*t*) *Lehman* v. *Great Eastern Casualty* (1896), 7 App. Div. N. Y. 424, 429.

(*u*) *Tuttle* v. *Travellers'* (1883), 45 Am. R. 316.

(*v*) *Williams* v. *U. S. Mutual Accident* (1894), 82 Hun. 268; *Meadows* v. *Pacific Mutual* (1895), 50 Am. S. R. 427; *Freeman* v. *Travellers'* (1887), 144 Mass. 572.

(*x*) *Neill* v. *Travellers'* (1885), 12 Can. S. C. R. 55, Strong, J., at p. 63; *Fowlie* v. *Ocean Accident* (1901), 4 Ont. L. R. 146.

(*y*) *Walker* v. *Railway Passengers' Assurance* (1910), 129 L. T. 64.

Clauses which have been judicially construed.

The assured shall use all due diligence for his personal safety, and protection . . . does not extend to cover death or injury whilst wilfully wantonly or negligently exposing himself to any unnecessary danger.
Sangster's Trustees v. *General Accident* (1896), 24 R. 56; *Walker* v. *Railway Passengers' Assurance* (1910), 129 L. T. 64.

Not to cover injuries or death resulting from or caused by . . . voluntary exposure to unnecessary danger or hazard or perilous adventure, . . . nor to extend to negligence contributing to the injury or death.
Traders' and Travellers' v. *Wagley* (1896), 74 Fed. Rep. 457.

No claim where death or injury may have happened in consequence of any voluntary exposure to unnecessary danger hazard or perilous adventure . . . the assured is required to use all due diligence for personal safety and protection.
Keene v. *New England Accident* (1894), 161 Mass. 149; *Meadows* v. *Pacific Mutual* (1895), 50 Am. S. R. 427.

Happening by exposure of the assured to obvious risk of injury.
Cornish v. *Accident* (1889), 23 Q. B. D. 453; *Lovell* v. *Accident* (1876), cited 29 Can. Com. Pl. 231; *Small* v. *Travellers'* (1903), 118 Ga. 900.

By unnecessary or negligent exposure to obvious danger.
Preferred Accident v. *Muir* (1904), 126 Fed. Rep. 926.

Neglecting to use due diligence for self-protection.
Box v. *Railway Passengers'* (1881), 56 Iowa, 664; 41 Am. R. 127; *Pacific Mutual* v. *Snowden* (1893), 58 Fed. Rep. 342; *Freeman* v. *Travellers'* (1887), 144 Mass. 572.

. . . resulting from unnecessary exposure to danger.
Sargent v. *Central Accident* (1901), 112 Wis. 29; 88 Am. S. R. 946.

Caused by the wilful act of the assured exposing himself to any unnecessary danger or peril.
Trew v. *Railway Passengers'* (1861), 6 H. & N. 839.

Voluntary exposure to unnecessary danger, hazard or perilous adventure.
Glass v. *Masons' Fraternal Accident* (1901), 112 Fed. Rep. 495; *Neill* v. *Travellers'* (1882), 7 Ont. A. R. 570; (1885), 12 Can. S. C. 55; *Lehman* v. *Great Eastern Casualty* (1896), 7 App. Div. N. Y. 424; 158 N. Y. 689; *Marn* v. *Travellers'* (1889), 39 Fed. Rep. 321; *Travellers'* v. *Randolph* (1897), 78 Fed. Rep. 754; *Berliner* v. *Travellers'* (1898), 121 Cal. 458; 66 Am. S. R. 49; *Badenfeld* v. *Massachusetts Mutual Accident* (1891), 154 Mass. 77; *Travellers'* v. *Jones* (1888), 80 Ga. 541; 12 Am. S. R. 270; *Thomas* v. *Masons' Fraternal Accident* (1901), 64 App. Div. N. Y. 22; *Cornwell* v. *Fraternal Accident* (1896), 6 N. D. 201; 66 Am. S. R. 601; *Bailey* v. *Interstate Casualty* (1896), 8 Hun. App. 127; *Insurance Co.* v. *Seaver* (1873), 19 Wall. 531; *Johnson* v. *London Guarantee* (1897), 115 Mich. 86; 69 Am. S. R. 549; *Tucker* v. *Mutual Benefit* (1888), 50 Hun. 50; *De Loy* v. *Travellers'* (1894), 50 Am. S. R. 787; *Providence Life* v. *Martin* (1869), 32 Md. 310; *Canadian Railway Accident* v. *M'Nevin* (1902), 32 Can. S. C. R. 194; *Ashenfelter* v. *Employers' Liability* (1898), 87 Fed. Rep. 682; *Travellers' Insurance* v. *Clark* (1900), 22 Ky. 902; *Union Casualty* v. *Harroll* (1897), 98 Tenn. 591; 60 Am. S. R. 873; *Buckhard* v. *Travellers'* (1883), 102 Pa. 262; *Manufacturers'* v. *Dorgan* (1893), 58 Fed. Rep. 945.

Voluntary or unnecessary exposure to danger.
Coles v. *New York Casualty* (1903), 87 App. Div. N. Y. 41.

Voluntary or unnecessary exposure to danger or to obvious risk of injury.
Keiffe v. *National Accident* (1896), 4 App. Div. N. Y. 392.

Exposure to any obvious or unnecessary danger.
Tuttle v. *Travellers'* (1883), 134 Mass. 175; 45 Am. R. 316.

Happening by reason of his wilfully and wantonly exposing himself to any unnecessary danger or peril.
Schneider v. *Provident Life* (1869), 24 Wis. 28; 1 Am. R. 157.

In consequence of exposure to unnecessary hazard or perilous adventure.
Sawtelle v. *The Railway Passengers* (1878), 15 Blatchf. 216.

12. Clauses excepting Injuries caused by Exposure to certain Specified Hazards

Construction of such clauses.

These exceptions of which there is a great variety in the forms of policies in common use must be confined to conscious and voluntary acts (*z*) and as excluding only such injuries as might naturally be expected to result from the particular nature of the hazard (*a*). As a rule they will not be construed as extending to such acts as are ordinarily incidental to the occupation of the assured where his occupation is specifically described in the policy (*b*).

Clauses which have been judicially construed.

This policy does not extend to cover injuries from over exertion, wrestling, lifting.
Standard Life and Accident v. *Schmaltz* (1899), 66 Ark. 588; 74 Am. S. R. 112.

Unnecessary lifting and voluntary over exertion.
Rustin v. *Standard Life and Accident* (1899), 58 Nebr. 792; 72 Am. S. R. 136.

Voluntary over exertion.
Keiffe v. *National Accident* (1896), 4 App. Div. N. Y. 392.

Through walking or being on a railroad bridge or road bed.
Wimschenk v. *Aetna Life* (1903), 183 Mass. 312; *Keene* v. *New England Mutual* (1895), 164 Mass. 170; *Traders' and Travellers'* v. *Wagley* (1896), 74 Fed. Rep. 457; *Piper* v. *Mercantile Mutual Accident* (1894), 161 Mass. 589; *Meadows* v. *Pacific Mutual Life* (1895), 50 Am. S. R. 427; *De Loy* v. *Travellers'* (1894), 50 Am. S. R. 787; *Yancey* v. *Aetna Life* (1899), 108 Ga. 349; *Buckhard* v. *Travellers'* (1883), 102 Pa. 262.

Through standing or riding or being upon the platform of moving railway cars.
Shindene v. *Travellers'* (1883), 58 Wis. 13; 46 Am. S. R. 618; *Sawtelle* v. *Railway Passengers'* (1878), 15 Blatchf. 216.

While riding on the platform or steps of any railway car.
Standard Life and Accident v. *Thornton* (1900), 100 Fed. Rep. 582; *Traders' and Travellers'* v. *Wagley* (1896), 74 Fed. Rep. 457.

From entering or attempting to enter a moving conveyance.
Terwillizer v. *National Masonic Accident* (1902), 197 Ill. 9.

Being in or on any steam conveyance not provided for transportation of passengers.
Berliner v. *Travellers'* (1898), 121 Cal. 458; 66 Am. S. R. 49; *Travellers'* v. *Randolph* (1897), 78 Fed. Rep. 754.

While the assured is employed in the manufacture . . . or handling firearms.
Thomas v. *Masonic Fraternal Accident* (1901), 64 App. Div. N. Y. 22.

While engaged in adventures into wild and uninhabited regions.
Aetna Life v. *Frierson* (1902), 114 Fed. Rep. 56.

While employed in wrecking . . .
Tucker v. *Mutual Benefit* (1888), 50 Hun. 50.

(*z*) *Rustin* v. *Standard Life and Accident* (1899), 58 Nebr. 792; 72 Am. S. R. 136; *Keiffe* v. *National Accident* (1896), 4 App. Div. N. Y. 392; *Shreiderer* v. *Travellers'* (1883), 58 Wis. 13; 46 Am. R. 618.

(*a*) *Buckhard* v. *Travellers'* (1883), 102 Pa. 262.

(*b*) *Standard Life and Accident* v. *Schmaltz* (1899), 66 Ark. 588; 74 Am. S. R. 112; *De Loy* v. *Travellers'* (1894), 50 Am. S. R. 787; *Zancey* v. *Aetna Life* (1899), 108 Ga. 349.

13. Clauses limiting or excluding the Right of the Assured when engaged in an Occupation more Hazardous than that under which he is Insured

Meaning of "occupation."

The word "occupation" in such clauses has reference to the vocation profession trade or calling in which the assured is engaged for hire or profit, and does not preclude him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations (*c*). Occasional acts do not amount to an occupation and even although they are acts which are ordinarily incidental to some other occupation they are not acts pertaining to that occupation unless the assured has temporarily or permanently engaged in such occupation as a means of livelihood (*d*). When the acts are done merely by way of recreation or to give temporary assistance to another they are acts pertaining to the daily life of any one whatever his occupation may be and not acts pertaining to any particular occupation (*e*).

Whether the assured's occupation is or is not that which is described in the policy (*f*) and whether or not the particular act giving rise to the accident did pertain to the occupation as described (*g*) are questions of fact to be determined by the jury.

When the company's agent who negotiated the insurance was fully informed of the facts the company may be bound by the description of the occupation as selected by the agent (*h*).

Clauses which have been judicially construed.

Provided that if the assured is injured in any occupation or exposure classed by the company as more hazardous than that here given his insurance shall only be for such sum as the premium paid by him will purchase at the rates fixed for such hazard.

Canadian Railway Accident v. *M'Nevin* (1902), 32 Can. S. C. 194; *Berliner* v. *Travellers'* (1898), 121 Cal. 458; 66 Am. S. R. 49; *Hoffman* v. *Standard Life and Accident* (1900), 127 N. C. 337; *Yancey* v. *Aetna Life* (1899), 108 Ga. 349; *Aetna Life* v. *Dunn* (1905), 138 Fed. Rep. 629; *Employers' Liability* v. *Back* (1900), 102 Fed. Rep. 229; *Aetna Life* v. *Frierson* (1902), 114 Fed. Rep. 56.

While engaged temporarily or otherwise in any act or occupation classed as more hazardous.

Union Mutual Accident v. *Frohard* (1890), 134 Ill. 228; 23 Am. S. R. 664; *Wilsley Casualty* v. *Sheppard* (1900), 61 Kan. 351; *Stamford* v. *Imperial Guarantee, &c.* (1908), 18 Ont. L. R. 562.

(*c*) *Union Mutual* v. *Frohard* (1890), 134 Ill. 288; 23 Am. S. R. 664, 668; *Berliner* v. *Travellers'* (1898), 121 Cal. 458; 66 Am. S. R. 49, 55.

(*d*) *Canadian Railway Accident* v. *M'Nevin* (1902), 32 Can. S. C. 194; *Holiday* v. *American Mutual Accident* (1897), 103 Iowa, 178; *Johnson* v. *London Guarantee* (1897), 115 Mich. 86; 69 Am. S. R. 549.

(*e*) *Holiday* v. *American Mutual Accident* (1897), 103 Iowa, 178, 182.

(*f*) *Wilder* v. *Continental Casualty* (1907), 150 Fed. Rep. 92.

(*g*) *Pacific Mutual* v. *Snowden* (1893), 58 Fed. Rep. 342.

(*h*) *New York Accident* v. *Clayton* (1893), 59 Fed. Rep. 559; *Pacific Mutual* v. *Snowden* (1893), 58 Fed. Rep. 342.

While engaged in an employment more hazardous than the one stated.
Aldrich v. *Mercantile Mutual Accident* (1899), 149 Mass. 457; *Loesch* v. *Union Casualty* (1903), 176 Mo. 654.

While engaged in any work or duty classed as more hazardous.
Johnson v. *London Guarantee* (1897), 115 Mich. 86; 69 Am. S. R. 549.

While doing or performing any act or thing pertaining to an occupation classed as more hazardous.
Holiday v. *American Mutual Accident* (1897), 103 Iowa, 178; *Thomas* v. *Mason's Fraternal Accident* (1901), 64 App. Div. 22; *Eggenberger* v. *Guarantee Mutual Accident* (1889), 41 Fed. Rep. 172.

The policy shall be void as to all accidents occurring in any occupation profession or employment or exposure not named or incident to the occupation under which he receives membership.
Knapp v. *Preferred Mutual Accident* (1889), 53 Hun. 84.

14. Exceptions excluding Death or Disability caused by Disease

Disease must be proximate cause.

Where the exception excludes disability or death "caused by or arising from disease" the insurers must show that the disease was a proximate and not merely a remote cause of the disability or death (*i*). Thus where disease is merely the cause of the accident and does not operate as an immediate cause of disability or death the case is not within the exception, as where the assured fainted or had a fit and fell into water and was drowned (*k*) or fell into a railway track in front of a train (*l*).

But need not be sole cause

The disease need not be the sole cause of disability or death; if it is a proximate cause the case is within the exception even although there are other proximate causes contributing to the result (*m*). Thus where the assured had a diseased heart and slipped and fell the case was within the exception because death resulted from the combined operation of two proximate causes, the accidental fall and the diseased condition of the heart (*n*).

When disease may be deemed a proximate cause.

Disease is not deemed to be a proximate cause of disability or death if it merely contributes thereto by having weakened the system of the assured so that he has become more vulnerable from accidental causes (*o*). Thus where the assured having previously suffered from inflammation of the liver had a predisposition to a recurrence and an accidental fall brought on inflammation which resulted in death it was held that the case was not within the exception if there was no existing disease at the time of the accident but that it was within the exception if the disease was then existing and the accident merely aggra-

(*i*) *Lawrence* v. *Accidental* (1881), 7 Q. B. D. 216, 221; *Winspear* v. *Accident* (1880), 42 L. T. 900, 903; *Accident Insurance* v. *Crandal* (1886), 120 U. S. 527.
(*k*) *Winspear* v. *Accident* (1880), 6 Q. B. D. 42.
(*l*) *Lawrence* v. *Accidental* (1881), 7 Q. B. D. 216.
(*m*) *Commercial Travellers' Mutual Accident* v. *Fulton* (1897), 79 Fed. Rep. 423.
(*n*) *National Masonic Accident* v. *Shryock* (1896), 36 U. S. 658; *Cawley* v. *National Employers' Accident and General* (1885), 1 Cab. & El. 597.
(*o*) *Thornton* v. *Travellers'* (1902), 94 Am. S. R. 99, 106.

vated it (*p*). Where persons who have diseased organs overexert themselves and thereby aggravate the disease and cause death or injury the result is due to disease and not to accidental means (*q*).

Disease arising in consequence of accident.

The exception is if possible to be construed as including only such diseases as arise independently of the accidental cause and therefore where disease follows as the natural and probable consequence of an injury caused by accidental means it is not to be deemed within the exception unless the policy has been so framed as to admit of no other construction (*r*). Thus where the policy "did not insure in case of death or disability arising from . . . hernia . . . or any other disease arising within the system of the insured" and the assured fell and ruptured himself and died from strangulated hernia the case was not within the exception (*s*). And so under a similar exception where blood poisoning or erysipelas ensued as a direct result from an accidental wound the assured was held entitled to recover (*t*).

Exception excluding all consequences of disease.

The exception may be so expressed as to exclude recovery (1) where the disease is a remote cause of the disability or death, (2) where the disease is the direct consequence of an accidental injury. In America if the policy provides that it shall not extend to disability or death "caused directly or indirectly by or in consequence of fits vertigo or disease" the Courts hold that the use of the word "indirectly" brings within the exception all cases where disease is the substantial cause of the accident and therefore indirectly the cause of the disability or death. The particular wording of the clause displaces the rule of law that the proximate cause alone is to be considered, and on this ground the case is distinguished from the English decisions in *Winspear* v. *Accident* and *Lawrence* v. *Accidental* (*u*). Where the policy excluded recovery in the case of "death or disability arising from . . . erysipelas or any other disease or secondary cause or causes arising within the system of the assured," the Court held that even although erysipelas followed as a direct consequence of an accidental wound the case was within the exception because the express mention of secondary causes showed that disease could not be construed as including only diseases arising independently of the accident (*x*).

(*p*) *Freeman* v. *Mercantile Accident* (1892), 156 Mass. 351; *McKechnie's Trust* v. *Scottish Accident* (1893), 17 R. 6, 9.

(*q*) *Travellers' Insurance* v. *Shelden* (1897), 78 Fed. Rep. 285.

(*r*) *Etherington* v. *Lancashire and Yorkshire Accident* (1909), 25 T. L. R. 987; *McCarthey* v. *Travellers'* (1878), 8 Biss. 362, 366.

(*s*) *Fitton* v. *Accidental Death* (1864), 17 C. B. N. S. 122; *Atlanta Accident* v. *Alexander* (1898), 104 Ga. 709; *Thornton* v. *Travellers'* (1902), 116 Ga. 121; 94 Am. S. R. 99; *Travellers'* v. *Murray* (1891), 25 Am. S. R. 267.

(*t*) *Accident Insurance* v. *Young* (1891), 20 Can. S. C, 280; *Martin* v. *Equitable Accident* (1891), 61 App. Div. N. Y. 467.

(*u*) *Manufacturers' Accident* v. *Dorgan* (1893), 58 Fed. Rep. 945, 955; *Cave* v. *Pacific Mutual* (1903), 100 Mo. App. 602; *Sharpe* v. *Commercial Travellers' Mutual* (1893), 139 Ind. 92.

(*x*) *Smith* v. *Accident* (1870), L. R. 5 Ex. 302, 306.

"Disease" defined in policy.

The meaning of "disease" may be defined in the policy and, even where the definition was obviously inserted for another purpose, *i.e.* to define the cases for which compensation for disability caused by disease would be given, the restricted definition including only some half-dozen diseases was held equally applicable to the exception and where the assured died from blood poisoning (which was not one of the specified diseases) resulting from an accidental wound his representatives were held entitled to recover, notwithstanding an exception against death "caused by disease or other intervening cause even although the disease or other intervening cause may either directly or otherwise be brought on as a result from accident" (*y*).

Meaning of in absence of definition.

In America the Courts have refused to construe the word "disease" in these exceptions as including every slight or temporary disorder (*z*). A fainting spell produced by indigestion or lack of proper food for a number of hours or from any other cause which would not indicate any disease in the body but would show a mere temporary disturbance or enfeeblement would probably not come within the meaning of the words "disease or bodily infirmity" as used in these policies (*a*). Contact with infectious or putrid substances giving rise to a diseased state of the body is in a sense accidental but the injury caused thereby is an injury caused by disease and not by accident within the meaning of an ordinary accident policy (*b*).

Exceptions which have been judicially construed.

This policy only insures against death . . . when accident within the meaning of the policy is the direct or proximate cause thereof, but not when the direct or proximate cause thereof is disease or other intervening cause even although the disease or other intervening cause may itself have been aggravated by such accident or have been due to weakness or exhaustion consequent thereon or the death accelerated thereby.

Etherington v. *Lancashire and Yorkshire* (1909), 25 T. L. R. 987.

This policy does not insure in case of death or disability arising from fits . . . or any disease whatsoever arising before or at the time or following such accidental injury (whether consequent upon such accidental injury or not and whether causing such death directly or jointly with such accidental injury).

Lawrence v. *Accidental* (1881), 7 Q. B. D. 216; *Travellers' Insurance* v. *Melick* (1894), 65 Fed. Rep. 178; *McCormack* v. *Illinois Commercial* (1907), 159 Fed. Rep. 114.

. . . arising from rheumatism gout hernia erysipelas or any other disease or cause arising within the system of the insured before or at the time of or following such accidental injury (whether causing death or disability directly or jointly with such accidental injury).

Fitton v. *Accidental Death* (1864), 17 C. B. N. S. 122.

. . . arising from rheumatism gout hernia erysipelas or any other disease or secondary cause or causes arising within the system of the assured before or at the time of or following such accidental injury (whether causing death or disability directly or jointly with such accidental injury).

Smith v. *Accident* (1870), L. R. 5 Ex. 302.

(*y*) *Mardorf* v. *Accident*, [1903] 1 K. B. 584.

(*z*) *Meyer* v. *Fidelity and Casualty* (1895), 59 Am. S. R. 374, 378; *Preferred Accident* v. *Muir* (1904), 126 Fed. Rep. 926.

(*a*) *Manufacturers' Accident* v. *Dorgan* (1893), 58 Fed. Rep. 945, 955.

(*b*) *Bacon* v. *U. S. Mutual Accident* (1890), 123 N. Y. 304.

. . . caused by or arising wholly or in part from disease or other intervening cause even although the disease or other intervening cause may either directly or otherwise be brought on as a result from acoident.
Mardorf v. *Accident*, [1903] 1 K. B. 584.

Not to extend to any case in whioh death or disability occurs in consequence of disease.
Freeman v. *Mercantile Accident* (1892), 156 Mass. 351.

Not to extend to any death or disability which may have been caused wholly or in part by bodily infirmities or disease.
Accident Insurance v. *Crandal* (1886), 120 U. S. 527; *Bacon* v. *U. S. Mutual Accident* (1890), 123 N. Y. 304.

Not to cover accident nor death nor disability resulting wholly or in part directly or indirectly from disease or bodily infirmity.
National Masonic Accident v. *Shryock* (1896), 36 U. S. App. 658; *Hubbard* v. *Travellers'* (1897), 98 Fed. Rep. 930; *Travellers' Insurance* v. *Selden* (1897), 78 Fed. Rep. 285.

Not to cover accident nor injuries nor disability nor death resulting wholly or partly directly or indirectly from hernia . . .
Atlanta Accident v. *Alexander* (1898), 104 Ga. 709; *Thornton* v. *Travellers'* (1902), 116 Ga. 121; 94 Am. S. R. 99; *Travellers'* v. *Murray* (1891), 25 Am. S. R. 267.

Not to cover accident or death occurring while the insured was affected with disease.
Aetna Life v. *Hicks* (1900), 23 Ten. Civ. App. 74.

Not to cover accidental injuries or death resulting from or caused directly or indirectly wholly or in part by or in consequence of fits vertigo . . . or any disease.
Manufacturers' Accident v. *Dorgan* (1893), 58 Fed. Rep. 945.

Does not insure against death . . . accelerated or promoted by any disease or bodily infirmity or any natural cause arising within the system of the assured whether accelerated by accident or not.
Cawley v. *National Employers' Acc. and Gen.* (1885), 1 Cab. and El. 597.

Shall not extend to death or injury arising from natural disease or weakness although accelerated by accident.
M'Kichniss Trs. v. *Scottish Accident* (1889), 17 R. 6; *Clidero* v. *Scottish Accident* (1890), 19 R. 355; *Hamlyn* v. *Crown Accidental*, [1893] 1 Q. B. 750.

Shall not extend to death or injury resulting from or caused directly or indirectly wholly or in part by disease or bodily infirmity.
Commerical Travellers' Mutual Accident v. *Fulton* (1897), 79 Fed. Rep. 423.

Shall not extend to death or injury resulting wholly or partly directly or indirectly . . . from disease in any form either as cause or effect.
Preferred Accident v. *Muir* (1904), 126 Fed. Rep. 926.

Not to cover injuries fatal or otherwise resulting directly or indirectly from . . . vertigo or any disease or bodily infirmity.
Meyer v. *Fidelity and Casualty* (1895), 96 Iowa, 378; 59 Am. S. R. 374.

Shall not extend to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease . . . although such death may have been accelerated by accident.
Winspear v. *Accident* (1880), 6 Q. B. D. 42.

Not to extend to any bodily injury happening directly or indirectly in consequence of any disease nor to any death or disability caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the issuance of the policy.
Martin v. *Equitable Accident* (1891), 61 Hun. App. 467; *Accident Insurance* v. *Young* (1891), 20 Can. S. C. 280; *Sharpe* v. *Commercial Travellers' Mutual* (1893), 139 Md. 92.

Not to cover injuries received which under the influence of or resulting directly or indirectly from any disease or bodily infirmity.
Carr v. *Pacific Mutual* (1903), 100 Mo. App. 602.

Not to extend to any injury happening directly or indirectly in consequence of disease.
McCarthy v. *Travellers'* (1878), 8 Biss. 362; *Baily* v. *Interstate Casualty* (1896), 8 App. Div. N. Y. 127.

15. Exceptions excluding Death or Disability resulting from Poison, inhaling Gas, or Medical Treatment

How far these exceptions imply a conscious act.

There has been much difference of opinion in America as to the meaning of some of these exceptions. The words "taking poison" "inhaling gas" have been held to imply a conscious and voluntary act done with knowledge of the nature of the substance taken or inhaled (*c*), but this view has been disapproved in the Federal Court (*d*). If the exception is against death resulting "from poison" the conscious or voluntary element which may be implied from the word "taking" is eliminated and therefore death from poison taken by mistake is a death "from poison" although it may not be a death "from taking poison" (*e*). Probably however the exception against death from poison does not prevent recovery where there is an accidental wound and blood poisoning supervenes as a direct result of the original injury (*f*).

Surgical or medical treatment.

Death or disability from medical or surgical treatment does not necessarily imply unskilful treatment (*g*), but when the assured has met with an accidental injury and a surgical operation is thereby rendered necessary the case is not within the exception if the operation was skilfully performed and the assured nevertheless dies even although the death was directly due to the operation and not to the original injury (*h*). Where the assured's physician prescribed opium as a remedy for nervous excitement and the assured died from taking more than the prescribed dose it was held that the death was caused by medical treatment and was within the exception (*i*).

Exceptions which have been judicially construed.

Does not cover death nor injury resulting wholly or partly directly or indirectly from . . . poison.

M'Glother v. *Provident Mutual Accident* (1898), 89 Fed. Rep. 685; 32 C. C. A. 318; *Early* v. *Standard Life and Accident* (1897), 113 Mich. 58; 67 Am. S. R. 445; *Omberg* v. *U. S. Mutual Accident* (1897), 101 Ky. 303; 72 Am. S. R. 413.

Not to cover death or injuries resulting from taking poison.

Travellers' v. *Dunlop* (1896), 160 Ill. 642; 52 Am. S. R. 355; *Pollock* v. *U. S. Mutual Accident* (1883), 102 Pa. St. 230; 48 Am. S. R. 204; *Hill* v. *Hartford* (1880), 22 Hun. 187 (overruled in *Paul* v. *Travellers'* (1889), 112 N. Y. 472).

Not to cover injuries from poison or anything accidentally or otherwise taken administered or inhaled.

Kasten v. *Interstate Casualty* (1898), 99 Wis. 73; *Richardson* v. *Travellers'* (1891), 46 Fed. Rep. 843; *Fidelity* v. *Waterman* (1896), 161 Ill. 635.

(*c*) *Travellers'* v. *Dunlop* (1896), 160 Ill. 642; *Menneiley* v. *Employers' Liability* (1896), 148 N. Y. 596.

(*d*) *McGlother* v. *Provident Mutual Accident* (1898), 89 Fed. Rep. 685.

(*e*) *M'Glother* v. *Provident Mutual Accident* (1898), 89 Fed. Rep. 685.

(*f*) *Hill* v. *Hartford* (1880), 22 Hun. 187, 192; *Omberg* v. *U. S. Mutual Accident* (1897), 72 Am. S. R. 413.

(*g*) *Westmoreland* v. *Preferred Accident* (1896), 75 Fed. Rep. 244.

(*h*) *Travellers'* v. *Murray* (1891), 25 Am. S. R. 267.

(*i*) *Bayless* v. *Travellers'* (1877), 14 Blatchf. 143.

From anything accidentally or otherwise taken administered absorbed or inhaled.

Fidelity and Casualty v. *Lowenstein* (1899), 97 Fed. Rep. 17; *Menneiley* v. *Employers' Liability* (1896), 148 N. Y. 596; *Paul* v. *Travellers'* (1889), 112 N. Y. 472; *Pickett* v. *Pacific Mutual* (1891), 144 Pa. 79; 27 Am. S. R. 618; *Miller* v. *Fidelity and Casualty* (1899), 97 Fed. Rep. 836; *Dezell* v. *Fidelity and Casualty* (1903), 176 Mo. 253.

Not to cover death or disability caused wholly or in part by medical or surgical treatment.

Westmoreland v. *Preferred Accident* (1896), 75 Fed. Rep. 244; *Bayliss* v. *Travellers'* (1877), 14 Blatchf. 143; *Travellers'* v. *Murray* (1891), 25 Am. S. R. 267.

Resulting wholly or in part from poison accidentally or otherwise taken nor directly or indirectly from the use of anæsthetics or narcotics voluntarily administered.

Bailey v. *Interstate Casualty* (1896), 8 App. Div. N. Y. 127.

This policy does not cover death nor disability resulting from mineral animal vegetable gaseous or any other kind of poisoning excepted as hereinafter stated; but subject to its conditions covers death or disability resulting from septicæmia. freezing, sunstroke, drowning, hydrophobia, choking in swallowing and death only as a result of anæsthetic while actually undergoing a surgical operation at the hands of a duly qualified regular physician.

Herdie v. *Maryland Casualty* (1906), 149 Fed. Rep. 198.

16. Conditions requiring Notice of an Accident within a Specified Time

Construction of such conditions.

Conditions requiring the assured or his representatives to give notice to the insurers of any accident are of the utmost importance to the insurers. They have a much better opportunity of testing the genuineness of the claim when the events are recent than they would have after a substantial lapse of time involving probably the loss of important evidence. They can also protect their interests by ensuring proper medical attendance and so perhaps prevent a trifling injury developing into something more serious through the assured's neglect or ignorance. These considerations seem not infrequently to be lost sight of by the Court or arbitrator when the defence of insufficient notice is set up by an insurance company and the clause is accordingly treated as imposing a mere formality which the tribunal does its best to evade and sometimes does so only by a forced and unnatural construction of the words used in the policy. As an American judge has put it, "In determining the liability of the insurer he is entitled to the benefit of his contract fairly construed and can stand upon all of its stipulations. But when his liability has become fixed by the capital fact of a loss within the range of the responsibility assumed in the contract Courts are reluctant to deprive the assured of the benefit of that liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available for his indemnification" (*k*). But there is no reason why the same rules of construction should not be applied to conditions

(*k*) *M'Nally* v. *The Phœnix* (1893), 137 N. Y. 389.

requiring notice as to other conditions in the policy. They are not inserted for the purpose of enabling the insurers to escape liability but rather to give them a reasonable opportunity of investigating the claim under the most favourable circumstances and thereby of detecting and rejecting fraudulent or exaggerated demands. The condition ought to be construed fairly to give effect to this object but at the same time so as to protect the assured against being trapped by obscure or ambiguous phraseology.

How far conditions precedent.

Whether or not these conditions are to be construed as conditions precedent is always a question of construction of the policy taken as a whole (*l*). No express words are necessary to create a condition precedent, and probably the presumption ought to be in favour of their being construed as such. In a case in the Supreme Court of Canada (*m*), Taschereau, J., said, with reference to such a condition, "To say that it is not a condition precedent is to leave it without any effect whatsoever. The intention of the parties which is the guide in the interpretation of contracts must necessarily have been that this notice should be a condition precedent to any right of action upon the policy, otherwise the stipulation is vain, frivolous, and means nothing. It was not necessary to say it was to be a condition precedent. It is so by its nature. It is not a condition at all if it is not a condition precedent." This is perhaps carrying the argument too far in favour of the insurers, but at any rate it may safely be said that it is not to be lightly assumed that insurers intended to have only a counter-claim for damages if the notice was out of time. Some conditions, however, are so carelessly framed that side by side with conditions which are expressed as involving forfeiture are other conditions to which no such sanction is attached. It is then difficult to avoid giving effect to the abrupt change of expression. It was on this ground that a Divisional Court (Mathew and Cave, J.J.) held (*n*) that a condition requiring notice was not a condition precedent. "It may be," said Cave, J., "that the company may incur extra expenses in consequence of the absence of notice within the stipulated time, and that expense the representatives of the insured must make good. But the absence of notice does not make the policy void" (*o*). In an insurance against employers' liability it was provided that "the observance and performance by the employer of the times and terms above set out so far as they contain anything to be done by the employer are of the essence of the contract" (*p*). Bray, J., held that this did not make the condition requiring notice a condition precedent and that

(*l*) *Stoneham* v. *The Ocean Railway and General Accident* (1887), 19 Q. B. D. 237, 239.

(*m*) *Employers' Liability* v. *Taylor* (1898), 29 Can. S. C. R. 104.

(*n*) *Stoneham* v. *Ocean Railway and General Accident* (1887), 19 Q. B. D. 237, and see *Bradley* v. *Essex and Suffolk Accident* (1911), 27 T. L. R. 455.

(*o*) 35 W. R. 716, 717.

(*p*) *Coleman's Depositaries* v. *Life and Health*, [1907] 2 K. B. 798.

breach by the assured only involved a counter-claim for damages. In the Court of Appeal the majority did not dissent from this view, but Fletcher Moulton, L.J., expressed his disapproval of any such construction, and held that any condition which was expressed to be of the essence of the contract was a condition precedent. Where the condition was expressed to be "a condition precedent to the right of the assured to recover" it was held that this applied equally to the right of the assured's representatives to recover in the event of his death (*q*).

Where giving notice is impossible within time limited.

The general rule of law is that where a party to a contract undertakes to do something which afterwards turns out to be impossible he is not thereby excused, but where from the nature of the subject matter the performance of a promise is only possible under certain circumstances the parties may be deemed to have impliedly confined the obligation to cases where these circumstances exist and to have excluded all other cases (*r*). Thus the obligation to give notice of an accident may be not unreasonably confined to cases where the claimant himself has knowledge of the accident. On this principle it has been held that where the assured was drowned, but his fate was not discovered by the claimant until six months afterwards, there was no breach if notice was given immediately after the discovery (*s*), and again where the assured died, but the accidental cause of death was not apparent until after a post-mortem examination, that notice given immediately after the discovery of the facts upon which the claim was based was sufficient (*t*). Where the accident has caused the immediate mental derangement of the assured strict compliance with the condition has not been enforced (*u*). But where the assured has been instantaneously killed by an accident the claimant is not to be excused because he was ignorant of the existence of an insurance or because, being unable to find the policy, he was ignorant of its conditions (*x*). Such failure to give notice is attributable not to any impossibility of performance but to the neglect of the assured in not apprising some of his family or friends of the policy or of the strict conditions contained in it (*y*). In an American case where the condition was that the claimant should give notice within seven days of the accident it was held to be inapplicable to the case of instantaneous death

(*q*) *Cawley* v. *National Employers' Accident and General* (1885), 1 Cab. & El. 597.

(*r*) Holcomb, J., in *Woodmen's Accidental* v. *Pratt* (1901), 89 Am. S. R. 777, 788.

(*s*) *Kentzler* v. *American Mutual Accident* (1894), 88 Wis. 589; 43 Am. S. R. 934.

(*t*) *Trippe* v. *Provident Fund* (1893), 37 Am. S. R. 529, 531.

(*u*) *Woodmen's Accidental* v. *Pratt* (1901), 62 Neb. 673; 89 Am. S. R. 777; *Hagadorn* v. *Masonic Accident* (1901), 59 App. Div. N. Y. 321.

(*x*) *Gamble* v. *Accident Insurance* (1869), 4 Ir. R. C. L. 204; *Accident Insurance* v. *Young* (1891), 20 Can. S. C. R. 280. See, however, *Konrad* v. *Union Casualty* (1895), 49 La. Ann. 636.

(*y*) 4 Ir. R. C. L. 215.

because there was no claim in existence until the assured's representatives had completed their title by probate (*z*). But where the condition was that "the assured or his representatives" should give notice this was held to apply to those acting for the assured after his death although they had not completed their title as legal representatives (*a*).

Where serious nature of accident is not at first apparent.

A more difficult class of case is that where the assured meets with an accident and no injury, or a very trivial injury, is apparent at the time, and no notice is given because the assured never contemplates that it will give rise to any claim under the policy. Much will depend on the precise wording of the policy. If the obligation is absolute to give notice within a specified number of days after the accident the Court will probably give effect to the condition notwithstanding the apparent hardship to the assured (*b*), but the context may justify the inference that the time is not to run from the date of the accident unless such accident has resulted in immediate death or disability. Where the condition is that notice must be given within so many days of "an accident causing disability or death," the American Courts have held that until disability or death has supervened the event of which notice is to be given has not occurred because although there is an accident there is no accident causing disability or death. In some cases it has been held that the time runs from the date when disability or death supervened (*c*), but in one case where disability supervened after the prescribed number of days from the date of the accident it was held that the clause had no application at all and that it was sufficient if, after a claim for indemnity had arisen, notice was given within a reasonable time (*d*).

Meaning of "immediate notice."

Where the condition requires notice to be given "immediately" or "forthwith," the American Courts have repeatedly held that this means within a reasonable time under all the circumstances of the case and that such facts as that the injury was at first of an apparently trifling nature or that full information of the circumstances had not come to the knowledge of the assured are to be taken into consideration in determining whether the delay was or was not reasonable (*e*). It is, however, open to question whether this view gives sufficient effect to the somewhat forcible nature of the words "immediately" or "forthwith." In a licensing case, where the statute provided that an appellant should immediately after giving notice of appeal enter into a recognisance,

(*z*) *Globe Accident* v. *Gerisch* (1896), 163 Ill. 625; 54 Am. S. R. 486.

(*a*) *Patton* v. *Employers' Liability* (1887), 20 L. R. Ir. 93.

(*b*) *Cassel* v. *Lancashire and Yorkshire Accident* (1885), 1 T. L. R. 495.

(*c*) *Rorick* v. *Railway Officials' and Employers' Accidental* (1902), 119 Fed. Rep. 63; *Hagadorn* v. *Masonic Accident* (1901), 59 App. Div. N. Y. 321; *Western, etc.* v. *Smith* (1898), 85 Fed. Rep. 401.

(*d*) *Odd Fellows' Fraternal Accident* v. *Earl* (1895), 70 Fed. Rep. 16.

(*e*) *Ewing* v. *Commercial Travellers'* (1900), 55 Hun. App. 241; *People's Accident* v. *Smith* (1889), 126 Pa. 317, Paxson, C.J., at p. 324; *Kentzler* v. *American Mutual* (1894), 88 Wis. 587; 43 Am. S. R. 934; *Shera* v. *Ocean Accident* (1900), 32 Ont. R. 411.

the Court of Queen's Bench held that 4 days' unexplained delay was not a compliance with the statute (*f*), and Cockburn, C.J., said, "It is impossible to lay down any hard-and-fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt vigorous action without any delay and whether there has been such action is a question of fact having regard to the circumstances of the particular case" (*g*).

Contents of notice.

Where the condition requires "notice of an accident" it is not sufficient to give notice of an injury. Notice must be given of the accidental cause alleged (*h*). Where the condition requires full particulars to be stated the claimant must give the best particulars available at the time but he is not precluded from amending his particulars when fuller or more accurate information comes to hand (*i*).

Waiver of conditions as to notice.

The condition as to notice may be waived by the conduct of the company. This may be done before or after there has been a breach of the condition, before, by conduct inducing the claimant to rely on informal notice or to delay giving formal notice, after, by conduct inducing the claimant to incur further trouble or expense in the prosecution of his claim in the belief that the forfeiture on the ground of defective notice would not be inforced. If before the time for giving notice has expired the insurers receive an informal or otherwise insufficient notice it is their duty, if the defect is apparent on the face of the notice, to inform the claimant and give him an opportunity of remedying the defect while there is yet time, and if they do not do so their silence will be taken as a waiver of the defect (*k*). *A fortiori* there is a waiver if without requiring the defect to be remedied they act upon an informal notice, as where the condition required written notice and the insurers on receiving oral notice sent their medical officer to investigate the case (*l*).

If the insurers receive no notice of any kind until the time for giving notice has expired mere silence on the part of the insurers can no longer operate as a waiver, and even an investigation of the claim, without repudiation on the ground of no notice, is not to be regarded as a waiver unless the claimant is required to incur trouble or expense (*m*).

It has been held in America that if the insurers without

(*f*) *R.* v. *Justices of Berkshire* (1878), 4 Q. B. D. 469.
(*g*) Cockburn, C.J., 4 Q. B. D. at p. 471.
(*h*) *Simons* v. *Iowa State Travelling Men's* (1897), 102 Iowa, 267.
(*i*) *Root* v. *London Guarantee and Accident* (1904), 92 Hun. App. 578; *Martin* v. *Manufacturers' Accident* (1896), 151 N. Y. 94.
(*k*) *Underwood* v. *Farmers' Joint Stock* (1874), 57 N. Y. 500, 505; *Patrick* v. *Farmers' Insurance* (1862), 43 N. H. 621, 623; *Walsh* v. *London Assurance* (1892), 151 Pa. 607; 31 Am. S. R. 786, 789.
(*l*) *Martin* v. *Equitable Accident* (1891), 61 App. Div. N. Y. 467.
(*m*) *Heywood* v. *Accident* (1893), 85 Me. 289.

taking objection to the notice furnish the claimant with blank forms and require him to fill them up and furnish evidence they waive the defence of defective notice (*n*). The Supreme Court in Canada, however, held that where the notice was out of time the insurers did not waive the defect merely by receiving proofs of loss and investigating the claim and denying liability upon the merits (*o*). No party is required to name all his reasons at once or any reason at all and the assignment of one reason for a refusal to pay cannot be a waiver of any other existing reason unless the other is one which could have been remedied or obviated and the adversary was so far misled or lulled into security by the silence as to such reason that to enforce it would be unfair or unjust. The whole doctrine of waiver depends on estoppel and the essential feature of it is loss or injury to the other party by the act of the party to be estopped (*p*).

In practice insurers who intend to take advantage of the notice being out of time should immediately repudiate liability on that ground. They may then ask for proofs and evidence. This request should be made expressly "without prejudice," but even although this precaution is omitted the request for information after the defence of no notice has been formally taken cannot readily be construed as implying a waiver of that defence (*q*).

How far proofs and information can be demanded after repudiation of liability.

If after the defence of no notice has been taken the insurers do not ask for proofs or information the claimant is not bound to supply them and is released from further performance of the conditions of the policy in that respect (*r*); but if the insurers ask for proofs and information without prejudice it would seem that the claimant is bound to supply them according to the conditions because the insurers are not bound to stake their defence solely on the ground of no notice but are entitled to a full opportunity of investigating the claim upon its merits.

It is clear that a request for proofs or other information can under no circumstances amount to a waiver of a breach of the condition as to notice unless the insurers were at the time aware of the insufficiency of the notice (*s*).

Notice to agent.

Where the condition requires notice to be given to the head office informal notice to a local agent cannot be relied on by the claimant unless he can show that the information was communicated to the head office (*t*). But, on the other hand, where the agent undertook to fill up the notice and transmit it to the

(*n*) *Trippe* v. *Provident Fund* (1893), 140 N. Y. 23; 37 Am. S. R. 529; *Moore* v. *Wildey Casualty* (1900), 176 Mass. 418.

(*o*) *Accident Insurance of North America* v. *Young* (1891), 20 Can. S. C. 280.

(*p*) *Welsh* v. *London Assurance* (1892), 151 Pa. 607; 31 Am. S. R. 786, 789; *Travellers'* v. *Nax* (1905), 142 Fed. Rep. 653.

(*q*) *Hagadorn* v. *Masonic Accident* (1901), 59 Hun. App. 321.

(*r*) *Coleman's Depositaries* v. *Life and Health Insurance*, [1907] 2 K. B. 798.

(*s*) *Hagadorn* v. *Masonic Accident* (1901), 59 Hun. App. 321.

(*t*) *American Accident* v. *Carol* (1896), 13 Ohio C. C. 154.

head office it was held that the company could not rely upon an error made by the agent in filling up the form (*u*).

It is not necessary for a claimant to prove notice as part of his case (*x*). Absence of proper notice must be pleaded and proved in defence.

Conditions which have been judicially construed.

Notice of accident shall be given as soon thereafter as possible with full particulars.
Providence Life v. *Marlin* (1869), 32 Md. 310.

Provided that in the event of any accident or injury for which any claim shall / may be made . . . or in case of death resulting therefrom immediate notice shall be given in writing to the manager with full particulars.
Accident Insurance v. *Young* (1891), 20 Can. S. C. 280; *Western Commercial Travellers'* v. *Smith* (1898), 85 Fed. Rep. 401; *Ewing* v. *Commercial Travellers'* (1900), 55 App. Div. 241; *People's Accident* v. *Smith* (1889), 126 Pa. 317; *Root* v. *London Guarantee and Accident* (1904), 92 App. Div. 578; *Young* v. *Travellers'* (1888), 80 Me. 244.

Notice must be given with full particulars of the accident and injury immediately after the accident occurs.
Kentzler v. *American Mutual Accident* (1894), 88 Wis. 589; 43 Am. S. R. 934.

Written notice of accident must be given immediately to the manager.
Shera v. *Ocean Accident* (1900), 32 Ont. R. 411.

Immediate notice of accident or injury with full particulars.
Johnston v. *Dominion, &c., Insurance* (1908), 17 Ont. L. R. 462; *Konrad* v. *Union Casualty* (1895), 49 La. Ann. 636; *Horsfall* v. *Pacific Mutual Life* (1903), 32 Wash. 132; 98 Am. S. R. 846; *Lyon* v. *Railway Passengers'* (1877), 46 Iowa, 631; *Travellers'* v. *Nax* (1905), 142 Fed. Rep. 653.

Immediate notice stating the full particulars as to when where and how it occurred . . . and failure to give such immediate notice within 10 days from the happening of such accident shall invalidate all claim under this certificate.
Martin v. *Manufacturers' Accident* (1896), 151 N. Y. 94.

Written notice shall be given . . . within 10 days of the date of the accident and injury for which claim to indemnity or benefit is made.
Woodmen's Accident v. *Pratt* (1901), 62 Neb. 673, 89 Am. S. R. 777; *Odd Fellows' Fraternal Accident* v. *Earl* (1895), 70 Fed. Rep. 16.

Notice of the accident . . . within 15 days from the date of the accident causing the disability or death.
Rorick v. *Railway Officials' and Employers' Accident* (1902), 119 Fed. Rep. 63; *Simons* v. *Iowa State Travelling Men's* (1897), 102 Iowa, 267; *Pennington* v. *Pacific Mutual Life* (1892), 85 Iowa, 468.

In case of injury from accident assured should give notice of the occurrence of the accident and also within 14 days of the accident should forward medical certificate.
Cassel v. *Lancashire and Yorkshire Accident* (1885), 1 T. L. R. 495.

Written notice shall be given within 10 days of the date of the accident and injury.
Hagadorn v. *Masonic Accident* (1901), 59 App. Div. N. Y. 321.

Notice in writing of any accident must be given to the association within 7 days of its occurrence.
Cawley v. *National Employers' Accident and General* (1885), 1 Cab. & E. 597.

Notice of any accidental injury shall be given in writing with full particulars of the accident and injury, and failure to give notice within 10 days of either injury or death shall invalidate any claim.
Trippe v. *Provident Fund* (1893), 140 N. Y. 23; 37 Am. S. R. 529.

(*u*) *Young* v. *Travellers'* (1888), 80 Me. 244.
(*x*) *Coburn* v. *Travellers'* (1887), 145 Mass. 227.

Unless claimant gives within 7 days written notice stating causes of injury . . . all claims shall be forfeited.
Globe Accident v. *Gerisch* (1896), 163 Ill. 625; 54 Am. S. R. 486.

In the event of any accident assured or his representatives shall give notice thereof in writing within 10 days of its occurrence.
Patton v. *Employers' Liability* (1887), 20 L. R. I. 93.

Notice of accident whether fatal or not must be delivered to the company at their chief office within 7 days.
Gamble v. *Accident* (1869), 4 Ir. R. C. L. 204.

17. Conditions requiring Proof to be furnished within a Specified Time

Construction of such conditions.

Much of what has been said with respect to the conditions requiring notice applies equally to conditions requiring proof. They may or may not be conditions precedent according to construction and the condition is not to be deemed to apply to circumstances where it is impossible to comply with the condition (*y*).

Statements in proof may be amended.

The claimant is not irrevocably bound by the statement made in his proofs of loss, although of course they are evidence which may be used against him at the hearing. He may amend his proofs at will provided the amended proofs are furnished so as to meet the requirements of the policy (*z*), and even at the hearing he may amend his case if fresh facts are discovered after the proofs have been furnished (*a*).

When insurers repudiate all liability.

If the insurers on receiving notice of the accident repudiate all liability and do not ask for proofs the claimant is not bound to furnish them (*b*), but probably the claimant is bound to furnish proofs if asked to do so without prejudice to the defence.

Blank forms for proof.

There is usually no obligation on the insurers to furnish forms of proof, but if they lead the claimant to believe that they will furnish him with forms and do not do so they cannot complain of the claimant's neglect in not sending the proofs (*c*).

Acceptance of proof is no admission of claim.

The insurers by accepting proofs of loss do not in any sense admit the case put forward by the claimant and the proofs are therefore not even *primâ facie* evidence in the claimant's favour at the hearing (*d*).

If on the face of them the proofs are insufficient the company should immediately notify the claimant to that effect. If there is still time to remedy the defect, but the company allow the time for delivering proofs to expire without taking any

(*y*) *Kentzler* v. *American Mutual Accident* (1894), 88 Wis. 589; 43 Am. S. R. 934; *Konrad* v. *Union Casualty* (1895), 49 La. Ann. 636.
(*z*) *McMaster* v. *North America* (1873), 55 N. Y. 222, 228.
(*a*) *North American Life and Accident* v. *Burroughs* (1871), 69 Pa. 43.
(*b*) *Coleman's Depositaries* v. *Life and Health Insurance*, [1907] 2 K. B. 798; *Thornton* v. *Travellers'* (1902), 94 Am. S. R. 99, 110; *Turner* v. *Fidelity and Casualty* (1897), 112 Mich. 425; 67 Am. S. R. 428.
(c) *Standard Life and Accident* v. *Schmaltz* (1899), 66 Ark. 508; 74 Am. S. R. 112.
(*d*) *People's Accident* v. *Smith* (1889), 126 Pa. 317.

objection to the proofs delivered, they cannot afterwards object on the ground of their insufficiency (*e*).

Proof means the furnishing of statements by witnesses and documents tending to support the truth of the claim. Unless specifically required by the policy the statements need not be on oath. The statements, however, must give a detailed narrative of the fact. A mere notice that an accident has occurred and that an injury has resulted is not proof (*f*).

Conditions which have been judicially construed.

Affirmative proof of death or disability within two months from death or termination of disability.
Konrad v. *Union Casualty* (1895), 49 La. Ann. 636.

Positive proof of death shall be furnished to the association within six months of the date of the accident.
Kentzler v. *American Mutual Accident* (1894), 88 Wis. 589; 43 Am. S. R. 934.

18. Conditions requiring Action to be brought within a Specified Time

Like the conditions requiring notice and proof, this condition requiring action to be brought within a specified time may be waived by the conduct of the insurers (*g*).

Where the policy provided that suit might be brought within three months after proof of loss and that no suit should be brought unless within a year of the alleged accident and the disability of the assured extended over nine months from the date of the accident, it was held that condition was not applicable (*h*).

Section V.—Burglary Policies

Scope of policy.

The scope of these policies varies considerably. They may cover losses consequent upon burglary, housebreaking, robbery or theft, or one or other of these causes.

Burglary.

To constitute the crime of burglary at Common Law there must be a breaking and entering of a dwelling-house or church with intent to commit a felony therein, and both breaking and entering must be committed during the night time although not necessarily both on the same night (*a*). The breaking may be actual or constructive. Actual breaking includes the opening of any door or window although not locked

(*e*) *Ocean Accident* v. *Fowlie* (1902), 33 Can. S. C. 253.
(*f*) *Johnston* v. *Dominion, etc., Insurance* (1908), 17 Ont. L. R. 462.
(*g*) *Turner* v. *Fidelity and Casualty* (1897), 112 Mich. 425; 67 Am. S. R. 428.
(*h*) *Denison* v. *Masons' Accident* (1901), 59 App. Div. N. Y. 294.
(*a*) Russell on Crimes, 7th Ed. p. 1066; Stephens' Digest of Criminal Law, 5th Ed. p. 282. For the purposes of a burglary at Common Law the night time means apparently the period from dusk to dawn, and is not affected by the statutory definition of night time in the Larceny Act, 1861, *i.e.* from 9 p.m. to 6 a.m.

or bolted. Constructive breaking means the obtaining of an entry by threat or trick or by conspiring with some one within the premises to leave a door or window open. Entry on the premises means the entry of the body or any part thereof or of any instrument. The premises broken into must constitute a dwelling-house, that is premises in which some person or persons habitually sleep. A house does not cease to be a dwelling-house during the temporary absence of the occupier. Under the Larceny Act, 1861, a person entering a dwelling-house with intent to commit a felony or committing a felony in a dwelling-house and breaking out of such dwelling-house in the night time is guilty of burglary (*b*).

Housebreaking.

The Larceny Act, 1861, specifies the various acts in the nature of housebreaking, that is breaking by day or night, which are punishable as felonies (*c*). They include acts in relation to any dwelling-house, church, chapel or meeting-house, or any building within the curtilage thereof, or to any school-house, shop, warehouse or counting-house. In each case the essence of the offence is a "breaking" of the same character as is required to complete the crime of burglary.

Robbery.

Robbery is the felonious taking of money or goods to any value from the person of another or in his presence against his will by violence or putting him in fear (*d*).

Theft or larceny.

Theft or larceny is the taking or carrying away of an article without any claim of right with the intention of permanently converting it to the use of some person other than the owner (*e*).

Definition of terms in policy excludes technical meaning.

If a policy covers losses consequent upon burglary, housebreaking, robbery or theft and these are not further defined the words will probably be construed in their technical criminal sense. The policy, however, may provide its own definition of the words, and if it does so that definition must be followed to the exclusion of the technical meaning.

George v. Goldsmiths' and General Burglary, [1899] 1 Q. B. 595

George v. *Goldsmiths' and General Burglary.*

An insurance was effected upon property situate in jeweller's premises described as a "shop, warehouse and dwelling." The insurance was "against loss or damage by burglary or housebreaking as hereinafter defined," and the risk was expressed to be loss of property insured "by theft following upon actual forcible and violent entry upon the premises." In the early morning before business hours a thief obtained access by opening the door of the shop which was not bolted and the only force used in entering was in turning the handle of the door. Having obtained entry the thief broke into a locked show case and abstracted the jewellery. The Court held that the loss was not covered by the policy. Although there was a "breaking"

(*b*) 24 & 25 Vict. c. 96, s. 51. For the purposes of this Act the night time means between 9 p.m. and 6 a.m.

(*c*) 24 & 25 Vict. c. 96, ss. 54, 55, 56, 57, 59.

(*d*) East, P. C. 707; Russell on Crimes, 7th Ed. p. 1127; Stephens' Digest of Criminal Law, 5th Ed. p. 279.

(*e*) Russell on Crimes, 7th Ed. p. 1177; Stephens' Digest of Criminal Law, 5th Ed. p. 254.

sufficient to constitute the crime of housebreaking, there was no "forcible and violent entry upon the premises" within the meaning of the policy. The object of these words in the policy was to confine the risk to an entry effected by real violence as contradistinguished from an entry effected by stealth without violence. The forcing of the show case was not an entry upon the premises which was defined as the shop, warehouse and dwelling.

Exception excluding loss by theft by member of assured's household.

A common exception to the general risk is that excluding loss by theft, etc., by members of the assured's household. When such loss is excluded nothing can be recovered in respect of a loss where some member of the household is guilty of complicity in the theft either as a principal or accessory before the fact (*f*). Where a servant in pursuance of a preconceived scheme unbolts the doors or windows and lets in a thief he is guilty of the theft as a principal (*f*). Where a loss is thus caused by the act of a servant and others acting in concert with him the loss cannot be apportioned, but the whole of it must be deemed to be a loss caused by the theft of the servant and accordingly within the exception (*f*).

Exception where premises unoccupied for specified number of consecutive days.

Another common exception to the risk in such policies is that which excludes recovery when the premises have been unoccupied for a specified number of consecutive days. In the case of a dwelling-house it is deemed to be unoccupied within the meaning of this clause unless there is some one inhabiting the house and sleeping on the premises. Where the occupier and his family were from home and no servant was left in the house but it was occasionally visited by a caretaker during the day the house was held to be unoccupied (*g*).

False or fraudulent claims.

The condition against false or fraudulent claims is common to burglary policies and other insurances on property. Where the assured claimed £507 in respect of a loss and the jury found that the claim should not have exceeded £150 judgment was entered for the defendants under this condition (*h*).

Conditions which have been judicially construed.

Definition of risk covered.

Now therefore this policy witnesseth that if at any time after the date hereof, and during the continuance of this policy, the property above described or any part thereof, shall be lost by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate then the association shall pay or make good to the assured such loss to the extent of the value of the property so lost but not exceeding in the whole the sum or sums of money respectively insured thereon.

George v. *Goldsmiths and General Burglary*, [1899] 1 Q. B. 595.

Loss by burglary theft or robbery.

Samuels v. *Tompson* (1910), The *Times* Newspaper, Nov. 12.

Theft by members of assured's household.

Provided always that there shall be no claim on this policy . . . for loss by theft, robbery or misappropriation by members of the assured's household business staff or other inmates of the insured premises.

Saqui and Lawrence v. *Stearns*, [1911] 1 K. B. 426.

(*f*) *Saqui & Lawrence* v. *Stearns*, [1911] 1 K. B. 426.

(*g*) *Clements* v. *National General Insurance* (1910), The *Times* Newspaper, June 11.

(*h*) *Hodgkins* v. *Wrightson* (1910), The *Times* Newspaper, March 24.

Premises unoccupied.

The policy shall not cover loss of or damage to gold or silver plate jewellery personal ornaments watches or trinkets due to any such theft as aforesaid or to any attempt thereat arising whilst the premises are unoccupied after they have been unoccupied for 14 consecutive days, or for more than 7 consecutive days when the premises are situate in London or within 50 miles thereof, or for periods while not comprising 14 or 7 consecutive days (whichever period shall be applicable to the case) exceed 56 days altogether in any one year of insurance.

Clements v. *National General Insurance* (1910), The *Times* Newspaper, June 11.

Fraudulent claim.

If the assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise the policy shall become void and all claim thereunder shall be forfeited.

Hodgkins v. *Wrightson* (1910), The *Times* Newspaper, March 24.

Reinstatement.

In case of loss the company may repair any damage to property and it may replace any damaged article with one of like quality and value instead of paying for same in money.

Bankers' Mutual v. *Goffs* (1906), 150 Fed. Rep. 78.

Section VI.—Employers' Liability Policies

Contracts of indemnity.

Such policies are essentially contracts of indemnity and are governed by the general principles of insurance applicable to fire and other indemnity policies (*i*).

Description in policy of assured's business.

The nature and scope of the employer's business must be clearly defined in the policy, and workmen employed outside the scope of the assured's business as described in the policy will not be covered. Where the employers were insured as "manufacturers and erectors of machinery show cases and office fixtures and general woodwork," evidence was admitted as to the trade meaning of "general woodwork," and the question whether an injured workman was or was not employed upon work answering to that description was submitted to the jury (*j*).

Inaccuracy of description in policy: knowledge of agent.

Where the employer's business is inaccurately described in the policy, but the company's agent knows the real nature of his business, the company may, under certain circumstances, be deemed to have had the agent's knowledge, and to have insured the employer in respect of his actual business as known to the agent and not only in respect of the business described in the policy.

Holdsworth v. Lancashire & Yorkshire (1907), 23 T. L. R. 521

Holdsworth v. *Lancashire & Yorkshire.*

The plaintiff effected an insurance with an insurance company through their local agent against liability to workmen under the Workmen's Compensation Act, 1907. The proposal form was filled up by the agent, and although he knew that the plaintiff was a builder and joiner, he described him as a joiner. The proposal form was not read over to, or read by, the plaintiff. The risk was accepted by the head office of the company and a policy issued which described the plaintiff as a joiner. The plaintiff at once called the agent's attention to this and the agent said he would get it altered. The agent thereupon communicated with the chief clerk in the branch office for the district and the chief clerk authorised the agent to add the words "and builder" to the descripton. The agent did so and returned

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(*i*) *Aetna* v. *Indemnity & Crowe* (1907), 154 Fed. Rep. 545.
(*j*) *Fidelity & Casualty* v. *Phœnix* (1900), 100 Fed. Rep. 604.

the policy to the assured, who thereupon paid the first premium and continued to pay the premiums when due. Afterwards an accident occurred for which the assured was liable, but the company declined to pay on the ground that they had never accepted the risk of a joiner and builder and that the policy had been altered without the company's authority. It was held that the company was liable on these grounds:—(1) the agent's knowledge was the company's knowledge, and as the company had received premiums after the alteration of the policy they were estopped from denying that the agent had the necessary authority; (2) the agent's knowledge was the company's knowledge, and as the agent knew the actual business of the plaintiff the company must be held to have insured him in respect of that business and the misdescription in the policy was immaterial.

Where insurance covered statutory liability only.

An employer's liability policy ought to protect the assured against all claims, whether at common law, under the Employers' Liability Act, 1880 (*k*), or the Workmen's Compensation Act, 1906 (*kk*). In a Scottish case, where the insurers agreed to pay in respect of liability "under or by virtue of the Employers' Liability Act, 1880," and an injured workman recovered damages against the assured in a common law action, it was held that the assured could not recover on his policy, even although there was a liability under the Act, and the same damages might have been recovered in an action brought under the Act (*l*).

Wages book, and adjustment of premium.

The premium in respect of employers' liability policies is based upon the amount of wages paid by the assured to his employees during the year of insurance. At the commencement of the risk a premium is paid upon the estimated amount of wages, and the policy provides that the assured shall keep a proper wages book and render an account of the actual wages paid so that at the end of the year the premium may be adjusted and any balance due by or to the assured paid accordingly.

Account of wages may be enforced by action.

If an employer declines to render a proper account of wages at the expiration of the risk the office may enforce their right to such account by bringing an action for an account and payment of such balance of premium as may be found due. They are not bound to show in the first instance that there will be any balance in their favour nor are they bound to supply the assured with a form upon which to make his return. At the hearing of an action brought to enforce the rendering of an account the Court will order an account to be delivered and the office will have the costs of the action down to the date of the order, subsequent costs being reserved (*m*).

Whether keeping a wages book is a condition precedent.

Since the keeping of a proper wages book is a matter which only affects the amount of premium payable upon the risk it has been held that the condition requiring the assured to keep a book is not to be deemed a condition precedent to the insurer's liability on the policy unless it is clearly and unequivocally stated to be so (*n*).

(*k*) 43 & 44 Vict. c. 42.
(*kk*) 6 Edw. 7, c. 58.
(*l*) *Morrison & Mason* v. *Scottish Employers' Liability* (1888), 16 R. 212.
(*m*) *General Accident* v. *Day* (1905), 21 T. L. R. 88.
(*n*) *Bradley* v. *Essex and Suffolk Accident* (1911), 27 T. L. R. 455.

Conditions which have been judicially construed.

Risk covered.

Shall pay to the employer all sums which such employer shall become liable for under or by virtue of the Employers' Liability Act, 1880, as and for any compensation for personal injury caused to any workman in their service while engaged in the employer's work.

Morrison and Mason v. *Scottish Employers' Liability* (1888), 16 R. 212.

Against loss from common law or statutory liability for damages on account of bodily injuries fatal or non-fatal accidentally suffered within the period of this policy by any employé of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given and during the continuation of the work described in the said schedule.

Chicago Coulterville v. *Fidelity and Casualty* (1904), 130 Fed. Rep. 957.

Exception assured's breach of statutory duty.

This policy does not cover loss from liability for injuries . . . occasioned by reason of the failure of the assured to observe any statute affecting the safety of persons.

Chicago Coulterville v. *Fidelity and Casualty* (1904), 130 Fed. Rep. 957.

Warranty against use of explosives.

Warranted that no explosives shall be used on premises.

B. Roth Tool Co. v. *New Amsterdam Casualty* (1908), 161 Fed. Rep. 709.

Wages book and adjustment of premium.

The first and all future premiums that may be accepted are to be regulated by the amount of wages and salaries paid to employés and sums paid to subcontractors by the employer during each year. The name of every direct employé and of every subcontractor shall be entered each week in a proper wages book with the sums paid *and no claim shall be covered by this policy unless the name of the injured employé or of the subcontractor employing him shall be so entered* and every subcontractor shall so far as possible be required in his turn to keep a similar wages book so that a record may exist of such employés as are entitled to call upon the employer for compensation; but if the wages paid by any subcontractor cannot be ascertained then for the purpose of this policy they shall be taken to be a sum equal to 60 per cent. of the sum agreed to be paid to such subcontractor for such work. The employer shall at all times allow the corporation to inspect such wages book and will on request supply the corporation with a correct account of all sums paid during any year of insurance and if the total amount so paid shall differ from the amount on which premium has been paid the difference in premium shall be met by a further proportionate payment to the corporation or by a refund by the corporation as the case may be.

General Accident Assurance v. *Day* (1904), 21 T. L. R. 88; *Bradley* v. *Essex and Suffolk Accident* (1911), 27 T. L. R. 455; *Gilbane* v. *Fidelity and Casualty* (1908), 163 Fed. Rep. 673.

Immediate notice of accident.

The employer shall give immediate notice to the association of any accident causing injury to a workman and the employer shall also forward to the association every written or information as to any verbal notice of claim received within three days after the receipt of such notice and shall give all information and assistance required by the association. . . .

The observance and performance by the employer of the times and terms above set out, so far as they contain anything to be done by the employer are the essence of the contract.

Coleman's Depositories v. *Life and Health Assurance*, [1907] 2 K. B. 798.

Upon the occurrence of any accident notice of it shall within three days of its occurrence be given to the company. The fullest particulars of the cause of the accident must be carefully preserved so that in the event of legal proceedings such may be produced or be open to inspection. The failure to observe such particulars has been an element against employers in the law courts. The employer on receiving notice of a claim shall within three days send on the same or a copy thereof to the company with such further certified information as to the time at and circumstances under which the injury was caused and the nature and extent thereof and the name and occupation of the claimant, and such other information as the company may by their rules or otherwise require, and he shall cause to be supplied to the company such further certified information as to and such evidence of the circumstances connected with such claim as the company may from time to time apply for.

Morrison and Mason v. *Scottish Employers' Liabilily* (1888), 16 R. 212.

Insurers' right to settle claims and

On receiving from the employer notice of any claim the company may take upon themselves the settlement of the same and in that case the employer shall give them all necessary information and assistance for the purpose. The employer

shall not except at his own cost pay or settle any claim without the consent of the company but if any proceedings be taken to enforce any claim in respect of which such notice shall be given the company shall have the absolute conduct and control of the same throughout in the name and on behalf of the employer and shall in any event indemnify the employer against all costs and expenses of and incident upon any such proceedings and the employer shall at the cost of the company render them every assistance in his power to enable them to resist any claim wholly or in part or to defend any such proceedings. defend proceedings.

Morrison and Mason v. *Scottish Employers' Liability* (1888), 16 R. 212.

The company shall not be liable under this policy unless an action to enforce such liability be brought within 60 days from the date of the entry of a final judgment against the assured, after a trial on the merits in a suit duly instituted within the period limited by the Statute of Limitations awarding damages on account of a casualty covered hereby and then only provided that such action against the company be brought by the assured personally for damages sustained by the assured in paying and satisfying such final judgment. This clause shall not in any way limit restrict or abridge the company's defence to any such action. Limitation of action.

Goddard v. *Casualty Co.* (1909), 167 Fed. Rep. 750; *Lynchburg Cotton Mill Co.* v. *Travellers' Insurance* (1906), 149 Fed. Rep. 954.

Section VII.—Third Party Risk Policies

These protect the assured against liability in respect of damage caused by him or his servants to the property or persons of third parties. It is usual to limit the risk to a total sum specified in the policy and further in respect of liability for personal injuries to limit the amount which can be recovered in respect of an injury to any one person. Limitation of risk.

The most important questions arising on these policies are with regard to the conduct by the company of negotiations for settlement or defence of legal proceedings when any claim for damages is made against the assured. The policy usually provides that all claims made or legal process served upon the assured shall be immediately forwarded to the company (*o*) and that the company shall have the right to settle all claims and defend all actions made or brought against the assured. Company's conduct of negotiations and defence.

If the company undertakes a defence it thereby admits liability on the policy and cannot afterwards repudiate liability on the ground that the loss was one not covered by the policy (*p*). Where, however, the company merely advise settlement, but at the same time deny liability on the policy the company's defence is not thereby prejudiced (*q*). Company undertaking defence admits liability.

The company may by the policy have an alternative (1) to pay the total sum insured in respect of any one accident or (2) to assume total responsibility for the settlement or defence of the claim and hold the assured absolutely indemnified in respect of damages recovered, taxed costs of the plaintiff and the assured's solicitor and client costs (*r*). If the company settles the Alternative to company to pay sum assured or defend proceedings at own risk.

(*o*) *Frank Parmelee Co.* v. *Aetna Life* (1908), 166 Fed. Rep. 741.

(*p*) *B. Roth Tool Co.* v. *New Amsterdam Casualty* (1908), 161 Fed. Rep. 709.

(*q*) *Chicago Coulterville Coal* v. *Fidelity and Casualty* (1904), 130 Fed. Rep. 957.

(*r*) *Maryland Casualty* v. *Omaha Electric* (1907), 157 Fed. Rep. 514; *Cadahay Packing Co.* v. *New Amsterdam Casualty* (1904), 132 Fed. Rep. 623.

claim for an amount larger than the sum assured it is liable for the amount so settled (*s*).

Condition that company's liability limited to sum assured in any event.

On the other hand the company may reserve the right to settle or defend a claim and at the same time provide that the total liability of the company either in respect of damages recovered or costs, shall in no event exceed the sum or sums stated in the policy. If the company intend to make this provision it must be stated in the policy with absolute clearness and freedom from ambiguity. It is a provision that may operate very harshly against the assured if the company elect to defend a doubtful case with the result that damages and costs are recovered far in excess of the sum assured although in the first instance the claim might have been settled for a sum within the sum assured. It is obvious that the Court will, if possible, find a meaning in the policy more equitable to the assured. In one case the Court held that although the limit of liability prevented the assured recovering in respect of damages in excess of the limit the insurers were liable for the whole costs of an action which they defended, and were bound to pay such costs in addition to the sum assured (*t*). In any case, if the company assumes conduct of a defence it owes a duty to the assured to conduct the proceedings with reasonable care and prudence, and if it fails in this duty the assured may recover damages against it in an action for negligence, notwithstanding the provision in the policy that the company shall not be liable in any event for a larger sum than the amount insured (*u*).

Conditions which have been judicially construed.

Limitation of liability in respect of injuries to person.

The company's liability as aforesaid arising from an accident resulting in injuries to or in the death of one person is limited to . . . and subject to the same limit for each person the total liability arising from any one accident resulting in injuries to or in the death of any number of persons is limited to. . . .

New Amsterdam Casualty v. *Cumberland Telephone Co.* (1907), 152 Fed. Rep. 961.

Insurer's right to settle claims and defend proceedings.

If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy the assured shall immediately forward to the company every summons or other process as soon as the same shall have been served on him and the company will at its own cost defend against such proceeding in the name and on behalf of the assured or settle the same unless it shall elect to pay to the assured the indemnity provided for.

Frank Parmelee Co. v. *Aetna Life* (1908), 166 Fed. Rep. 741; *Maryland Casualty Co.* v. *Omaha Electric* (1907), 157 Fed. Rep. 514; *Cadahay Packing Co.* v. *New Amsterdam Casualty* (1904), 132 Fed. Rep. 623; *Employers' Liability Assurance* v. *Chicago Coke Co.* (1905), 141 Fed. Rep. 962; *New Amsterdam Co.* v. *East Tennessee, etc.* (1905), 139 Fed. Rep. 602; *Chicago Coulterville Coal Co.* v. *Fidelity and Casualty* (1904), 130 Fed. Rep 957; *Attleboro Co.* v. *Frankfort Insurance* (1909), 171 Fed. Rep. 495.

(*s*) *New Amsterdam* v. *East Tennessee, etc.* (1905), 139 Fed. Rep. 602.

(*t*) *New Amsterdam Casualty* v. *Cumberland Telephone* (1907), 152 Fed. Rep. 961.

(*u*) *Attleboro Co.* v. *Frankfort Insurance* (1909), 171 Fed. Rep. 495.

Section VIII.—Fidelity Policies

Obligation to disclose previous defalcations.

It has been said that the grantee of a fidelity bond is not bound to disclose to the grantor any knowledge which he may have of previous defalcations on the part of the person whose fidelity is guaranteed (*x*). This, however, only applies where the relationship of insurer and assured is not present. A fidelity bond is not necessarily a contract of insurance as where a father who has obtained employment for his son guarantees his integrity by granting a fidelity bond to the employer. Where, however, a company carries on the business of granting fidelity bonds or policies to employers in respect of their employees the relationship as a rule is that of insurer and assured, and the employer must disclose any knowledge which he has respecting previous defalcations on the part of the employee whose integrity is insured (*y*).

Knowledge of servants or agents as to

The responsibility of a partnership or corporation in respect of non-disclosure of information known to some of its servants or agents but not to the partners or board of directors depends upon principles already discussed (*z*).

prospective employee procuring bond is not agent of employer.

When an employer requires an applicant for employment to procure a fidelity bond and the applicant goes to an insurance company and they issue a policy in favour of the employer upon the application of the applicant, the latter is not the agent of the employer for the purpose of procuring the insurance so as to fix the employer with responsibility for non-disclosure of facts known to the applicant but not known to the employer. The applicant is, in fact, procuring the policy in his own interest because he is desirous of obtaining employment and although the policy insures the employer there is no relationship of principal and agent in the transaction (*a*).

How far statements in proposal are warranties as to future course of business.

How far the answers to questions relating to the checks which will be used to test the employee's honesty, and to prevent as far as possible the commission of acts of dishonesty, constitute continuing warranties that such checks will be constantly employed during the currency of the risk is a matter which has already been discussed (*b*).

Negligence of assured no defence.

Apart from a possible breach of warranty arising from the express terms of the policy, the fact that the assured has been negligent in supervising the employee does constitute a defence to an action on the policy (*c*).

(*x*) *Bryne* v. *Muzio* (1881), 8 L. R. Ir. 396.

(*y*) *Supra*, p. 300; *Smith* v. *Bank of Scotland* (1813), 1 Dow. 272.

(*z*) *Supra*, p. 348; and see *American Surety* v. *Pauly* (1896), 72 Fed. Rep. 470; *American Bonding Co.* v. *Spokan Building Society* (1904), 130 Fed. Rep. 737; *Aetna Indemnity Co.* v. *Farmers' National Bank* (1909), 169 Fed. Rep. 737.

(*a*) *Comptoire Nationale* v. *Law Car and General* (1909), C. A. June 10, 353.

(*b*) *Supra*, pp. 336–338.

(*c*) *Shepherd* v. *Beecher* (1725), 2 P. Wms. 288; *Guardians of Mansfield Union* v. *Wright* (1882), 9 Q. B. D. 683.

A statement, in answer to a question in the application form, that the employee's books had been examined and found correct was held to be true; the facts being that an examination was made and the examiners believed that the books were correct, but the books were not correct, and the errors had been overlooked owing to the carelessness of the examination (*d*).

Every breach of duty by employee during currency of risk to be disclosed.

If during the currency of a fidelity insurance the employee is guilty of any breach of duty which would entitle the employer to dismiss him from the employment, the assured must give notice to the insurer even although the conduct of the employee has given rise to no claim upon the policy (*e*). If the assured does not give notice the insurer is discharged from liability. If the assured does give notice the insurer may call upon the assured to dismiss the employee, and if the assured refuses or neglects to do so the insurer is discharged. The employer is not bound to communicate to the insurers mere suspicions (*f*). He must have information which would justify a reasonable man in making a definite charge against the employee. The employer is not bound to be diligent to discover defalcations (*g*). All he is bound to do is to disclose the facts when they come to his knowledge.

Exceptions to rule.

Fidelity policies frequently contain a condition requiring the assured to give notice of any breach of duty committed by the employee during the continuance of the risk and the precise nature of the obligation will then depend upon the terms of the condition. The equitable obligation, however, as stated in the preceding paragraph, exists independently of any express term in the contract (*h*). The principle, however, does not apply where the bond is given in favour of some public officer, such as a county treasurer in respect of rate collectors, who has no power to dismiss the persons whose fidelity is insured (*i*). The power to suspend a person from his office does not entitle the insurers to have such power exercised for their benefit, and therefore where the assured has no other power there is no obligation upon him to give notice of irregularities to the company.

Speculation or gambling to be disclosed.

Where the policy contained a condition that the employer should at once give notice to the company on his becoming aware that the employee was engaged in speculation or gambling, it was held that one isolated act of gambling on a small scale need not be disclosed (*k*).

(*d*) *Guarantee Co.* v. *Mechanics* (1896), 80 Fed. Rep. 766.

(*e*) *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666; *Sanderson* v. *Aston* (1873), L. R. 8 Ex. 73; *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450.

(*f*) *Aetna Indemnity* v. *Crowe* (1907), 154 Fed. Rep. 545; *American Surety* v. *Pauly* (1896), 72 Fed. Rep. 470.

(*g*) *National Bank* v. *Fidelity and Casualty* (1898), 89 Fed. Rep. 819.

(*h*) *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666.

(*i*) *Lawder* v. *Lawder* (1873), I. R. 7 C. L. 57; *Byrne* v. *Muzio* (1881), 8 L. R. Ir. 396, 412.

(*k*) *Guarantee Co.* v. *Mechanics* (1896), 80 Fed. Rep. 766.

Whether alteration of terms of service discharges grantor of fidelity bond.

Alteration of the terms of service as between the employer and the assured does not discharge the insurers' liability on a fidelity bond (*l*) unless the particular terms of service were made the basis of the contract (*m*). Where the bond recited that the employer was engaged at a fixed salary of £100, and during the currency thereof the employers altered the method of remuneration and paid him by commission on orders executed, it was held that the alteration discharged the surety from liability (*m*).

Increase of servant's duties.

When a servant's fidelity is insured the assured is protected in respect only of matters within the general scope of the servant's employment as it existed when the insurance was effected. If during the risk entirely new duties are undertaken by the servant there is an increase of risk which discharges the insurers, and they are not liable even when the loss occurred in connexion with the servant's original duties (*n*). A mere increase in the burden of the duties performed by the servant does not discharge the insurers when such duties are all within the scope of his employment as it existed when the insurance was effected (*o*).

Meaning of "fraud or dishonesty."

Where the insurance was against any "act of fraud or dishonesty" it was held that the words were not restricted to such conduct as imports a criminal offence, but included any breach of trust and any want of financial integrity resulting in loss to the employer (*p*).

"Dishonesty or negligence"; *proxima causa.*

Where the insurance was against "loss directly occasioned by . . . dishonesty or negligence," and money was abstracted by some person unknown, but owing to the employee's negligence in scrutinising and checking the accounts the abstraction was not discovered at a time when if discovered the defaulter could have been arrested and the money recovered, and was not discovered until too late, it was held that the loss was directly occasioned by such negligence (*q*).

Loss and discovery thereof to be within specified time.

The insurance is usually confined to defalcations occurring (1) during the currency of the policy, and (2) within a specified period next before discovery, thus excluding the possibility of stale claims made long after the expiration of the risk (*r*). The evidence of the claimant must show definitely that the loss occurred within the prescribed limits (*s*).

(*l*) *Sanderson* v. *Aston* (1873), L. R. 8 Ex. 73.

(*m*) *North Western Railway Co.* v. *Whinray* (1854), 10 Ex. 77.

(*n*) *Pybus* v. *Gibb* (1856), 6 E. & B. 902; *Wembley U.D.C.* v. *Poor Law, &c. Association* (1901), 17 T. L. R. 516.

(*o*) *Skillett* v. *Fletcher* (1867), L. R. 2 C. P. 469.

(*p*) *United States Fidelity* v. *Egg Shippers' Co.* (1906), 143 Fed. Rep, 353.

(*q*) *Crown Bank* v. *London Guarantee, &c.* (1908), 17 Ont. L. R. 93; *United States Fidelity* v. *Des Moines National Bank* (1906), 145 Fed. Rep. 273.

(*r*) *Proctor Coal Co.* v. *U. S. Fidelity, &c.* (1903), 124 Fed. Rep. 424; *America Credit Indemnity* v. *Champion Paper Co.* (1900), 103 Fed. Rep. 609; *Florida Central, &c.* v. *America Surety Co.* (1900), 99 Fed. Rep. 674; *Guarantee Co.* v. *Mechanics* (1896), 80 Fed. Rep. 766.

(*s*) *Fidelity and Casualty* v. *Bank of Timmonsville* (1905), 139 Fed. Rep. 101.

Policy available in hands of receiver or liquidator.

Where the employees of a company are insured the policy is not avoided by the appointment of a receiver or by the company going into liquidation. The employees are still the company's servants although the management of the company's affairs is in the hands of a receiver or liquidator (*t*).

Condition that money due by employer to defaulting employee shall be deducted from amount payable under the policy.

The policy may provide for the deduction from the amount otherwise payable of all moneys due by the employer to the employed. In one case where the loss was greater than the sum assured, this was held to mean that such moneys should be deducted from the loss and not from the sum assured, and where the assured company was in liquidation and it was uncertain what sum would ultimately be found to be due to the employed, the assured company was held entitled to recover the full sum assured upon the footing that if and when it was settled what sum was due by them to the employed they should hold that for the company (*u*).

Immediate notice of default.

The condition that the assured must give immediate notice of default to the insurers means that notice must be given with that degree of promptitude which is reasonable in the circumstances (*x*).

Condition that assured must prosecute defaulter.

Where there is a condition to the effect that the assured when called upon shall use all diligence in prosecuting the defaulting employee to conviction, and there is also a condition in general terms that the policy is issued subject to the conditions which shall be conditions precedent to the right on the part of the employer to recover the assured cannot recover if he declines to prosecute (*y*).

Conditions which have been judicially construed.

Statement, etc., in proposal.

Has been in service of for years and has at all times so far as known faithfully and satisfactorily performed his duties . . . his accounts were last examined on and found correct to date in every particular.

Aetna Indemnity Co. v. *Farmers' National Bank* (1909), 169 Fed. Rep. 737; *American Bonding Co.* v. *Spokane Building Society* (1904), 130 Fed. Rep. 737; *American Surety Co.* v. *Pauly* (1896), 72 Fed. Rep. 470.

Q. State as far as circumstances will permit . . . the checks which will be used to secure accuracy in his accounts and when and how often they will be balanced and closed?

A. Examined by finance committee every fortnight.

Benham v. *United Guarantee* (1852), 7 Exch. 744; *Towle* v. *National Guardian Assurance* (1861), 10 W. R. 49; *Regina* v. *National Insurance* (1887), 13 Vict. L. R. 914; *A.-G.* v. *Adelaide Life* (1888), 22 S. Aust. L. R. 5.

Q. Will he receive remittances from customers on open accounts? If so how often will you render customers a statement of balances due to them and by whom will this be done? This should be done by some other person than the applicant and is important as a means of verifying balances appearing on the ledger.

A. Yes; monthly by bookkeeper.

Phœnix Insurance v. *Guarantee Co.* (1902), 115 Fed. Rep. 964.

(*t*) *American Surety Co.* v. *Pauly* (1896), 72 Fed. Rep. 470.

(*u*) *Fifth Liverpool, &c.* v. *Travellers' Accident* (1892), 9 T. L. R. 221.

(*x*) *Fidelity and Casualty* v. *Bank of Timmonsville* (1905), 139 Fed. Rep. 101; *American Surety Co.* v. *Pauly* (1896), 72 Fed. Rep. 470; *Harbour Commissioners* v. *Guarantee Co.* (1894), 22 Can. S. C. 542.

(*y*) *London Guarantee* v. *Fearnley* (1880), 5 A. C. 911.

Q. How often will the employer balance and settle the applicant's accounts?
A. Monthly.
Q. Specify the checks which the employer will use to secure accuracy in the applicant's accounts.
A. Statements sent to customers by employer.
Q. In particular will employer send accounts direct to customers and if so how often?
A. Every three months.
Haworth & Co. v. *Sickness and Accident* (1891), 18 R. 563.

Q. It is suggested (1) that all moneys and checks received be deposited intact in the bank and all disbursements be made either by check or from a petty cash fund drawn from the bank as required, and (2) that all checks received be indorsed "For deposit" to prevent any loss or conversion. To what extent will these practices be followed?
A. Fully.
Phœnix Insurance v. *Guarantee Co.* (1902), 115 Fed. Rep. 964.

Q. How will moneys reach his hands?
A. Paid to him in the course of business for transmission to the company.
Q. State largest sum which may be held at any one time.
A. Two months' premium.
Q. To whom does he pay moneys received?
A. To the company or its representative.
Q. How often will moneys be deposited in bank?
A. By him for transmission as stated.
Q. How often and by whom will cash be compared and verified with accounts and vouchers?
A. Monthly.
Hunt v. *Fidelity and Casualty* (1900), 99 Fed. Rep. 242.

Q. Will he be authorised to sign checks on your behalf?
A. Yes.
Q. Will the counter signature of any other person be invariably required? If so, whose?
A. Yes, X, bookkeeper.
Rice v. *Fidelity and Deposit Co.* (1900), 103 Fed. Rep. 427.

It is agreed that the above answers are true to the best of the knowledge and belief of the assured and are to be taken as the basis of the contract between the insurer and the assured.
Hunt v. *Fidelity and Casualty* (1900), 99 Fed. Rep. 242; *Rice* v. *Fidelity and Deposit Co.* (1900), 103 Fed. Rep. 427.

Specific warranties that course of business shall continue as stated.

The answers contained in the declaration contain a true statement of the manner in which the business is kept and the business shall be so continued and accounts so kept and a proper supervision exercised.
Harbour Commissioners of Montreal v. *Guarantee Co.* (1894), 22 Can. S. C. 542; *Dougherty* v. *London Guarantee* (1880), 6 Vict. L. R. 376.

This agreement is granted on the condition that the business of the employer shall be conducted in every particular in accordance with the said proposal statements and declaration, except with the consent of the association in writing.
Haworth & Co. v. *Sickness and Accident* (1891), 18 R. 563.

The employer shall observe or cause to be observed all due and customary supervision over the said employé for the prevention of default.
Guarantee Co. v. *Mechanics, etc.* (1896), 80 Fed. Rep. 766.

All acts of dishonesty and bad faith during currency of risk to be disclosed.

If at any time during the term for which the bond is given or any continuance thereof there should come to its knowledge the fact that any employé for whom the indemnity company is bound was dishonest or had done anything in bad faith and not through mere negligence or error of judgment the bank will promptly notify the company of the fact, the failure to do which will relieve it from liability for loss thereafter arising.
Aetna Indemnity v. *Crown* (1907), 154 Fed. Rep. 545; *National Bank* v. *Fidelity and Casualty* (1898), 89 Fed. Rep. 819; *Guarantee Co.* v. *Mechanics, etc.* (1898), 80 Fed. Rep. 766; *American Surety* v. *Pauly* (1896), 72 Fed. Rep. 470.

The employer shall at once notify the company on his becoming aware of the said employé being engaged in speculation or gambling.
Guarantee Co. v. *Mechanics, etc.* (1898), 80 Fed. Rep. 766.

Immediate notice of loss.

Provided always that the said party hereto of the second part shall within ten days after the discovery by him of any fraud or dishonesty of the said "person employed" and of any matter in respect of which any claim may be intended to be made, give notice in writing at the office of the said society as far as the case will admit of all the particulars thereof and after any such discovery the guarantee herein contained shall as to loss by any act of fraud or dishonesty subsequent thereto be at an end.

Byrne v. *Murzio* (1881), 8 L. R. Ir. 396.

Immediate notice of default.

Fidelity and Casualty v. *Bank of Timmonsville* (1905), 139 Fed. Rep. 101; *Amerian Surety Co.* v. *Pauly* (1896), 72 Fed. Rep. 470; *Harbour Commissioners of Montreal* v. *Guarantee Co.* (1893), 22 Can. S. C. 542.

Employer to prosecute defaulter.

Subject to the conditions herein contained which shall be conditions precedent to the right on the part of the employer to recover under this policy.

Provided that the employer shall if and when required by the company (but at the expense of the company if a conviction be obtained) use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under this policy and shall at the company's expense give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or by his estate of any moneys which the company shall have become liable to pay.

London Guarantee v. *Fearnley* (1880), 5 A. C. 911.

The employer shall give every description of aid and assistance (not pecuniary) for the purpose of bringing an offender to justice.

Crown Bank v. *London Guarantee, etc.* (1908), 17 Ont. L. R. 95.

Description of risk.

All and any pecuniary loss . . . directly occasioned by dishonesty or negligence.

Crown Bank v. *London Guarantee, etc.* (1908), 17 Ont. L. R. 95; *United States Fidelity* v. *Des Moines National Bank* (1906), 145 Fed. Rep. 273.

To make good and reimburse to the employer all and any pecuniary loss sustained by the employer of money securities or other personal property in the possession of the employé or for the possession of which he is responsible by any act of fraud or dishonesty on the part of the said employé in the discharge of the duties of his office or position hereinbefore referred to or the duties to which in the employer's service he may be subsequently appointed.

United States Fidelity v. *Egg Shippers' Co.* (1906), 148 Fed. Rep. 353; *American Surety Co.* v. *Pauly* (1896), 72 Fed. Rep. 470.

Shall at the expiration of three months next after proof satisfactory to the directors of a loss make good to the extent of £1000 all and any pecuniary loss sustained by the plaintiffs by reason of any fraud or dishonesty of the employed in connexion with the duties of . . . as should amount to a criminal act and should be committed and discovered during the continuance of the said policy . . . the policy shall extend to cover only such losses as may have occurred within the period of twelve months previous to the date of any notice of claim.

Fanning v. *London Guarantee and Accident* (1884), 10 Vict. L. R. (Law) 9.

The company shall not be liable hereunder for any loss occasioned by mistake accident error of judgment on the part of any employé or any robbery unless by or with the connivance or culpable negligence of the employé; and "culpable negligence" as used in this bond shall be taken and held to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs.

Crown Bank v. *London Guarantee, etc.* (1908), 17 Ont. L. R. 95.

Against loss not exceeding £ over and above the loss of £ agreed to be first borne by the said indemnified.

American Credit Indemnity v. *Champion* (1900), 103 Fed. Rep. 609.

Any claim made under this bond or a renewal thereof shall embrace and cover only acts and defaults committed during its currency and within twelve months next before the date of the discovery of the act or default upon which such claim is based.

Fidelity and Casualty v. *Bank of Timmonsville* (1905), 139 Fed. Rep. 101; *Proctor Coal Co.* v. *U. S. Fidelity and Guaranty Co.* (1903), 124 Fed. Rep. 424; *American Credit Indemnity* v. *Champion Paper Co.* (1900), 103 Fed. Rep. 609; *Florida Central* v. *American Surety Co.* (1900), 99 Fed. Rep. 674.

And discovered during the continuance of this bond within six months of the employé ceasing to be in the said service.

Guarantee Co. of North America v. *Mechanics* (1896), 80 Fed. Rep. 766.

To pay at the expiration of three calendar months after receipt at the office of the said society of full and satisfactory particulars and proof of the loss, and the nature and extent thereof, all such loss not exceeding £1000 and happening within eighteen calendar months next preceding the receipt of such particulars and proof as the said party hereto of the second part shall sustain from any act of fraud or dishonesty of the said collector of rates or from any failure on his part to duly faithfully diligently and honestly collect all such rates and taxes now imposed or hereafter to be imposed as he shall be authorised to collect . . . or from any failure on his part from time to time to well and truly pay over all and every sum and sums of money which shall be collected or received by him for or on account of any such rates or taxes.

Byrne v. *Muzio* (1881), 8 L. R. Ir. 396.

Money due by employer to defaulting employee to be applied in first instance to make good the loss.

Provided also that any salary or commission which but for the act or acts of embezzlement on which the claim shall be founded would have become payable by the employer to the employed as aforesaid or any other money which shall be due to the employed from the employer shall be deducted from the amount payable under this policy and that all moneys estate and effects of the employed in the hands of or received or possessed by the employer and all sums which may be or may become due from the employer to the employed and also all moneys or effects which shall come into the possession or power of the employer for or on account of the employed whereupon any claim shall be made on this policy shall be applied by the employer in and towards making good the amount of his claim under this policy in priority to any person claiming upon such money estate or effects.

Fifth Liverpool, etc. v. *Travellers' Accident* (1892), 9 T. L. R. 221.

Section IX.—Guarantee Polieies

Insurance distinguished from ordinary contract of guarantee.

Contracts of insurance whereby the insurers guarantee the assured in respect of the default or insolvency of his debtors must be distinguished from the ordinary contract of guarantee where a surety undertakes to be answerable to the creditor for the default of the principal debtor (*z*). Contracts of insurance are generally matters of speculation where the person desiring to be insured has means of knowledge as to the risk and the insurer has not the means or not the same means. The insured generally puts the risk before the insurer as a business transaction, and the insurer on the risk stated fixes a proper price to remunerate him for the risk to be undertaken; and the insurer engages to pay the loss incurred by the insured in the event of certain specified contingencies occurring. On the other hand, in general, contracts of guarantee are between persons who occupy or ultimately assume the positions of creditor, debtor, and surety, and thereby the surety becomes bound to pay the debt or make good the default of the debtor. In general the creditor does not himself go to the surety or represent or explain to the surety the risk to be run. The surety often takes the position from motives of friendship to the debtor and generally not as the result of any

(*z*) *Seaton* v. *Heath*, [1899] 1 Q. B. 782; *Dane* v. *Mortgage Insurance*, [1894] 1 Q. B. 54; *Finlay* v. *Mexican Investment*, [1897] 1 Q. B. 517; *Denton's Estate, In re*, [1904] 2 Ch. 178; *Shaw* v. *Royce, Limited*, [1911] 1 Ch. 138.

direct bargaining between him and the creditor or in consideration of any remuneration passing to him from the creditor (*a*).

Contracts of guarantee and contracts of insurance not mutually exclusive.

Contracts of guarantee and contracts of insurance are not, however, mutually exclusive, and a contract may have the attributes of a contract of insurance in so far as the relationship between insurer and assured and the duty of *uberrima fides* are concerned, and at the same time the attributes of a contract of guarantee in so far as the insurer's obligation to pay and his right over against third parties is concerned (*b*).

Insurance involves duty of full disclosure.

Where a contract of guarantee is made by underwriters at Lloyd's, or by a company, and is issued in the form of a policy in consideration of a premium, the contract must at least, in so far as the *uberrima fides* and duty to disclose is concerned, be deemed to be an insurance, and if full disclosure of all matters material to the risk is not made the insurers may avoid the contract (*c*).

Ordinary guarantee does not necessarily call for full disclosure.

On the other hand, in the case of an ordinary guarantee, where the surety is an individual who offers his bond on account of his friendship for or interest in the affairs of the debtor, the surety is not of necessity entitled to receive from the creditor, without inquiry, a full disclosure of all the circumstances and dealings between the debtor and creditor. If the surety requires to know any particular matter of which the party about to receive the surety is informed, he must make it the subject of a distinct inquiry (*d*).

Contract must be in writing.

Whether a contract of guarantee is one of ordinary guarantee or is a contract of insurance it falls within the fourth section of the Statute of Frauds, which provides that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

Discharge of guarantor by release of or giving time to debtor.

The creditor must not, during the risk, consent to any alteration in the liability of the debtor or debtors in respect of which the guarantee is given. The guarantor is entitled to have that liability preserved intact for his benefit in the event of his having to pay. Mere delay on the part of the assured in enforcing his debt does not affect the guarantee, but any binding contract with the debtor either by way of releasing him or giving him further time to pay discharges the guarantors (*e*).

Insurers' obligation to pay loss

The event upon which a guarantee insurance becomes payable depends upon the construction of each particular policy. When that event has happened there is an obligation on the

(*a*) Romer, L.J., in *Seaton* v. *Heath*, [1899] 1 Q. B. 782.
(*b*) *Denton's Estate, In re*, [1904] 2 Ch. 178; *Shaw* v. *Royce, Limited*, [1911] 1 Ch. 138.
(*c*) *Seaton* v. *Heath*, [1899] 1 Q. B. 782; *Tibbets* v. *Mercantile Credit Guarantee* (1896), 73 Fed. Rep. 95.
(*d*) *Hamilton* v. *Watson* (1845), 12 Cl. & F. 109.
(*e*) *Ward* v. *National Bank of New Zealand* (1883), 8 A. C. 755.

insurers to pay the loss, and subsequent alterations in the relationship between debtor and creditor will not discharge the insurers unless the creditor agrees to surrender some right to which the insurer ought to be subrogated (*f*).

not affected by subsequent discharge of debtor under scheme of arrangement.

Where the obligation is to pay upon the default of the debtor in payment of capital or interest, and the debtor, being a company, makes default and afterwards goes into liquidation and a scheme of arrangement is sanctioned by the Court under which the liabilities of the company are discharged, that does not relieve the insurers on the guarantee policy on the ground either (1) that there was no default or (2) that the insurers could not be subrogated to the claim in respect of the debt (*g*).

Loss payable after final dividend in bankruptcy or liquidation.

The insurers' obligation is not necessarily an obligation to pay the whole debt upon the default of the debtor. It may be confined to an obligation to pay interest on the debt upon default, but as to the capital, to pay only the balance which remains due after a final dividend has been declared in bankruptcy or winding-up proceedings. In one case, where the insurance was in this form in respect of a deposit with a bank, the bank went into liquidation and was reconstructed and again went into liquidation and, after paying dividends to the extent of 5*s.* 7*d.* in the pound, transferred the remaining assets, which were practically exhausted, to a new company for realisation. Shares in the new company were offered to the assured, but he rejected them and sued the insurers. The Court held that, although not so called, there had in fact been a final dividend and that the insurers were liable. Upon paying the balance of the deposit they would be entitled to the shares in the assets company as salvage (*h*).

Guarantee of debentures.

Where the insurers guaranteed to a debenture holder the payment of debentures within three months of the specified date of repayment and afterwards by a special resolution of debenture holders, in respect of which the assured neither assented nor dissented, the date of repayment was postponed, it was held that the company had made default and that the assured could recover on the policy when three months after the original date of repayment had expired (*i*).

Release of guarantee company under scheme of arrangement with debenture holders.

But although a guarantee company is not released from its obligation to individual debenture holders merely because the original debt has been discharged or altered by a resolution of the debenture holders or by a scheme of arrangement, yet if the release of a guarantee company's obligation to the whole body of debenture holders is made a term in a scheme of arrangement between the company and the debenture holders, an individual debenture holder will be bound by the release notwithstanding that he has dissented from the scheme (*k*).

(*f*) *Dane* v. *Mortgage Insurance*, [1894] 1 Q. B. 54.
(*g*) *Laird* v. *Securities Insurance* (1893), 22 R. 452; *Young* v. *Trustees Assets Co.* (1893), 21 R. 222; *Law Guarantee Trust* v. *Munich Re-insurance* (1911), The Times, Nov. 10.
(*h*) *Murdock* v. *Heath* (1899), 80 L. T. 50.
(*i*) *Finlay* v. *Mexican Investment Co.*, [1897] 1 Q. B. 517.
(*k*) *Shaw* v. *Royce, Limited*, [1911] 1 Ch. 138.

Guarantee may be special or general.

A guarantee in respect of a particular debtor may be a special guarantee guaranteeing only the repayment of some specified debt or debts, or it may be a general guarantee in respect of all debts due or to become due from the specified debtor to the creditor guaranteed. Whether it is one or the other must depend on the words of the instrument construed in the light of surrounding circumstances (*l*).

Revocation of general guarantee.

A general guarantee such as that which might be given to a bank making advances to the person whose solvency is guaranteed may be withdrawn at any time upon payment to the creditor of all money then due (*l*). This, however, would not apply to a guarantee insurance where the insurers, in consideration of a premium, have agreed to take the risk for a specified period.

Guarantee in general terms against loss from insolvency.

A guarantee in general terms against loss from insolvency of customers has been held in America to be a contract to pay only the ultimate loss falling upon the assured after all reasonable steps have been taken to realise the debt or any part of it (*n*). If it is intended to give the assured a right to look to the insurers for immediate payment of the whole debt due from each insolvent debtor this should be clearly specified.

Primarily insurers liable for whole debt and are entitled to debt and securities.

Primarily the obligation of the insurers upon a guarantee of a specified debt is to pay the whole debt upon the failure of the debtor to pay the debt when due or upon the insolvency of the debtor as the case may be, and any sum which may be ultimately recovered from the debtor, and all securities for the debt belong to the insurers.

Loss caused by insolvency covers refusal of insolvent debtor to pay.

In one case a depositor with a bank took two guarantee policies, (1) from an insurance company to pay the amount of the deposit three months after the bank stopping payment, (2) from underwriters at Lloyd's to pay any loss in consequence of stoppage of the bank and insolvency of the insurance company. The bank stopped payment and the insurance company went into liquidation and denied liability on their policy. The underwriters declined to pay on their policy on the ground that the failure of the insurance company to pay was not due to insolvency but to the fact that they had, or believed they had, a defence to the claim. It was held that the defence set up by the insurance company was so shadowy that it was impossible to believe that a solvent company would have resisted payment and that their failure to pay was therefore due to insolvency and that the amount of the debt could be recovered (*o*).

Question whether insurers are co-sureties with some other surety.

When a creditor obtains a double security as in the above case, the question may arise as to whether the second guarantor is a co-surety with the first or whether his obligation only arises upon the failure both of the debtor and of the first guarantor. The distinction is of importance not only with regard

(*l*) *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450.
(*n*) *Mercantile Credit Guarantee* v. *Wood* (1895), 68 Fed. Rep. 529.
(*o*) *MacVicar* v. *Poland* (1894), 10 T. L. R. 566.

to the primary liability of the second guarantor, but also upon the question of his right to be subrogated to the debt and the creditor's securities. Where a debt was secured by a mortgage-deed in which X joined as surety for repayment of the debt, and subsequently the mortgagee obtained from a guarantee company a policy guaranteeing payment of the mortgaged debt, it was held that, in the circumstances proved, the company guaranteed payment of the mortgage debt in the event of the default of both mortgagor and surety and that as their obligation was supplemental and not collateral they were not co-sureties with the first surety and bound to contribute with him but were upon payment of the debt entitled to the mortgagee's securities, and accordingly were entitled to sue X for the full amount of the debt upon his covenant in the mortgage-deed (*p*).

Termination of risk.

Where a general guarantee in favour of a trader against losses due to insolvency of customers specifically covered the risk for a term of two years, and the policy thereafter provided that it should be treated as renewed from the expiration of the original term upon the same conditions, unless two months' notice should be given of an intention not to renew, it was held that the automatic renewal operated once only, and that on the expiration of four years from the commencement of the risk the risk ceased unless expressly renewed (*q*).

Upon a condition that a general guarantee against loss from insolvency should cease upon the insured trader retiring from business, it was held that the whole risk determined upon the retirement from the insured firm of one of the two partners (*r*).

Bonds of guarantee societies accepted by Court as sufficient security.

The bonds of guarantee societies or insurance companies are accepted by the Court in cases where security is required to be given by a litigant, liquidator, receiver or any other person (*s*). The fact that the liability on the bond is confined to payment out of the capital stock and funds of the society, and that the personal liability of the directors is expressly excluded is not a valid objection to the bond as a sufficient security (*t*). The Court will consider in each case the sufficiency of the company offered as surety, in the same way as it would consider the sufficiency of an individual. The bond of a Scottish company may be accepted if it submits in its bond to the jurisdiction of the English Courts and has an address for service within the jurisdiction (*u*). The bond of a foreign company may be accepted if, under the peculiar circumstances of the case, the Court deems it to be sufficient security (*x*).

Allowance of guarantee premium in receiver's accounts.

A receiver appointed without salary or remuneration is entitled to be allowed as part of his expenditure premiums paid by

(*p*) *Denton's Estate, In re*, [1904] 2 Ch. 178.
(*q*) *Solvency Mutual* v. *Froane* (1861), 7 H. & N. 5.
(*r*) *Solvency Mutual* v. *Freeman* (1861), 7 H. & N. 17.
(*s*) *Colemore* v. *North* (1872), 27 L. T. 405.
(*t*) *Carpenter* v. *Treasury Solicitor* (1882), 7 P. D. 235.
(*u*) The Annual Practice, O. 50, r. 16 note.
(*x*) *Aldrich* v. *British Griffin, &c. Co.*, [1904] K. B. 850.

him to a guarantee society on the bond which constitutes his security (*y*). A receiver who is remunerated is bound to pay such premium out of his salary (*y*).

Conditions which have been judicially construed.

Guarantee of debt in default of payment of interest or capital.

The corporation do hereby guarantee to the assured the due payment of the principal moneys and interest secured by the debentures in manner following, that is to say, (1) If the debtors make default for more than 60 days in the payment of any interest due under the debentures the corporation will pay the amount thereof to the assured at the expiration of 14 days after the assured shall have demanded payment thereof from the corporation; (2) If the debtors make default for more than three calendar months in payment of any principal money due under the debentures the corporation will pay the same principal moneys to the assured at the expiration of three calendar months after the assured shall have demanded payment thereof from the corporation; (3) This policy is issued subject to the conditions indorsed hereon which are to be deemed part of it.

Finlay v. *Mexican Investment Co.*, [1897] 1 Q. B. 517.

If the debtors make default for more than 21 days in payment of any interest due in respect of such deposit the assurers will pay the amount thereof to the assured at the expiration of 14 days after the assured shall have demanded payment thereof from the assurers.

Laird v. *Securities Insurance Co.* (1895), 22 R. 452.

Loss payable after final dividend.

It is understood and agreed that interest is payable hereunder when due and default is made by the bank, and continues payable hereunder on the principal or any balance thereof until the principal is paid by the bank or the underwriters; and the principal sums less any portion of the principal previously received from the bank when the final dividend in bankruptcy or liquidation is declared.

Murdock v. *Heath* (1899), 80 L. T. 50.

Transfer of debt to insurers condition precedent to payment.

After default has been made in payment by the bank pursuant to the notice to them recalling the money and upon a transfer being made to the company of the deposit note and the money due thereunder, so as to place the company in a position legally to sue for such money as creditors of the bank the company will pay to the assured the principal money for the time being due under the deposit with any interest then due thereon.

Young v. *Trustee Assets, etc., Co.* (1893), 21 R. 222.

Whenever any such demand as aforesaid is made the assurers shall be at liberty to make it a condition of complying with such demand that the assured shall forthwith transfer the deposit and all his rights in respect thereof to the assurers in exchange for a sum equal to the amount of the deposit and all interest thereon up to the date of such transfer and the assured shall be bound to comply with such condition.

Laird v. *Securities Insurance Co.* (1895), 22 R. 452.

Guarantee against loss from insolvency of purchasers.

If the total amount of the sales made by the said members in any or any one of the years to which this guarantee is hereinafter made to extend, shall not exceed £8000 then and in such case the subscribed funds of the said company standing to the credit of the debt guarantee fund mentioned in the said deed of settlement after satisfying all guarantees granted by the said company previously payable and all other prior charges on such fund shall . . . be subject and liable to pay or make good to the said members their executors etc. nine tenth parts of the loss or damage to be occasioned to the said members in respect of goods sold by the said members during the term of two years, from to , by reason of any or any one of the purchasers of such goods being duly found and declared bankrupt, or taking benefit of any act for the relief of insolvent debtors or making an assignment for the benefit of his or their creditors or compounding with them under the sanction of the said company within such time aforesaid and during any further period in respect whereof the said members shall contribute to the funds of the said company and the said company shall consent to receive further payments at the rate aforesaid.

Solvency Mutual v. *Froane* (1861), 7 H. & N. 5.

(*y*) *Harris* v. *Sleep*, [1897] 2 Ch. 83.

Against loss by reason of the insolvency of debtors owing for merchandise.
Mercantile Credit Guarantee v. *Wood* (1895), 68 Fed. Rep. 529; *Tibbets* v. *Mercantile Credit Guarantee* (1896), 73 Fed. Rep. 95; *Peden Iron and Steel Co.* v. *Ocean Accident* (1907), 151 Fed. Rep. 992.

Amounts realised from other security to be deducted before adjustment.

In all cases where the indemnified under this contract shall hold other security, guaranty indemnity or preference or shall have instituted attachment or replevin proceedings against any insolvent debtor covered under this bond the amounts realised therefrom shall be deducted before the loss under this bond shall be adjusted.
American Credit Co. v. *Wood* (1896), 73 Fed. Rep. 81.

Duration of risk.

Every guarantee shall be made for a specified term but all guarantees upon gross annual returns, floating risks or rent whatever may be the original term of the same, shall from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors shall give two calendar months' notice of an intention not to renew the same.
Solvency Mutual v. *Froane* (1861), 7 H. & N. 5.

If a member of this company shall die or if any member guaranteed with respect to his gross or particular trade debts shall cease to be such trader his guarantee or contract shall become void upon such death or (if such trader) on his retiring from such trade; but in case of death or in the case of the member retiring from the trade, his executors or administrators shall be entitled to claim from this company for all just demands which may become due on such guarantee or contract on sales effected or transactions happening prior to his death or his retirement from the trade and coming within the scope of his guarantee or contract.
Solvency Mutual v. *Freeman* (1861), 7 H. & N. 17.

No loss shall be proven after the expiration of this bond provided however that in case this bond is renewed and the premium on such renewal is paid at or before the expiration of this bond loss resulting after such date of expiration on shipments made during the term of this bond may be proven during the term of the removal bond next immediately succeeding.
American Credit Co. v. *Aetna Woollen Mills* (1899), 92 Fed. Rep. 581,

Additional premium where claims exceed specified amount.

When the gross admitted claims of any member guaranteed upon gross returns shall in any one year exceed twice the amount of subscription payable by such member for such year then the subscription of such member shall, for that year, be increased after the following rates of percentage upon the gross amount of such admitted claims, that is to say: if the admitted claims shall exceed twice the amount of subscription, and do not exceed three times the amount, 10 per cent.; if they exceed three times that amount, and not four times the amount 20 per cent., and so on in like proportion.
Solvency Mutual v. *Freeman* (1861), 7 H. & N. 17.

Condition that rights against debtor shall not be modified.

The assured must not without the consent of the corporation assent to any arrangements modifying the rights or remedies of the assured.
Finlay v. *Mexican Investment Co.*, [1897] 1 Q. B. 517.

Notification of claims.

Notification of claims must be delivered to this company on the blanks furnished and in the manner prescribed by it within 10 days after the indemnified shall have had information of the insolvency of any debtor and must be received at the central office during the term of this bond.
American Credit Co. v. *Carrollton Furniture Co.* (1899), 95 Fed. Rep. 111; *American Credit Co.* v. *Wood* (1896), 73 Fed. Rep. 81.

Section X.—Live Stock Policies

General nature of risks covered by.

There is little judicial authority upon the interpretation of such policies. There are many different forms in use covering all kinds of risks to horses, cattle and other animals. An annual insurance covering a general farm stock is usually an insurance against loss by death arising from any accident or disease with certain specified exceptions such as poisoning, docking, or surgical

operation, improper use, overloading, unskilful treatment, wilful neglect, malicious injuries or slaughtering, war, tumult, or riot. Certain other specified causes of death are not insured against unless an extra premium is paid. These may include death occurring during transport by rail or sea, or arising from foaling, castration, fire or lightning, or glanders or farcy. The insurance is conditional upon every animal insured being in perfect health and free from any injury at the time of proposal and at the time the first premium is paid, and upon each annual renewal of the policy the assured is required to furnish a satisfactory written declaration of health and soundness. The animals insured by the policy are specified in a schedule showing the numbers of each class and distinguishing marks and stating the total compensation payable in each case. The policy, however, is not as a rule a valued policy, and the liability to pay in respect of each animal will not exceed either the sum assured or the actual market value at the date of death. Among the special risks against which policies are issued are foaling and castration. Live stock policies are commonly issued to territorial units in respect of their horses during training. The policy insures compensation in case of the death of any horse within the period specified in the policy and a weekly allowance in case of total disability from injury received during the training.

Fatal injury.

Where the policy insures against the death of an animal and the animal is so seriously injured that the proper course is to slaughter it at once, the loss is covered (*y*).

Walking at port of destination to be deemed a safe arrival.

In one case a fox terrier dog was insured for £150 against risk of transport from England to India "against all risks, including mortality from any cause, jettison, and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." On arrival at Lahore the dog was suffering from periostitis of the right hind leg, and was unable by reason of such injury to walk upon four legs, and therefore moved upon only three legs. It was held that there was not a safe arrival. The clause meant that the dog must be capable of locomotion in the usual way upon four legs. In this case it was incapable of using one leg at all. The insurers had therefore to pay a total loss (*z*).

Evidence admissible to prove value of animal.

In an American case the assured, under a live stock policy, claimed compensation for the loss of a thoroughbred stallion. At the trial the judge admitted the evidence of several witnesses engaged in farming and stock raising who knew the horse, and expressed their opinion as to its value, but he excluded evidence which was offered to show that the animal was sold at a considerably smaller figure six months previously. The Supreme Court of Iowa upheld these rulings, but it is submitted that the evidence as to the price at which the animal was sold six months previously ought to have been admitted (*a*).

(*y*) *Shiells* v. *Scottish Assurance Corporation* (1889), 16 R. 1014.
(*z*) *Jacob* v. *Gaviller* (1902), 7 Com. Cas. 116.
(*a*) *Gere* v. *The Council Bluffs* (1885), 67 Iowa, 272.

Section XI.—Plate Glass Policies

General nature of risk covered by.

These policies are largely issued in respect of shop premises. The policy usually contains a detailed description of the glass which is insured, and it is insured against breakage by or from any cause whatsoever except the same shall arise or be occasioned directly or indirectly by fire or explosion. Risk of breakages caused by workmen making alterations or repairs on the premises is usually excepted if the assured does not give notice of the proposed alterations and pay such additional premium as may be required to cover any increase of risk. The liability of the company is limited to the cost value of the glass insured, and the company usually reserves the right to reinstate instead of making a money payment.

Fire, breakage during removal, etc., excepted.

In *Marsden* v. *City and County Assurance* (*b*) the insurance was against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration or repair of premises." A fire broke out in adjoining premises and threatened to destroy the assured's premises. The assured had commenced to remove his furniture when the mob raided the premises and broke the windows. The Court held that the loss was covered by the policy. The proximate cause of loss was the lawless action of the mob, and the fire and removal of furniture were remote causes, and the loss could not be deemed to have been caused by them within the meaning of the exception. The words now commonly in use excluding loss arising or occasioned directly or indirectly by fire would probably have included recovery in the above case.

Section XII.—Polices Covering Risk of Explosion

General nature of risk covered by.

Loss by explosion being commonly excepted from the risk in fire policies, it is sometimes necessary to insure separately against loss caused by explosion. The meaning of loss or damage by explosion has already been considered from the point of view of an exception in a fire risk. As policies covering the risk of explosion are intended to supply the want created by this exception, the words ought to be construed, as far as possible, on the one hand to give full protection to the assured against all risks, but, on the other hand, so as to avoid an overlapping or double insurance. In an American case the policy insured "against explosion and accident and against loss or damage resulting therefrom," and the conditions provided that no claim should be made under the policy "for any loss or damage by fire resulting from any cause whatsoever." A small fire broke out in the insured building and continued for three days though apparently extinguished each day. On the third day efforts to put out the fire resulted in bringing it in contact with a cloud of

(*b*) (1866), L. R. 1 C. P. 232.

starch dust which ignited and exploded, demolishing the building which then burned up. The Court held that the company was not liable, since the explosion was merely an incident of the fire (*c*).

Section XIII.—Policies Covering Risk of Storm and Tempest

Risks covered by.

This is another class of policy designed to fill up what is omitted from the ordinary fire policy. The risk is more commonly insured in America than in this country, and the policy may cover loss by lightning, hurricane, cyclone, tornado, or windstorm (*d*).

(*c*) *American Steam Boiler Co.* v. *Chicago Sugar* (1892), 57 Fed. Rep. 294.

(*d*) *Beakes* v. *Phœnix Insurance* (1894), 143 N. Y. 402; *Holmes* v. *Phœnix Insurance* (1899), 98 Fed. Rep. 240; *Maryland Casualty* v. *Finch* (1906), 147 Fed. Rep. 388; *Phœnix Insurance* v. *Charleston Bridge Co.* (1895), 65 Fed. Rep. 625.

APPENDIX

ASSURANCE COMPANIES ACT, 1909

(9 EDW. 7, c. 49)

An Act to consolidate and amend and extend to other Companies carrying on Assurance or Insurance business the Law relating to Life Assurance Companies, and for other purposes connected therewith.

A.D. 1909.

[*3rd December* 1909.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Companies to which Act applies.

Companies to which Act applies.

1. This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established before or after the commencement of this Act and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following classes :—

(*a*) Life assurance business ; that is to say, the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life ;

(*b*) Fire insurance business ; that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire ;

(*c*) Accident insurance business ; that is to say, the issue of, or the undertaking of liability under, policies of insurance upon the happening of personal accidents, whether fatal or not, disease, or sickness, or any class of personal accidents, disease, or sickness ;

(*d*) Employers' liability insurance business ; that is to say, the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment ;

(*e*) Bond investment business ; that is to say, the business of issuing bonds or endowment certificates by which the company, in return for subscriptions payable at periodical intervals of two months or less, contract to pay the bond holder a sum at a future date, and not being life assurance business as hereinbefore defined ;

subject as respects any class of assurance business to the special provisions of this Act relating to business of that class.

A company registered under the Companies Acts which transacts assurance business of any such class as aforesaid in any part of the world shall for the purposes of this provision be deemed to be a company transacting such business within the United Kingdom.

General.

Deposit.

2.—(1) Every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of twenty thousand pounds.

(2) The sum so deposited shall be invested by the Paymaster-General in such of the securities usually accepted by the Court for the investment of funds placed under its administration as the company may select, and the interest accruing due on any such securities shall be paid to the company.

(3) The deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and, upon the incorporation of the company, shall be deemed to have been made by, and to be part of the assets of, the company, and the registrar shall not issue a certificate of incorporation of the company until the deposit has been made.

(4) Where a company carries on, or intends to carry on, assurance business of more than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on any such deposit or the securities in which it is for the time being invested shall be carried by the company to that fund.

(5) The Paymaster-General shall not accept a deposit except on a warrant of the Board of Trade.

(6) The Board of Trade may make rules with respect to applications for warrants, the payment of deposits, and the investment thereof or dealing therewith, the deposit of stocks or other securities in lieu of money, the payment of the interest or dividends from time to time accruing due on any securities in which deposits are for the time being invested, and the withdrawal and transfer of deposits, and the rules so made shall have effect as if they were enacted in this Act, and shall be laid before Parliament as soon as may be after they are made.

(7) This section shall apply to an assurance company registered or having its head office in Ireland, subject to the following modifications :—

References to the Supreme Court shall be construed as references to the Supreme Court of Judicature in Ireland, and references to the Paymaster-General shall be construed as references to the Accountant-General of the last-mentioned Court.

Separation of funds.

3.—(1) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business,

and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund.

(2) A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable.

Accounts and balance sheets.

4. Every assurance company shall, at the expiration of each financial year of the company, prepare—

(*a*) A revenue account for the year in the form or forms set forth in the First Schedule to this Act and applicable to the class or classes of assurance business carried on by the company;

(*b*) A profit and loss account in the form set forth in the Second Schedule to this Act, except where the company carries on assurance business of one class only and no other business;

(*c*) A balance sheet in the form set forth in the Third Schedule to this Act.

Actuarial report and abstract.

5.—(1) Every assurance company shall, once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or byelaws, cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the form or forms set forth in the Fourth Schedule to this Act and applicable to the class or classes of assurance business carried on by the company.

(2) The foregoing provisions of this section shall also apply whenever at any other time an investigation into the financial condition of an assurance company is made with a view to the distribution of profits, or the results of which are made public.

Statement of assurance business.

6. Every assurance company shall prepare a statement of its assurance business at the date to which the accounts of the company are made up for the purposes of any such investigation as aforesaid in the form or forms set forth in the Fifth Schedule to this Act and applicable to the class or classes of assurance business carried on by the company: Provided that, if the investigation is made annually by any company, the company may prepare such a statement at any time, so that it be made at least once in every five years.

Deposit of accounts, &c. with Board of Trade.

7.—(1) Every account, balance sheet, abstract, or statement hereinbefore required to be made shall be printed, and four copies thereof, one of which shall be signed by the chairman and two directors of the company and by the principal officer of the company and, if the company has a managing director, by the managing director, shall be deposited at the Board of Trade within six months after the close of the period to which the account, balance sheet, abstract, or statement relates:

Provided that, if in any case it is made to appear to the Board of Trade that the circumstances are such that a longer period than six months should be allowed, the Board may extend that period by such period not exceeding three months as they think fit.

(2) The Board of Trade shall consider the accounts, balance sheets, abstracts, and statements so deposited, and, if any such account, balance sheet, abstract, or statement appears to the Board to be inaccurate or incomplete in any respect, the Board shall communicate with the company with a view to the correction of any such inaccuracies and the supply of deficiencies.

(3) There shall be deposited with every revenue account and balance sheet of a company any report on the affairs of the company submitted to the shareholders or policy holders of the company in respect of the financial year to which the account and balance sheet relates.

(4) Where an assurance company registered under the Companies Acts in any year deposits its accounts and balance sheet in accordance with the provisions of this section, the company may, at the same time, send to the registrar a copy of such accounts and balance sheet; and, where such copy is so sent, it shall not be necessary for the company to send to the registrar a statement in the form of a balance sheet as required by subsection (3) of section twenty-six of the Companies (Consolidation) Act, 1908, and the copy of the accounts and balance sheet so sent shall be dealt with in all respects as if it were a statement sent in accordance with that subsection.

8 Edw. 7, c. 69.

Right of shareholders, &c. to copies of accounts, &c.

8. A printed copy of the last-deposited accounts, balance sheet, abstract, or statement, shall on the application of any shareholder or policy holder of the company be forwarded to him by the company by post or otherwise.

Audit of accounts.

8 & 9 Vict. c. 16.

9. Where the accounts of an assurance company are not subject to audit in accordance with the provisions of the Companies (Consolidation) Act, 1908, or the Companies Clauses Consolidation Act, 1845, relating to audit, the accounts of the company shall be audited annually in such manner as the Board of Trade may prescribe, and the regulations made for the purpose may apply to any such company the provisions of the Companies (Consolidation) Act, 1908, relating to audit, subject to such adaptations and modifications as may appear necessary or expedient.

List of shareholders.

10. Every assurance company which is not registered under the Companies Acts, or which has not incorporated in its deed of settlement section ten of the Companies Clauses Consolidation Act, 1845, shall keep a "Shareholders Address Book," in accordance with the provisions of that section, and shall, on the application of any shareholder or policy holder of the company, furnish to him a copy of such book, on payment of a sum not exceeding sixpence for every hundred words required to be copied.

Deed of settlement.

11. Every assurance company which is not registered under the Companies Acts shall cause a sufficient number of copies of its deed of settlement or other instrument constituting the company to be printed, and shall, on the application of any shareholder or policy holder of the

company, furnish to him a copy of such deed of settlement or other instrument on payment of a sum not exceeding one shilling.

Publication of authorised, subscribed, and paid-up capital.

12. Where any notice, advertisement, or other official publication of an assurance company contains a statement of the amount of the authorised capital of the company, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

Amalgamation or transfer.

13.—(1) Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement.

(2) The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established.

(3) Before any such application is made to the Court—

(*a*) notice of the intention to make the application shall be published in the Gazette; and

(*b*) a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which the amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent actuary, shall, unless the Court otherwise directs, be transmitted to each policy holder of each company in manner provided by section one hundred and thirty-six of the Companies Clauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally: Provided that it shall not be necessary to transmit such statement and other documents to policy holders other than life, endowment, sinking fund, or bond investment policy holders, nor in the case of a transfer to such policy holders if the business transferred is not life assurance business or bond investment business; and

(*c*) the agreement or deed under which the amalgamation or transfer is effected shall be open for the inspection of the policy holders and shareholders at the offices of the companies for a period of fifteen days after the publication of the notice in the Gazette.

(4) No assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the Court in accordance with this section.

Statements in case of amalgamation or transfer.

14. Where an amalgamation takes place between any assurance companies, or where any assurance business of one such company is transferred to another company, the combined company or the purchasing company, as the case may be, shall, within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade—

(*a*) certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer ; and

(*b*) a certified copy of the agreement or deed under which the amalgamation or transfer is effected ; and

(*c*) certified copies of the actuarial or other reports upon which that agreement or deed is founded ; and

(*d*) a declaration under the hand of the chairman of each company, and the principal officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the amalgamation or transfer.

Special provisions as to winding up of assurance companies.

15. The Court may order the winding up of an assurance company, in accordance with the Companies (Consolidation) Act, 1908, and the provisions of that Act shall apply accordingly, subject, however, to the following modification :—

The company may be ordered to be wound up on the petition of ten or more policy holders owning policies of an aggregate value of not less than ten thousand pounds :

Provided that such a petition shall not be presented except by leave of the Court, and leave shall not be granted until a primâ facie case has been established to the satisfaction of the Court and until security for costs for such amount as the Court may think reasonable has been given.

Winding up of subsidiary companies.

16.—(1) Where the assurance business or any part of the assurance business of an assurance company has been transferred to another company under an arrangement in pursuance of which the first-mentioned company (in this section called the subsidiary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section called the principal company), then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the subsidiary company to be wound up in conjunction with the principal company, and may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to the companies being wound up as if they were one company.

(2) The commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the subsidiary company.

(3) In adjusting the rights and liabilities of the members of the several companies between themselves, the Court shall have regard to the constitution of the companies, and to the arrangements entered into between the companies, in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the

case of the winding up of a single company, or as near thereto as circumstances admit.

(4) Where any company alleged to be subsidiary is not in process of being wound up at the same time as the principal company to which it is subsidiary, the Court shall not direct the subsidiary company to be wound up unless, after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is subsidiary to the principal company, and that the winding up of the company in conjunction with the principal company is just and equitable.

(5) An application may be made in relation to the winding up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, the principal or subsidiary company.

(6) Where a company stands in the relation of a principal company to one company, and in the relation of a subsidiary company to some other company, or where there are several companies standing in the relation of subsidiary companies to one principal company, the Court may deal with any number of such companies together or in separate groups, as it thinks most expedient, upon the principles laid down in this section.

Valuation of annuities and policies.

17.—(1) Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act.

(2) The rules in the Sixth and Seventh Schedules to this Act shall be of the same force, and may be repealed, altered, or amended, as if they were rules made in pursuance of section two hundred and thirty-eight of the Companies (Consolidation) Act, 1908, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of assurance companies.

Power to Court to reduce contracts.

18. The Court, in the case of an assurance company which has been proved to be unable to pay its debts, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order.

Extension of 8 Edw. 7, c. 69, s. 274, to all assurance companies established outside the United Kingdom.

19. Section two hundred and seventy-four of the Companies (Consolidation) Act, 1908 (which contains provisions as to companies incorporated outside the United Kingdom), shall apply to every assurance company constituted outside the United Kingdom which carries on assurance business within the United Kingdom, whether incorporated or not.

Custody and inspection of documents deposited with Board of Trade.

20. The Board of Trade may direct any documents deposited with them under this Act, or certified copies thereof, to be kept by the registrar or by any other officer of the Board of Trade; and any such documents and copies shall be open to inspection, and copies thereof may be procured by any person on payment of such fees as the Board of Trade may direct.

Evidence of documents.

21.—(1) Every document deposited under this Act with the Board of Trade, and certified by the registrar or by any person appointed in

that behalf by the President of the Board of Trade to be a document so deposited, shall be deemed to be a document so deposited.

(2) Every document purporting to be certified by the registrar, or by any person appointed in that behalf by the President of the Board of Trade, to be a copy of a document so deposited shall be deemed to be a copy of that document, and shall be received in evidence as if it were the original document, unless some variation between it and the original document be proved.

Alteration of forms.

22. The Board of Trade may, on the application or with the consent of an assurance company, alter the forms contained in the schedules to this Act as respects that company, for the purpose of adapting them to the circumstances of that company.

Penalty for non-compliance with Act.

23. Any assurance company which makes default in complying with any of the requirements of this Act shall be liable to a penalty not exceeding one hundred pounds, or, in the case of a continuing default, to a penalty not exceeding fifty pounds for every day during which the default continues, and every director, manager, or secretary, or other officer or agent of the company who is knowingly a party to the default shall be liable to a like penalty ; and, if default continue for a period of three months after notice of default by the Board of Trade (which notice shall be published in one or more newspapers as the Board of Trade may, upon the application of one or more policy holders or shareholders, direct), the default shall be a ground on which the Court may order the winding up of the company, in accordance with the Companies (Consolidation) Act, 1908.

Penalty for falsifying statements, &c.

24. If any account, balance sheet, abstract, statement, or other document required by this Act is false in any particular to the knowledge of any person who signs it, that person shall be guilty of a misdemeanour and shall be liable on conviction on indictment to fine and imprisonment, or on summary conviction to a fine not exceeding fifty pounds.

Recovery and application of penalties.

25. Every penalty imposed by this Act shall be recovered and applied in the same manner as penalties imposed by the Companies (Consolidation) Act, 1908, are recoverable and applicable.

Service of notices.

26. Any notice which is by this Act required to be sent to any policy holder may be addressed and sent to the person to whom notices respecting such policy are usually sent, and any notice so addressed and sent shall be deemed and taken to be notice to the holder of such policy :

Provided that where any person claiming to be interested in a policy has given to the company notice in writing of his interest, any notice which is by this Act required to be sent to policy holders shall also be sent to such person at the address specified by him in his notice.

Accounts, &c. to be laid before Parliament.

27. The Board of Trade shall lay annually before Parliament the accounts, balance sheets, abstracts, statements, and other documents under this Act, or purporting to be under this Act, deposited with them during the preceding year, except reports on the affairs of assurance companies submitted to the shareholders or policy holders thereof, and may append to such accounts, balance sheets, abstracts, statements,

or other documents any note of the Board of Trade thereon, and any correspondence in relation thereto.

Savings.

28.—(1) This Act shall not affect the National Debt Commissioners or the Postmaster-General, acting under the authorities vested in them respectively by the Government Annuities Acts, 1829 to 1888, and the Post Office Savings Bank Acts, 1861 to 1908.

(2) This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the Eighth Schedule to this Act, and applicable to business of that class.

(3) Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in section one of this Act, and a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy.

Interpretation.

29. In this Act, unless the context otherwise requires,—

The expression "chairman" means the person for the time being presiding over the board of directors or other governing body of the assurance company;

The expression "annuities on human life" does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade, or employment, or of the dependants of such persons;

The expression "policy holder" means the person who for the time being is the legal holder of the policy for securing the contract with the assurance company;

The expression "underwriter" includes any person named in a policy or other contract of insurance as liable to pay or contribute towards the payment of the sum secured by such policy or contract;

The expression "financial year" means each period of twelve months at the end of which the balance of the accounts of the assurance company is struck, or, if no such balance is struck, then the calendar year;

The expression "Court" means the High Court of Justice in England, except that in the case of an assurance company registered or having its head office in Ireland it means, in the provisions of this Act, the High Court of Justice in Ireland, and in the case of an assurance company registered or having its head office in Scotland it means, in the provisions of this Act other than those relating to deposits, the Court of Session, in either division thereof;

The expression "Companies Acts" includes the Companies (Consolidation) Act, 1908, and any enactment repealed by that Act;

The expression "registrar" means the Registrar of Joint Stock Companies;

The expression "actuary" means an actuary possessing such

qualifications as may be prescribed by rules made by the Board of Trade ;

The expression "Gazette" means the London, Edinburgh, or Dublin Gazette, as the case may be.

Application to Special Classes of Business.

Application to life assurance companies.

30. Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications :—

(*a*) "Policy on human life" shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life ;

(*b*) Where the company grant annuities upon human life, "policy" shall include the instrument evidencing the contract to pay such an annuity, and "policy holder" includes annuitant ;

(*c*) The obligation to deposit and keep deposited the sum of twenty thousand pounds shall apply notwithstanding that the company has previously made and withdrawn its deposit, or been exempted from making any deposit under any enactment hereby repealed ;

(*d*) Where the company intends to amalgamate with or to transfer its life assurance business to another assurance company, the Court shall not sanction the amalgamation or transfer in any case in which it appears to the Court that the life policy holders representing one-tenth or more of the total amount assured in the company dissent from the amalgamation or transfer ;

(*e*) Nothing in this Act providing that the life assurance fund shall not be liable for any contracts for which it would not have been liable had the business of the company been only that of life assurance shall affect the liability of that fund, in the case of a company established before the ninth day of August eighteen hundred and seventy, for contracts entered into by the company before that date ;

(*f*) In the case of a company carrying on life assurance business and established before the ninth day of August eighteen hundred and seventy, by the terms of whose deed of settlement the whole of the profits of all the business carried on by the company are paid exclusively to the life policy holders, and on the face of whose life policies the liability of the life assurance fund in respect of the other business distinctly appears, such of the provisions of this Act as require the separation of funds, and exempt the life assurance fund from liability for contracts to which it would not have been liable had the business of the company been only that of life assurance, shall not apply ;

(*g*) Any business carried on by an assurance company which under the provisions of any special Act relating to that company

is to be treated as life assurance business shall continue to be so treated, and shall not be deemed to be other business or a separate class of assurance business within the meaning of this Act;

(*h*) In the case of a mutual company whose profits are allocated to members wholly or mainly by annual abatements of premium, the abstract of the report of the actuary on the financial condition of the company, prepared in accordance with the Fourth Schedule to this Act, may, notwithstanding anything in section five of this Act, be made and returned at intervals not exceeding five years, provided that, where such return is not made annually, it shall include particulars as to the rates of abatement of premiums applicable to different classes or series of assurances allowed in each year during the period which has elapsed since the previous return under the Fourth Schedule.

Application to fire insurance companies.

31. Where a company carries on fire insurance business, this Act shall apply with respect to that business, subject to the following modifications :—

(*a*) It shall not be necessary for the company to prepare any statement of its fire insurance business in accordance with the Fourth and Fifth Schedules to this Act :

(*b*) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the fire insurance business carried on by the company if the company has commenced to carry on that business within the United Kingdom before the passing of this Act :

(*c*) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply where the company is an association of owners or occupiers of buildings or other property which satisfies the Board of Trade that it is carrying on, or is about to carry on, business wholly or mainly for the purpose of the mutual insurance of its members against damage by or incidental to fire caused to the houses or other property owned or occupied by them :

(*d*) It shall not be necessary to make a deposit in respect of fire insurance business where the company has made a deposit in respect of any other class of assurance business, and, where a company, having made a deposit in respect of fire insurance business, commences to carry on life assurance business or employers' liability insurance business, the company may transfer the deposit so made to the account of that other business, and after such transfer the deposit shall be treated as if it had been made in respect of such other business :

(*e*) So much of this Act as requires an assurance company transacting other business besides assurance business, or more than one class of assurance business, to keep separate funds into which all receipts in respect of the assurance business or of each class of assurance business are to be paid shall not apply as respects fire insurance business :

(*f*) The provisions of this Act with respect to the amalgamation of companies shall not apply where the only classes of assurance

business carried on by both of the companies are fire insurance business, or fire insurance business and accident insurance business, and the provisions of this Act with respect to the transfer of assurance business from one company to another shall not apply to fire insurance business.

Application to accident insurance companies.

32. Where a company carries on accident insurance business, this Act shall apply with respect to that business, subject to the following modifications :—

(*a*) In lieu of the provisions of sections five and six of this Act the following provisions shall be substituted :—

"The company shall annually prepare a statement of its accident insurance business in the form set forth in the Fourth Schedule to this Act and applicable to accident insurance business, and the statement shall be printed, signed, and deposited at the Board of Trade in accordance with section seven of this Act" :

(*b*) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the accident insurance business carried on by the company if the company has commenced to carry on that business in the United Kingdom before the passing of this Act :

(*c*) It shall not be necessary to make or keep a deposit in respect of accident insurance business where the company has made a deposit in respect of any other class of assurance business, and, where a company, having made a deposit in respect of accident insurance business, commences to carry on life assurance business or employers' liability insurance business, the company may transfer the deposit so made to the account of that other business, and after such transfer the deposit shall be treated as if it had been made in respect of such other business :

(*d*) So much of this Act as requires an assurance company transacting other business besides assurance business, or more than one class of assurance business, to keep separate funds into which all receipts in respect of the assurance business or of each class of assurance business are to be paid shall not apply as respects accident insurance business :

(*e*) The provisions of this Act with respect to the amalgamation of companies shall not apply where the only classes of assurance business carried on by both of the companies are accident insurance business, or accident insurance business and fire insurance business, and the provisions of this Act with respect to the transfer of assurance business from one company to another shall not apply to accident insurance business :

(*f*) The expression "policy" includes any policy under which there is for the time being an existing liability already accrued, or under which a liability may accrue :

(*g*) Where a sum is due, or a weekly or other periodical payment is payable, under any policy, the expression "policy holder" includes the person to whom the sum is due or the weekly or other periodical payment payable.

Application to employers' liability insurance companies.

33.—(1) Where a company carries on employers' liability insurance business, this Act shall apply with respect to that business, subject to the following modifications :—

(*a*) This Act shall not apply where the company is an association of employers which satisfies the Board of Trade that it is carrying on, or is about to carry on, business wholly or mainly for the purpose of the mutual insurance of its members against liability to pay compensation or damages to workmen employed by them, either alone or in conjunction with insurance against any other risk incident to their trade or industry :

(*b*) This Act shall not apply where the company carries on the employers' liability insurance business as incidental only to the business of marine insurance by issuing marine policies, or policies in the form of marine policies, covering liability to pay compensation or damages to workmen as well as losses incident to marine adventure or adventure analogous thereto :

(*c*) In lieu of the provisions of sections five and six of this Act the following provisions shall be substituted :—

"The company shall annually prepare a statement of its employers' liability insurance business in the form set forth in the Fourth Schedule to this Act and applicable to employers' liability insurance business, and shall cause an investigation of its estimated liabilities to be made by an actuary so far as may be necessary to enable the provisions of that form to be complied with, and the statement shall be printed, signed, and deposited at the Board of Trade in accordance with section seven of this Act" :

(*d*) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the employers' liability insurance business carried on by a company where the company had commenced to carry on that business within the United Kingdom before the twenty-eighth day of August nineteen hundred and seven :

(*e*) As soon as the employers' liability fund set apart and secured for the satisfaction of the claims of policy holders of that class amounts to forty thousand pounds, the Paymaster General shall, if the company has made a deposit in respect of any other class of assurance business, return to the company the money deposited in respect of its employers' liability insurance business, and it shall not thereafter be necessary for the company to keep any sum deposited in respect of that business, so long as the sum deposited in respect of any other class of assurance business is kept deposited :

(*f*) Where money is paid into a county court under the provisions of the Eighth Schedule to this Act, the court shall (unless the court for special reason sees fit to direct otherwise) order the lump sum to be invested or applied in the purchase of an annuity or otherwise, in such manner that the duration of the benefit thereof may, as far as possible, correspond with the probable duration of the incapacity :

(*g*) The expression "policy" includes any policy under which there is for the time being an existing liability already accrued, or under which any liability may accrue :

(*h*) Where any sum is due, or a weekly payment is payable, under any policy, the expression "policy holder" includes the person to whom the sum is due or the weekly payment payable :

(*i*) If the company carries on employers' liability insurance business outside the United Kingdom, that business shall not be treated as part of the employers' liability insurance business carried on by the company for the purposes of this Act.

(2) In the application of this section to Scotland the expression "county court" means sheriff court.

Application to bond investment companies.

34. Where a company carries on bond investment business, this Act shall apply with respect to that business, subject to the following modifications :—

(*a*) The expression "policy" includes any bond, certificate, receipt, or other instrument evidencing the contract with the company, and the expression "policy holder" means the person who for the time being is the legal holder of such instrument :

(*b*) Such of the provisions of this Act as relate to deposits shall not apply with respect to the bond investment business carried on by the company, if the company has commenced to carry on that business in the United Kingdom before the passing of this Act :

(*c*) As soon as the bond investment fund set apart and secured for the satisfaction of the claims of the policy holders of that class amounts to forty thousand pounds, the Paymaster-General shall, if the company has made a deposit in respect of any other class of assurance business, return to the company the money deposited in respect of its bond investment business, and it shall not thereafter be necessary for the company to keep any sum deposited in respect of that business, so long as the sum deposited in respect of any other class of business is kept deposited :

(*d*) The first statement of the bond investment business of the company shall be deposited at the Board of Trade on or before the thirtieth day of June nineteen hundred and eleven :

(*e*) The company shall not give the holder of any policy issued after the passing of this Act any advantage dependent on lot or chance, but this provision shall not be construed as in anywise prejudicing any question as to the application to any such transaction, whether in respect of a policy issued before or after the passing of this Act, of the law relating to lotteries.

Power of Board of Trade to exempt unregistered trade unions and friendly societies.

35. The Board of Trade may, on the application of any unregistered trade union originally established more than twenty years before the commencement of this Act, extend to the trade union the exemption conferred by this Act on registered trade unions, and may on the application of an unregistered friendly society extend to the society the exemption conferred by this Act on registered friendly societies if it appears to the Board, after consulting the Chief Registrar of Friendly Societies, that the society is one to which it is inexpedient that the provisions of this Act should apply.

Provisions as to Collecting Societies and Industrial Assurance Companies.

Provisions as to collecting societies and industrial assurance companies.

36.—(1) Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister.

(2) No policy effected before the passing of this Act with a collecting society or industrial assurance company shall be deemed to be void by reason only that the person effecting the policy had not, at the time the policy was effected, an insurable interest in the life of the person assured, or that the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or that the insurance was not one authorised by the Acts relating to friendly societies, if the policy was effected by or on account of a person who had at the time a bonâ fide expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not unreasonable for the purpose of covering those expenses, and any such policy shall enure for the benefit of the person for whose benefit it was effected or his assigns.

(3) Any collecting society or industrial insurance company which, after the passing of this Act, issues policies of insurance which are not within the legal powers of such society or company shall be held to have made default in complying with the requirements of this Act; and the provisions of this Act with respect to such default shall apply to collecting societies, industrial insurance companies, and their officers, in like manner as they apply to assurance companies and their officers.

(4) Without prejudice to the powers conferred by section seventy-one of the Friendly Societies Act, 1896, the committee of management or other governing body of a collecting society having more than one hundred thousand members may petition the court to make an order for the conversion of the society into a mutual company under the Companies (Consolidation) Act, 1908, and the court may make such an order if, after hearing the committee of management, or other governing body, and other persons whom the court considers entitled to be heard on the petition, the court is satisfied, on a poll being taken, that fifty-five per cent. at least of the members of the society over sixteen years of age agree to the conversion; and the court may give such directions as it thinks fit for settling a proper memorandum and articles of association of the company; but, before any such petition is presented to the court, notice of intention to present the petition shall be published in the Gazette, and in such newspapers as the court may direct. 59 & 60 Vict. c. 25.

When a collecting society converts itself into a company in accordance with the provisions of this subsection, subsection (3) of section seventy-one of the Friendly Societies Act, 1896, shall apply in like manner as if the conversion were effected under that section.

(5) In this section the expressions "collecting society" and "industrial assurance company" have the same meanings as in the Collecting Societies and Industrial Assurance Companies Act, 1896. 59 & 60 Vict. c. 26.

Supplemental.

Repeal.

37. The enactments mentioned in the Ninth Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule:

Provided that nothing in this repeal shall affect any investigation made, or any statement, abstract, or other document deposited, under any enactment hereby repealed, but every such investigation shall be deemed to have been made and every such document prepared and deposited under this Act.

Short title and commencement.

38.—(1) This Act may be cited as the Assurance Companies Act, 1909.

(2) This Act shall come into operation on the first day of July nineteen hundred and ten, except that as respects section thirty-six it shall come into operation on the passing thereof.

SCHEDULES.—FIRST SCHEDULE.

N.B.—Where marine insurance business or sinking fund or capital redemption insurance business is carried on, the income and expenditure thereof to be stated in like manner in separate accounts. Any additional businesses (including employers' liability insurance business transacted out of the United Kingdom) to be shown in a separate inclusive general account.

(A.)—*Form applicable to Life Assurance Business.*

Revenue Account of the _____ for the Year ending _____ in respect of Life Assurance Business.

—	Business within the United Kingdom.	Business out of the United Kingdom.	Total.	—	Business within the United Kingdom.	Business out of the United Kingdom.	Total.
	£ s. d.	£ s. d.	£ s. d.		£ s. d.	£ s. d.	£ s. d.
Amount of life assurance fund at the beginning of the year				Claims under policies paid and outstanding :—			
Premiums :— - - - -	—	—		By death - - -			
Consideration for annuities granted - - - - -				By maturity - - -			
Interest, dividends, and rents - - £ s. d.				Surrenders, including surrenders of bonus - - -			
Less income tax thereon - -				Annuities - - - -			
	—	—		Bonuses in cash - - -			
				Bonuses in reduction of premiums - - - -			
				Commission - - - -			
				Expenses of management -	—	—	
				Other payments (accounts to be specified) - - -	—	—	
Other receipts (accounts to be specified) - - - -	—	—		Amount of life assurance fund at the end of the year, as per Third Schedule -	—	—	
£				£			

NOTE 1.—Companies having separate accounts for annuities to return the particulars of their annuity business in a separate statement.

NOTE 2.—Companies having both Ordinary and Industrial branches to return the particulars of the business in each department separately.

NOTE 3.—Items in this Account to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the Company's risks.

NOTE 4.—If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

NOTE 5.—Particulars of the new life assurances effected during the year of account to be appended to the above Account showing separately, as respects business within and business out of the United Kingdom, the number of policies, the total sums assured, the amount received by way of single premiums, and the amount of the yearly renewal premium income, the items to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the company's risks. The particulars as to yearly renewal premium income need not be furnished in respect of Industrial business.

NOTE 6.—The columns headed "Business out of the United Kingdom," in the case of companies having their head office in the United Kingdom, apply only to business secured through Branch Offices or Agencies out of the United Kingdom.

(B.)—*Form applicable to Fire Insurance Business.*

Revenue Account of the_____for the Year ending_____19__in respect of Fire Insurance Business.

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of fire insurance fund at the beginning of the year :—			Claims under policies paid and outstanding - -		
Reserve for unexpired risks -			Commission - - - - - - - -		
Additional reserve (if any) - -			Expenses of management - - - - -		
			Contributions to fire brigades - - - -		
Premiums - - - - - - - - -			Other payments (accounts to be specified) - -		
	£ s. d.			£ s. d.	
Interest, dividends, and rents - -			Amount of fire insurance fund at the end of the year as per Third Schedule :—		
Less income tax thereon - -			Reserve for unexpired risks being per cent. of premium income for the year - -		
			Additional Reserve (if any) -		
Other receipts (accounts to be specified) - -					
	£			£	

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

(C.)—*Form applicable to Accident Insurance Business.*

Revenue Account of the for the Year ending 19 in respect of Accident Insurance Business.

	£ s. d.	£ s. d.		£ s. d.
Amount of accident insurance fund at the beginning of the year :—			Payments under policies, including medical and legal expenses in connection therewith	
Reserve for unexpired risks			Commission	
Total estimated liability in respect of outstanding claims			Expenses of management	
Additional reserve (if any)			Other payments (accounts to be specified)	
				£ s. d.
Premiums—	£ s. d.		Amount of accident insurance fund at the end of the year as per Third Schedule :—	
Interest, dividends, and rents			Reserve for unexpired risks being per cent. of premium income for the year	
Less income tax thereon			Total estimated liability in respect of outstanding claims as per Fourth Schedule (C)	
Other receipts (accounts to be specified)			Additional reserve (if any)	
	£			£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

(D.)—*Form applicable to Employers' Liability Insurance Business.*

Revenue Account of the _____ for the Year ending _____ 19__ in respect of Employers' Liability Insurance Business transacted within the United Kingdom.

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of employers' liability insurance fund at the beginning of the year :—			Payments under policies, including medical and legal expenses in connection therewith - -		
Reserve for unexpired risks -			Commission - - - - - - - -		
Total estimated liability in respect of outstanding claims -			Expenses of management - - - - -		
Additional reserve (if any) - -			Other payments (accounts to be specified) - -		
			Amount of employers' liability insurance fund at the end of the year, as per Third Schedule :—	£ s. d.	
Premiums - - - - - - - -			Reserved for unexpired risks, being per cent. of premium income for the year -		
Interest, dividends, and rents - -	£ s. d.		Total estimated liability in respect of outstanding claims, as per Fourth Schedule (D) - -		
Less income tax thereon - -			Additional reserve (if any) - -		
Other receipts (accounts to be specified) - -					
	£			£	

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account

(E.)—*Form applicable to Bond Investment Business.*

Revenue Account of the _____ for the Year ending _____ 19__ in respect of Bond Investment and Endowment Certificate Business.

	£ s. d.	£ s. d.		£ s. d.
Amount of Bond Investment and Endowment Certificate Fund at the beginning of the year			Claims under bonds and certificates, paid and outstanding	
Additional reserve (if any)			Commission	
Premiums			Expenses of management	
Interest, dividends, and rents			Other payments (accounts to be specified)	
Less income tax thereon			Amount of Bond Investment and Endowment Certificate Fund at the end of the year as per Third Schedule	
Other receipts (accounts to be specified)			Additional reserve (if any)	
	£			£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

Section 4.

SECOND SCHEDULE.

PROFIT AND LOSS ACCOUNT OF THE FOR THE YEAR ENDING 19 .

	£ s. d.	£ s. d.		£ s. d.
Balance of last year's account			Dividends and bonuses to shareholders	
Interest and dividends not carried to other accounts			Expenses not charged to other accounts	
Less income tax thereon			Loss realised (accounts to be specified)	
Profit realised (accounts to be specified)			Other payments (accounts to be specified)	
Other receipts (accounts to be specified)			Balance as per Third Schedule	
	£			£

THIRD SCHEDULE.

Balance Sheet of the _____ on the _____ 19____

Liabilities.	£ s. d.	£ s. d.	Assets.	£ s. d.
Shareholders' capital paid up (if any) . . . . £			Mortgages on property within the United Kingdom . . .	
Life assurance funds*:—			Do. do. out of the United Kingdom . . .	
Ordinary branch			Loans on parochial and other public rates	
Industrial do.			Do. Life interests	
Annuity fund*			Do. Reversions	
Fire insurance fund			Do. Stocks and shares	
Accident insurance fund			Do. Company's policies within their surrender values . .	
Employers' liability insurance fund			Do. Personal security	
Bond investment and endowment certificate fund .			Investments:	
Marine insurance fund			Deposit with the High Court (securities to be specified) .	
Sinking fund and capital redemption fund . . .			British Government securities	
Profit and loss account			Municipal and county securities, United Kingdom . .	
Other funds (if any) to be specified			Indian and Colonial Government securities . . .	
	£		Do. provincial securities . . .	
Claims admitted or intimated but not paid† . .			Do. municipal do. . . .	
Life assurance			Foreign Government securities	
Fire insurance			Do. provincial securities	
Bond investment			Do. municipal do.	
Annuities due and unpaid†			Railway and other debentures and debenture stocks—Home and Foreign	
Other sums owing by the company † (to be stated separately under each class of business).			Railway and other preference and guaranteed stocks . .	
			Do. ordinary stocks	
			Rent charges	
			Freehold ground rents	
			Leasehold do.	
			House property	
			Life interests	
			Reversions	
			Agents' balances	
			Outstanding premiums†	
			Do. interest, dividends, and rents† . . .	
			Interest accrued but not payable†	
			Bills receivable	
			Cash:	
			On deposit	
			In hand and on current account . . .	
			Other assets (to be specified)	
	£			£

* Life companies having separate annuity fund to show amount thereof separately.

† These items are or have been included in the corresponding items in the First Schedule.

NOTE 1.—When part of the assets of the company are specifically deposited, under local laws, in various places out of the United Kingdom, as security to holders of policies there issued, each such place and the amount compulsorily lodged therein must be specified in respect of each class of business, except that, in the case of fire, accident, or employers' liability insurance business, it shall be sufficient to state the fact that a part of the assets has been so deposited.

NOTE 2.—A Balance Sheet in the above form must be rendered in respect of each separate fund for which separate investments are made.

NOTE 3.—The Balance Sheet must state how the values of the Stock Exchange securities are arrived at, and a certificate must be appended, signed by the same persons as sign the Balance Sheet, to the effect that in their belief the assets set forth in the Balance Sheet are in the aggregate fully of the value stated therein, less any investment reserve fund taken into account. In the case of a company transacting life assurance business or bond investment business, this certificate is to be given on the occasions only when a statement respecting valuation under the Fourth Schedule is made.

NOTE 4.—In the case of a company required to keep separate funds under section 3 of this Act, a certificate must be appended, signed by the same persons as signed the Balance Sheet and by the auditor, to the effect that no part of any such fund has been applied, directly or indirectly, for any purpose other than the class of business to which it is applicable.

FOURTH SCHEDULE.

Sections 5, 30, 32 and 33.

N.B.—Where sinking fund or capital redemption insurance business is carried on, a separate statement signed by the actuary must be furnished, showing the total number of policies valued, the total sums assured, and the total office yearly premiums, and also showing the total net liability in respect of such business and the basis on which such liability is calculated.

(A.)—*Form applicable to Life Assurance Business.*

STATEMENT respecting the VALUATION of the LIABILITIES under LIFE POLICIES and ANNUITIES of the , to be made and signed by the ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.

2. The general principles adopted in the valuation, and the method followed in the valuation of particular classes of assurances, including a statement of the method by which the net premiums have been arrived at, and whether these principles were determined by the instrument constituting the company, or by its regulations or byelaws, or how otherwise; together with a statement of the manner in which policies on under average lives are dealt with.

3. The table or tables of mortality used in the valuation. In cases where the tables employed are not published, specimen policy values are to be given, at the rate of interest employed in the valuation, in respect of whole-life assurance policies effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years, and upwards at intervals of five years respectively; with similar specimen policy values in respect of endowment assurance policies, according to age at entry, original term of policy, and duration.

4. The rate or rates of interest assumed in the calculations.

5. The actual proportion of the annual premium income, if any, reserved as a provision for future expenses and profits, separately specified in respect of assurances with immediate profits, with deferred profits, and without profits. (If none, state how this provision is made.)

6. The consolidated revenue account since the last valuation, or, in case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed. No return under this heading will be required where a statement under this schedule is deposited annually.)

7. The liabilities of the company under life policies and annuities at the date of the valuation, showing the number of policies, the amount assured, and the amount of premiums payable annually under each class of policies, both with and without participation in profits; and also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns to be made in the forms annexed.)

8. The principles upon which the distribution of profits among the shareholders and policy holders is made, and whether these principles were determined by the instrument constituting the company or by its regulations or byelaws or how otherwise, and the number of years' premiums to be paid before a bonus (*a*) is allotted, and (*b*) vests.

9. The results of the valuation, showing—

(1) The total amount of profit made by the company, allocated as follows:—

(*a*) Among the policy holders with immediate participation, and the number and amount of the policies which participated;

(*b*) Among policy holders with deferred participation, and the number and amount of the policies which participated;

(*c*) Among the shareholders;

(*d*) To reserve funds, or other accounts;

(*e*) Carried forward unappropriated.

(2) Specimens of bonuses allotted to whole-life assurance policies for £100 effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years, and upwards at intervals of five years respectively, together with the amounts apportioned under the various modes in which the bonus might be received; with similar specimen bonuses and particulars in respect of endowment assurance policies, according to age at entry, original term of policy, and duration.

Note.—Separate statements to be furnished throughout in respect of Ordinary and Industrial business respectively, the basis of the division being stated.

(FORM referred to under Heading No. 6 in Fourth Schedule (A).)

Consolidated Revenue Account of the_____for_____years commencing_____and ending_____.

	£ s. d.		£ s. d.
Amount of life assurance fund at the beginning of the period		Claims under policies paid and outstanding	
Premiums		By death	
Consideration for annuities granted		By maturity	
£ s. d.		Surrenders	
Interest, dividends, and rents		Annuities	
Less income tax thereon		Bonuses in cash	
Other receipts (accounts to be specified)		Bonuses in reduction of premiums	
		Commission	
		Expenses of management	
		Other payments (accounts to be specified)	
		Amount of life assurance fund at the end of the period, as per Third Schedule	
£		£	

NOTE.—If any sum has been deducted from the expenses of management account and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Statement.

(FORM referred to under Heading No. 7 in Fourth Schedule (A).)

SUMMARY and VALUATION of the POLICIES of the _____ as at _____ 19___.

Description of Transactions.	Particulars of the POLICIES for Valuation.				VALUATION.			
					Value by the	Table, Interest		per cent.
	Number of Policies.	Sums assured and Bonuses.	Office Yearly Premiums.	Net Yearly Premiums.	Sums assured and Bonuses.	Office Yearly Premiums.	Net Yearly Premiums.	Net Liability
ASSURANCES.								
I. *With immediate participation in profits.*								
For whole term of life								
Other classes (to be specified)								
Extra premiums payable								
II. *With deferred participation in profits.*								
For whole term of life								
Other classes to be specified)								
Extra premiums payable								
Total assurances with profits								
III. *Without participation in profits.*								
For whole term of life								
Other classes (to be specified)								
Extra premiums payable								
Total assurances without profits								
Total assurances								
Deduct re-assurances (to be specified according to class in a separate statement)								
Net amount of assurances								
Adjustments, if any (to be separately specified)								
ANNUITIES ON LIVES.								
Immediate								
Other classes (to be specified)								
Total of the results								

NOTE 1.—The term "extra premium" in this Act shall be taken to mean the charge for any risk not provided for in the minimum contract premium. If policies are issued in or for any country at rates of premium deduced from tables other than the European mortality tables adopted by the company, separate schedules similar in form to the above must be furnished.

NOTE 2.—Separate returns and valuation results must be furnished in respect of classes of policies valued by different tables of mortality, or at different rates of interest, also for business at other than European rates.

NOTE 3.—In cases also where separate valuations of any portion of the business are required under local laws in places outside the United Kingdom, a summary statement must be furnished in respect of the business so valued in each such place showing the total number of policies, the total sums assured and bonuses, the total office yearly premiums, and the total net liability on the bases as to mortality and interest adopted in each such place, with a statement as to such bases respectively.

(FORM referred to under Heading No. 7 in Fourth Schedule (A).)

VALUATION BALANCE SHEET of _____ as at _____ 19__.

Dr.	£	Cr.	£
To net liability under Life Assurance and Annuity transactions (as per summary statement provided in Fourth Schedule (A))		By Life Assurance and Annuity funds (as per balance sheet under Schedule 3)	
To surplus, if any		By deficiency, if any	

(C.)—*Form applicable to Accident Insurance Business.*

STATEMENT of the ESTIMATED LIABILITY in respect of OUTSTANDING CLAIMS arising in the year of Account, and in the preceding year or years; computed as at the end of the year in which the claims arose, and as at the end of the year of Account; with particulars as to the number and amount of the claims actually paid in the intervening period.

I.—Claims arising during the year of account ending 19

(*a*) Particulars as to Claims arising, and settled, during the year of Account:—

Class of Claim.	No. of Claims.	Total amount paid.	
		By Sums insured.	By Weekly Allowance.
(1)	(2)	(3)	(4)
(i) Fatal claims . . .			
(ii) Non-fatal claims . .			
Totals			

(*b*) Particulars as to Claims arising during and outstanding at the end of the year of Account:—

Class of Claim.	No. of Claims.	Amount paid during Year of Account.	Estimated Liability.
(1)	(2)	(3)	(4)
(i) Fatal claims			
(ii) Non-fatal claims, involving payment of sums insured.			
(iii) Non-fatal claims, involving payment of temporary weekly allowances:—			
With maximum duration, not exceeding 26 weeks.			
With maximum duration exceeding 26 weeks, but not exceeding 52 weeks.			
And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.			
(iv) Non-fatal claims, involving payment of yearly allowances during permanent total disablement.			
Totals			

II.—Outstanding claims which arose during the *first year* preceding the year of account, ending 19 .

Particulars of Claims.	Estimated Liability in respect of Claims Outstanding as at the above Date.		Claims paid during the Period of One Year between the above Date and the End of Year of Account.				Estimated Liability in respect of Claims Outstanding as at the End of Year of Account.		Totals of Columns (3), (4) and (5).	
			Terminated within such Period.		Not terminated within such Period.					
(1)	(2)		(3)		(4)		(5)		(6)	
	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.
(i) Fatal claims . .										
(ii) Non-fatal claims, involving payment of sums insured.										
(iii) Non-fatal claims, involving payment of temporary weekly allowances :—										
With maximum duration not exceeding 26 weeks.										
With maximum duration exceeding 26 weeks, but not exceeding 52 weeks.										
And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.										
(iv) Non-fatal claims, involving payment of yearly allowances during permanent total disablement.										
Totals . . .										

NOTE.—If temporary weekly allowances are granted by the Company for periods exceeding 52 weeks, particulars are to be furnished, in a form or forms similar to II. above, showing, in respect of claims involving such extended allowances, the estimated liability as at the end of the year in which such claims arose, and as at the end of the year of account ; and the number and amount of such actual claims paid during the intervening period of two (or more) years' distinguishing claims terminated, and not terminated, within such period.

III.—Summary of estimated liability, in respect of claims outstanding as at the end of the year of account—

As per column (4) of Statement I. (*b*) – –	£
,, ,, (5) ,, ,, II. – –	,
,, ,, (5) of further schedules in the form of Statement II. (if required).	
In respect of yearly allowances during permanent total disablement, outstanding at the end of the year of account, but not included in the above Statements – –	
Total estimated liability, in respect of outstanding claims as at the end of the year of account, as per First Schedule (C.) –	£

(D.)—*Form applicable to Employers' Liability Insurance Business.*

STATEMENT of the ESTIMATED LIABILITY in respect of outstanding CLAIMS arising during each of the Five Years preceding the Year of ACCOUNT, and in such Year; computed as at the end of the Year in which the CLAIMS arose, and as at the end of the Year of ACCOUNT; with Particulars as to the Number and Amount of the CLAIMS actually paid in the intervening Period.

I.—Claims arising during the year of account ending 19 .

(*a*) Particulars as to claims arising and settled during the year of account:—

Class of Claim. (1)	Number. (2)	Amount paid. (3)
Fatal claims		£
Non-fatal claims . . .		
Total . . .		

(*b*) Particulars as to claims arising during, and outstanding at end of, the year of account:—

Class of Claim. (1)	Number. (2)	Amount paid during year of account. (3)	Estimated Liability. (4)
Fatal claims . . .		£	£
Non-fatal claims . .			
Total . .			

II.—Outstanding claims which arose during the first year preceding the year of account, ending 19 .

Particulars of Claims. (1)	Estimated Liability in respect of Claims outstanding as at the above date. (2)		Claims paid during the period of 1 year between the above date and the end of the year of Account. (3)		Estimated Liability in respect of Claims outstanding as at the end of the year of Account. (4)		Total of Columns (3) and (4). (5)	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
		£		£		£		£
Fatal claims .								
Non-fatal claims—								
Terminated .					—	—		
Not terminated								
Total .								

III.—Outstanding claims which arose during the second year preceding the year of account, ending the . 19 .

Particulars of Claims. (1)	Estimated Liability in respect of Claims outstanding as at the above date. (2)		Claims paid during the period of 2 years between the above date and the end of the year of Account. (3)		Estimated Liability in respect of Claims outstanding as at the end of the year of Account. (4)		Total of Columns (3) and (4). (5)	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
		£		£		£		£
Fatal claims .								
Non-fatal claims—								
Terminated .					—	—		
Not terminated								
Total .								

IV.—Outstanding claims which arose during the third year preceding the year of account, ending the . 19 .

Particulars of Claims. (1)	Estimated Liability in respect of Claims outstanding as at the above date. (2)		Claims paid during the period of 3 years between the above date and the end of the year of Account. (3)		Estimated Liability in respect of Claims outstanding as at the end of the year of Account. (4)		Total of Columns (3) and (4). (5)	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
		£		£		£		£
Fatal claims .								
Non-fatal claims—								
Terminated .					—	—		
Not terminated								
Total .								

V.—Outstanding claims which arose during the fourth year preceding the year of account, ending the . 19 .

Particulars of Claims. (1)	Estimated Liability in respect of Claims outstanding as at the above date. (2)		Claims paid during the period of 4 years between the above date and the end of the year of Account. (3)		Estimated Liability in respect of Claims outstanding as at the end of the year of Account. (4)		Total of Columns (3) and (4). (5)	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
		£		£		£		£
Fatal claims .								
Non-fatal claims—								
Terminated .					—	—		
Not terminated								
Total .								

VI.—Outstanding claims which arose during the fifth year preceding the year of account, ending the 19.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 5 years between the above date and the end of the year of Account.		Estimated Liability (included in Statement VII. and valued by the method there specified) in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3) and (4)	
(1)	(2)		(3)		(4)		(5)	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
		£		£		£		£
Fatal claims .								
Non-fatal claims—								
Terminated .					—	—		
Not-terminated								
Total .								

NOTE.—In cases where the date at which the estimated liability required under column (2) in Forms IV. V. and VI. above would fall in any year prior to 1908, such estimated liability is to be returned as at the end of the year of account terminated in 1908, and the claims paid, repuired under column (3) of such forms, are to be in respect of the period between the end of the year of account terminated in 1908 and the end of the year of account rendered.

VII.—Statement respecting claims of five years' duration and upwards outstanding as at the end of the year of account. (To be made and signed by an actuary.)

(1) The number of claims incumbent and having durations of five years and upwards as at the end of the year of account, including those separately returned under Form VI. above; and the amount of the weekly payment, and of the annual payment, due in respect of such claims; separately stated in respect of each year of life of the workmen, from the youngest to the oldest. (These particulars to be returned under columns (1) to (4) of the tabular statement given below.)

(2) The estimated liability in respect of the claims specified above, computed, as at the end of the year of account, on the basis of the amount which would be required to purchase from the National Debt Commissioners, through the Post Office Savings Bank, an immediate life annuity for the workmen equal to 75 per cent. of the value of the weekly payment, according to the sex and true age of the workers. (These particulars to be returned under column (5) of the tabular statement given below, in respect of each year of life of the workmen, from the youngest to the oldest.)

(3) If the estimated liability, as reserved under the First Schedule in respect of the claims specified above, is computed on any basis other than that specified under Heading No. (2) above, the whole of the particulars required under Headings (1) and (2) above are to be returned in columns (1) to (5) of the tabular statement given below, together with the following additional particulars:—

(i) If the estimated liability is determined on the basis of the value of an immediate life annuity:—

(*a*) The table of mortality upon which such life annuity values are based;

(*b*) The rate of interest at which such life annuity values are computed;

(*c*) Whether such life annuity values are discriminated according to the sex of the workers;

(*d*) The proportion of such life annuity values representing the estimated liability;

(*e*) The modifications (if any) made in the true ages of the workmen, in deducing the estimated liability;

(*f*) The amount of the estimated liability. (To be returned, in respect of each year of life, in column (6) of the tabular statement given below.)

(ii) If the estimated liability is not determined on the basis of the value of an immediate life annuity, full particulars are to be specified as to the precise method adopted in deducing such estimated liability, and the total amount of estimated liability is to be returned under column (6) of the tabular statement given below.

Number of Claims. (1)	Ages of the Workmen as at the end of the Year of Account. (2)	Amount of Weekly Payment. (3)	Amount of Annual Payment. (4)	Estimated Liability computed on Basis of 75 per Cent. of Value of Life Annuity purchased through the Post Office. (5)	Estimated Liability, if computed on Basis other than that specified in Column 5. (6)

NOTE.—Separate particulars to be furnished in respect of male and female workers.

Summary of estimated liability in respect of outstanding claims as at the end of the year of account—

	£
As per column (4) of Statement I (*b*) – – –	
,, ,, (4) ,, II – – –	
,, ,, (4) ,, III – – –	
,, ,, (4) ,, IV – – –	
,, ,, (4) ,, V – – –	
,, ,, (5) or (6) ,, VII – – –	
Total estimated liability in respect of outstanding claims as at the end of the year of account as per First Schedule (D)	£

(E.)—*Form applicable to Bond Investment Business.*

STATEMENT respecting the VALUATION of the LIABILITY under BONDS and ENDOWMENT CERTIFICATES of the to be made and signed by the ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.

2. The principles adopted in the valuation of the liabilities under bond investment policies and endowment certificates, and whether these principles were determined by the instrument constituting the company, or by its regulations or byelaws, or how otherwise.

3. The rate or rates of interest assumed in the calculations.

4. The actual proportion of the annual income from contributions, if any, reserved as a provision for future expenses and profits. (If none, state how this provision is made.)

5. The consolidated revenue account since the last valuation, or, in the case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed. No return under this heading will be required where the valuation is made annually.)

6. The liabilities of the company under bond investment policies and endowment certificates at the date of the valuation, showing the number of policies or certificates, the amounts assured, the amount of contribution payable annually, and the provision for future expenses and profits; also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns should be made in the forms annexed.)

7. The principles upon which the distribution of profits among the bond and certificate holders and shareholders is made, and whether those principles are determined by the instrument constituting the company, or by its regulations or byelaws, or how otherwise, and the time during which a bond investment policy or endowment certificate must be in force to entitle it to share in the profits.

8. The results of the valuation, showing—

(1) The total amount of profit made by the company, allocated as follows:—

(*a*) among participating bond or certificate holders, with the number so participating and the total amount of their bonds or certificates;

(*b*) among the shareholders;

(*c*) to reserve funds, or other accounts;

(*d*) carried forward unappropriated.

(2) Specimens of profit allotted to policies or certificates for £100 effected for different periods, and having been in force for different durations.

(FORM referred to under Heading No. 5 in Fourth Schedule (E).)

CONSOLIDATED REVENUE ACCOUNT of the _____ for _____ Years commencing _____ 19____ and ending _____ 19____.

	£ s. d.	£ s. d.		£ s. d.
Amount of Bond Investment and Endowment Certificate Fund at the beginning of the period			Claims under Bonds and Certificates	
Additional reserve, if any			Commission	
Premiums			Expenses of management	
Interest, dividends, and rents			Other payments (accounts to be specified)	
Less Income Tax thereon			Amount of Bond Investment and Endowment Certificate Fund at the end of the period, as per Third Schedule	
Other receipts (accounts to be specified)				

NOTE.—If any sum has been deducted from the Expenses of management account and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Statement.

(FORMS referred to under Heading No. 6 in Fourth Schedule (E).)

SUMMARY and VALUATION of the BOND INVESTMENT POLICIES or ENDOWMENT CERTIFICATES of the_____ as at_____ 19_____.

Description of Transactions.	Particulars of the Policies or Certificates for Valuation.			Valuation (Interest at per cent.).			
	No. of Policies.	Sums Assured and Bonuses (if any).	Full Yearly Premiums.	Value of Sums Assured and Bonuses (if any).	Value of Full Yearly Premiums.	Provisions for future Expenses and Profits.	Net Liability.
With participation in profits .							
Without participation in profits .							
Totals							
Deduct re-assurances (to be specified according to class)							
Net Totals							
Adjustments (if any) . .							
Total of the results . .							

(FORM referred to under Heading No. 6 in Fourth Schedule (E).)

VALUATION BALANCE SHEET of the _____ as at _____ 19____.

Dr.	£	Cr.	£
To net liability under Bond Investment and Endowment Certificate transactions (as per summary statement provided in Fourth Schedule (E))		By Bond Investment and Endowment Certificate Fund (as per balance sheet under Schedule 3) . . .	
To surplus (if any)		By deficiency (if any)	

FIFTH SCHEDULE.

Section 6.

N.B.—Where sinking fund or capital redemption business is carried on, a separate statement, signed by the actuary, must be furnished showing the total sums assured maturing in each calendar year and the corresponding office premiums.

(A.)—*Form applicable to Life Assurance Business.*

STATEMENT of the LIFE ASSURANCE and ANNUITY BUSINESS of the on the 19 , to be signed by the Actuary.

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-assurances corresponding to the statements in respect of assurances are to be given throughout.) Separate statements are to be furnished in the replies to all the headings under this schedule for business at other than European rates. Separate statements are to be also furnished throughout in respect of ordinary and industrial business respectively.

1. The published table or tables of premiums for assurances for the whole term of life and for endowment assurances which are in use at the date above mentioned.

2. The total amount assured on lives for the whole term of life which are in existence at the date above mentioned, distinguishing the portions assured with immediate profits, with deferred profits, and without profits, stating separately the total reversionary bonuses and specifying the sums assured for each year of life from the youngest to the oldest ages, the basis of division as to immediate and deferred profits being stated.

3. The amount of premiums receivable annually for each year of life, after deducting the abatements made by the application of bonuses, in respect of the respective assurances mentioned under Heading No. 2, distinguishing ordinary from extra premiums. A separate statement is to be given of premiums payable for a limited number of years, classified according to the number of years' payments remaining to be made.

4. The total amount assured under endowment assurances, specifying sums assured and office premiums separately in respect of each year in which such assurances will mature for payment. The reversionary bonuses must also be separately specified, and the sums assured with immediate profits, with deferred profits, and without profits, separately returned.

5. The total amount assured under classes of assurance business, other than assurances dealt with under Questions 2 and 4, distinguishing the sums assured under each class, and stating separately the amount assured with immediate profits, with deferred profits, and without profits, and the total amount of reversionary bonuses.

6. The amount of premiums receivable annually in respect of each such special class of assurances mentioned under Heading No. 5, distinguishing ordinary from extra premiums.

7. The total amount of premiums which has been received from the commencement upon pure endowment policies which are in force at the date above mentioned.

8. The total amount of immediate annuities on lives, distinguishing the amounts for each year of life, and distinguishing male and female lives.

9. The amount of all annuities on lives other than those specified under Heading No. 8, distinguishing the amount of annuities payable under each class, and the amount of premiums annually receivable.

10. The average rate of interest yielded by the assets, whether invested

or uninvested, constituting the life assurance fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax.

It must be stated whether or not the mean fund upon which the average rate of interest is calculated includes reversionary investments.

11. A table of minimum values, if any, allowed for the surrender of policies for the whole term of life and for endowments and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of the application of such method to policies of different standing and taken out at various interval ages from the youngest to the oldest. In the case of industrial policies, where free or paid up policies are granted in lieu of surrender values, the conditions under which such policies are granted must be stated, with specimens as prescribed for surrender values.

(E.)—*Form applicable to Bond Investment Business.*

STATEMENT of the BOND INVESTMENT BUSINESS of the
on the 19 . (To be signed by the Actuary.)

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements or re-insurances, corresponding to the statements in respect of insurances, are throughout to be given.)

1. The published table or tables of rates of contribution for bond investment policies and endowment certificates which are in use at the date above-mentioned; with full particulars as to the terms and conditions on which advances are made under such policies or certificates, whether on security of house property or land, or otherwise.

2. The total amounts assured under policies or certificates which are in existence at the date above-mentioned, distinguishing the portions insured with and without profits, stating separately the total additions by way of bonus, and specifying such sums insured and bonuses respectively according to the number of complete years unexpired at such date.

3. The amount of premiums receivable annually, in respect of the respective insurances mentioned under Heading No. 2, separately specified according to the number of complete years unexpired at the date above mentioned.

4. The total amount of premiums which have been received from the commencement upon all policies or certificates mentioned under Headings Nos. 2 and 3, separately specified according to the number of complete years unexpired at the date above mentioned.

5. The average rate of interest realised by the assets, whether invested or uninvested, constituting the bond investment and endowment certificate fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax.

6. Full particulars as to the terms and conditions upon which surrenders of policies and certificates are granted, with specimens of the values allowed in respect of different durations, and different unexpired terms at the date of surrender.

7. Full particulars as to the terms and conditions upon which allowances are made on the death of a policy or certificate holder, with specimen values as required under Heading No. 6.

8. Full particulars as to the terms and conditions upon which transfers of the interest in a policy or certificate are granted, whether on the death of the policy or certificate holder, or during his lifetime.

9. Full particulars as to the terms and conditions upon which redemption of advances is granted, with specimens of redemption values in respect of bonds or certificates of different durations, and having different unexpired terms, at the date of redemption.

10. A tabular statement in respect of policies or certificates lapsed during the period since the last investigation, showing the number, the amount insured, the yearly premiums, and the total premiums received from the

commencement; classified according to the year in which such policies or certificates were effected, and lapsed, respectively; with a similar tabular statement in respect of policies or certificates surrendered during the period: Provided that policies or certificates which have lapsed and been revived shall not be entered as lapses.

11. A statement of the total number of advances made under policies or certificates to the holders thereof, whether on the security of house property or land or otherwise, and the total amount of such advances outstanding at the date above mentioned, distinguishing the advances on first mortgage and those on second or subsequent mortgage.

SIXTH SCHEDULE.

Section 17.

Rules for Valuing Policies and Liabilities.

(A.)—*As respects Life Policies and Annuities.*

Rule for valuing an Annuity.

An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and, where such tables cannot be ascertained or adopted to the satisfaction of the court, then according to such rate of interest and table of mortality as the court may direct.

Rule for valuing a Policy.

The value of the policy is to be the difference between the present value of the reversion in the sum assured according to the contingency upon which it is payable, including any bonus or addition thereto made before the commencement of the winding up, and the present value of the future annual premiums.

In calculating such present values interest is to be assumed at such rate, and the rate of mortality according to such tables, as the court may direct.

The premium to be calculated is to be such premium as according to the said rate of interest and rate of mortality is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges.

(B.)—*As respects Fire Policies.*

Rule for valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

(C.)—*As respects Accident Policies.*

Rule for valuing a periodical Payment.

The present value of a periodical payment shall, in the case of total permanent incapacity, be such an amount as would, if invested in the purchase of a life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity equal to seventy-five per centum of the annual value of the periodical payment, and, in any other case, shall be such

proportion of such amount as may, under the circumstances of the case, be proper.

Rule for valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

(D.)—*As respects Employers' Liability Policies.*

Rule for valuing a Weekly Payment.

The present value of a weekly payment shall, if the incapacity of the workman in respect of which it is payable is total permanent incapacity, be such an amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper.

Rule for valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment.

(E.)—*As respects Bonds or Certificates.*

Rule for valuing a Policy or Certificate.

The value of a policy or certificate is to be the difference between the present value of the sum assured according to the date at which it is payable, including any bonus or addition thereto made before the commencement of the winding up, and the present value of the future annual premuims.

In calculating such present values, interest is to be assumed at such rate as the court may direct.

The premium to be calculated is to be such premium as, according to the said rate of interest, is sufficient to provide for the sum assured by the policy or certificate, exclusive of any addition thereto for office expenses and other charges.

Section 17.

SEVENTH SCHEDULE.

Where an assurance company is being wound up by the court or subject to the supervision of the court, the liquidator, in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, is to ascertain the value of the liability of the company to each such person, and give notice of such value to such persons in such manner as the court may direct, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the court.

EIGHTH SCHEDULE.

Sections 28 and 33.

Requirements to be complied with by Underwriters being Members of Lloyd's or of any other Association of Underwriters approved by the Board of Trade.

(A.)—*As respects Life Assurance Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the life assurance business effected by him.

(B) *and* (C.)—*As respects Fire and Accident Insurance Business.*

1. Except as hereinafter provided, every underwriter shall comply with the following requirements:—

(*a*) He shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds in respect of each class of business. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

(*b*) He shall furnish every year to the Board of Trade a statement, in such form as may be prescribed by the Board, showing the extent and character of the fire or accident insurance business effected by him.

2. An underwriter who carries on fire insurance or accident insurance business may, in lieu of complying with the above requirements, elect to comply with the under-mentioned conditions:—

(*a*) All premiums received by or on behalf of the underwriter in respect of fire and accident insurance or re-insurance business carried on by him, either alone or in conjunction with any other insurance business for which special requirements are not laid down in this schedule, shall without any apportionment be placed in a trust fund in accordance with the provisions of a trust deed approved by the Board of Trade:

(*b*) He shall also furnish security to the satisfaction of the Board of Trade (or, if the Board so direct, to the satisfaction of the committee of the association), which shall be available solely to meet claims under policies issued by him in connexion with fire and accident business and any other non-marine business carried on by him for which special requirements are not laid down in this schedule.

The security may be furnished in the form of either a deposit or a guarantee, or partly in the one form and partly in the other.

The amount of the security to be furnished shall never be less than the aggregate of the premiums received or receivable by the underwriter in the last preceding year in connexion with such fire and accident and other non-marine business :

(*c*) The accounts of every underwriter shall be audited annually by an accountant approved by the committee of the association, who shall furnish a certificate to the committee of the association and to the Board of Trade in a form prescribed by the Board of Trade :

(*d*) For the purpose of these requirements " non-marine insurance business " means the business of issuing policies upon subject-matters of insurance other than the following, namely :—

Vessels of any description, including barges and dredgers, cargoes, freights, and other interests which may be legally insured by, in, or in relation to vessels, cargoes, and freights, goods, wares, merchandise, and property of whatever description insured for any transit by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit.

(D.)—*As respects Employers' Liability Insurance Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. Where the person insured by any policy issued by an underwriter is liable to make a weekly payment to any workman during the incapacity of the workman, and the weekly payment has continued for more than six months, the liability therefor shall before the expiration of twelve months from the commencement of the incapacity be redeemed by the payment of a lump sum in accordance with paragraph (17) of the First Schedule to the Workmen's Compensation Act, 1906, and the underwriter shall pay the lump sum into the county court, and shall inform the court that the redemption has been effected in pursuance of the provisions of this schedule.

3. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the employers' liability business effected by him.

4. For the purposes of this schedule " policy " means a policy insuring any employer against liability to pay compensation or damages to workmen in his employment.

(E.)—*As respects Bond Investment Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the bond investment business effected by him.

NINTH SCHEDULE.

Section 37.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
33 & 34 Vict. c. 61.	The Life Assurance Companies Act, 1870 .	The whole Act.
34 & 35 Vict. c. 58.	The Life Assurance Companies Act, 1871 .	The whole Act.
35 & 36 Vict. c. 41.	The Life Assurance Companies Act, 1872 .	The whole Act.
39 & 40 Vict. c. 22.	The Trade Union Act Amendment Act, 1876	Section seven.
7 Edw. 7, c. 46.	The Employers' Liability Insurance Companies Act, 1907.	The whole Act.

STATUTORY RULES, 1910.

ORDER OF THE BOARD OF TRADE DATED JUNE 6, 1910, MAKING RULES AND REGULATIONS AND PRESCRIBING FORMS UNDER THE ASSURANCE COMPANIES ACT, 1909 (9 EDW. 7, c. 49).

The Board of Trade in pursuance of the powers conferred upon them by Sections 2, 9, 20, 21, and 29 and by the 8th Schedule of the Assurance Companies Act, 1909, do hereby make the following Rules and Regulations and prescribe the following Forms.

Sydney Buxton,
President of the Board of Trade.

Board of Trade,
6th June, 1910.

RULES RELATING TO DEPOSITS BY ASSURANCE COMPANIES UNDER SECTION 2 OF THE ASSURANCE COMPANIES ACT, 1909.

A 1. These Rules apply to all Companies to which the Assurance Companies Act, 1909, applies; and in the construction of these Rules, unless and except so far as the context may otherwise require, the following words or phrases shall have the following meanings, that is to say:—

"The Act" means the Assurance Companies Act, 1909.

"Company" means a Company to which the Act applies, and includes an Irish Company as next hereinafter defined.

"Irish Company" means a Company to which the Act applies, and which is registered or has its head office in Ireland.

"Assurance business" means all or any of the five classes of assurance business specified in Section 1 of the Act.

"The Court" means the Supreme Court of Judicature in England or in the case of an Irish Company the Supreme Court of Judicature in Ireland.

"The Paymaster-General" means the Paymaster-General for the time being or in the case of an Irish Company the Accountant-General for the time being of the Supreme Court of Judicature in Ireland.

"The Assistant Paymaster-General" means the official or one of the officials acting for the time being as the Assistant or Deputy of the Paymaster-General as hereinbefore defined in relation to business connected with the Court.

"The Bank" means the Bank of England (Law Courts' Branch), or in the case of an Irish Company the Bank of Ireland or in either case such Bank or Branch of a Bank as may from time to time be appointed to receive and deal with cash and securities under the control of the Paymaster-General on behalf of the Court.

2. Where any Company is required, in pursuance of the Act, to deposit the sum of twenty thousand pounds with the Paymaster-General for the time being for and on behalf of the Court, the Company, or the subscribers of the Memorandum of Association of the Company or any of them, as the case may be (in this Rule referred to as the

NOTE.—The marginal letters are not in the King's Printer's copies of the Rules, but are inserted here for convenience of reference in the text.

Depositors), may, in the name of the Company, make application to the Board of Trade for a Warrant, and the Board of Trade may thereupon issue their Warrant to the Depositors for lodgment of such deposit in Court, which Warrant shall be a sufficient authority for the Company or persons therein named to lodge the money therein mentioned at the Bank to the account of the Paymaster-General for and on behalf of the Court, and for the Paymaster-General or the Assistant Paymaster-General to issue directions to the Bank to receive the same, to be placed in the books of the Paymaster-General, to the credit of *ex parte* the Company mentioned in such Warrant, according to the method for the time being in force respecting the lodgment of money.

Provided, that in lieu, wholly or in part, of the lodgment of money, the Depositors may bring into Court as a deposit an equivalent sum of any stocks, funds, or securities in which cash under the control of or subject to the order of the Court may for the time being be invested (the value thereof being taken at a price as near as may be to, but not exceeding, the current market price); and in that case the Board of Trade shall vary their Warrant accordingly, by directing the lodgment of such amount of such stocks, funds, or securities, by the Company or the persons therein named, to the said account of the said Paymaster-General for the credit in his books of *ex parte* the Company mentioned in such Warrant.

3. Where the assurance business by reason whereof the deposit is made is a class of business in respect of which a separate assurance fund is required to be kept (that is to say, is either life assurance business, employers' liability insurance business or bond investment business), then and in any such case the application to the Board of Trade and the Warrant of the Board of Trade shall specify the particular class of business in respect of which the deposit is being made, and the deposit shall be marked accordingly in the books of the Paymaster-General to a special ledger credit. In all other respects the provisions of the last preceding Rule shall apply to any such separate deposit.

4. Where a lodgment of money or securities has been made under the preceding Rules, the Court may, on the application of the Company, order:—

(*a*) Investment in such of the stocks, funds, or securities in which cash under the control of or subject to the order of the Court may for the time being be invested as the applicants desire and the Court thinks fit, and either by way of original investment or by way of variation of investment.

(*b*) Payment to the Company of the interest, dividends, or income from time to time accruing due on any stocks, funds, or securities in which the deposit is for the time being invested.

(*c*) Transfer or payment in the cases provided for by the Rules following of the deposit and the stocks, funds, or securities for the time being representing the same either from one ledger credit of the Company to another or out of Court.

5. In the subsequent provisions of these Rules the term "the deposit fund" means the money or securities deposited, or the stocks, funds, or securities for the time being representing the same, as the case may be.

6. In any case where it may appear to be just and equitable so to do, and in particular in any of the following cases, namely:—

(*a*) Where a Company having carried on or having intended to carry on only a class or classes of assurance business in respect of which a separate assurance fund is not required to be kept (that is to say either fire insurance business or accident insurance business) and having a deposit fund standing to the credit of the Company generally, intends subsequently to carry on a class of assurance business in respect of which a separate assurance fund is required to be kept;

(*b*) where a Company having carried on employers' liability insurance business or bond investment business as the case may be and having a deposit fund standing to a special ledger credit in respect of the class of business in question, has a fund amounting to £40,000 set apart and secured for the satisfaction of the claims of policy holders of that class, and intends subsequently to carry on in the first case bond investment business or in the second case employers' liability insurance business or in either of the said cases life assurance business;

the Court may on the application of the Company order the deposit fund to be transferred from the general account of the Company to a special ledger credit in respect of a particular class of assurance business, or from one special ledger credit in respect of one particular class of assurance business to another special ledger credit in respect of another particular class of assurance business, or otherwise to be dealt with as may be just and equitable and not in contravention of any provision of the Act.

7. In any case where it may be just and equitable so to do, and particularly in any of the following cases, namely:—

(*a*) Where a Company having carried on or having intended to carry on either fire insurance business, or accident insurance business, or both, and having a deposit fund standing to the credit of the Company generally, makes a further deposit in respect of any other class of assurance business;

(*b*) where a Company has a deposit fund to a special ledger credit in respect of employers' liability business, and the employers' liability fund of the Company set apart and secured for the claims of policy holders of that class amounts to £40,000, and the Company has or makes a further deposit in respect of any other class of assurance business as provided for in Section 33 (*e*) of the Act;

(*c*) where a Company has a deposit fund to a special ledger credit in respect of bond investment business, and the bond investment fund of the Company set apart and secured for the claims of the policy holders of that class amounts to £40,000, and the Company has or makes a further deposit in respect of any other class of assurance business as provided for in Section 34 (*c*) of the Act;

(*d*) where a Company has ceased altogether to carry on within the United Kingdom, either assurance business of any class, or the particular class of assurance business to the special ledger credit whereof a deposit fund (not being the sole deposit fund) is standing, and all liabilities in respect of the deposit fund have been satisfied or are otherwise provided for;

the Court may, on the application of the Company, order the deposit

fund to be paid or transferred out of Court and returned to the Company or as it shall direct.

8. The issuing in any case of any Warrant or certificate relating to a deposit or to the deposit fund, or any error in any such Warrant or certificate, or in relation thereto, shall not make the Board of Trade, or the person signing the Warrant or certificate on their behalf, in any manner liable for or in respect of the deposit fund, or the interest or dividends accruing on the same, or any part thereof, respectively.

9. Any application under these Rules to the Court shall be made in such manner as shall from time to time be prescribed by Rules of Court, and until otherwise prescribed in the like manner in which similar applications under the Life Assurance Companies Acts, 1870 to 1872, and the Employers' Liability Insurance Companies Act, 1907, were made immediately prior to the commencement of the Act. Provided always that any application under Rule 6 or Rule 7 shall be served on the Board of Trade.

10. These Rules shall, so far as may be, extend to and authorise applications with regard to deposits already made by existing Companies under the provisions of the Life Assurance Companies Acts, 1870 to 1872, and the Employers' Liability Insurance Companies Act, 1907, and for this purpose deposits made under the Life Assurance Companies Acts, 1870 to 1872, and the deposit funds representing the same shall *primâ facie* and in default of reason to the contrary be treated and dealt with as having been made in respect of the life assurance business of the Companies by or on behalf of which such deposits were made, and deposits made under the Employers' Liability Insurance Companies Act, 1907, and the deposit funds representing the same shall *primâ facie* and in default of reason to the contrary, be treated and dealt with as having been made in respect of the employers' liability insurance business of the Companies by or on behalf of which such deposits were made.

Where any such deposit as in this Rule mentioned has been made by an Irish Company, the same may be ordered by the Supreme Court of Judicature in England to be transferred from the account of the Paymaster-General of the English Court to a corresponding account of the Accountant-General of the Supreme Court of Judicature in Ireland.

Rules relating to Deposits by Underwriters who are members of Lloyd's.

1. These Rules shall apply only to deposits made pursuant to the Assurance Companies Act, 1909, by Underwriters who are members of Lloyd's, and such Underwriters are hereinafter referred to simply as Underwriters. B

2. Where under the provisions of the Eighth Schedule to the said Act any Underwriter has to make and keep any deposit in respect of any class of assurance business, the payment, repayment, investment of, and dealing with, such deposit and the payment of interest and dividends on such deposit, and the investments from time to time representing the same shall be regulated by the terms of an Indenture under Seal, which shall be executed in the case of each deposit by the Underwriter making the deposit, by Lloyd's, and by Trustees to be appointed by the Committee of Lloyd's for the time being, and shall be

in accordance with a model form approved by the Board of Trade for deposits in relation to that class of assurance business.

3. Where any Underwriter carries on more than one class of assurance business and accordingly has, under the provisions of the said Eighth Schedule, to make a separate deposit in respect of each class of business a separate Indenture of the nature specified in the last preceding Rule, shall be executed in respect of each separate deposit.

4. So soon as any deposit has been made by an Underwriter and a corresponding Indenture executed under the preceding Rules, Lloyd's shall forthwith notify to the Board of Trade the name and address of such Underwriter, the date of the Indenture, and the class of assurance business in respect of which the deposit has been made and the Indenture has been executed, and Lloyd's and the Trustees for the time being of the Indenture shall from time to time notify to the Board of Trade any alteration in the address or the name of the Underwriter, and shall at all times furnish to the said Board any material information in regard to the deposit and the investment thereof, and the dealings therewith and the position of the Underwriter in relation thereto, and otherwise, which may from time to time be possessed by Lloyd's and the said Trustees.

Rules relating to the Audit of Accounts of Assurance Companies.

C 1. The accounts of every assurance company not subject to audit in accordance with the provisions of the Companies (Consolidation) Act, 1908, or of the Companies Clauses Consolidation Act, 1845, relating to audit shall be audited in accordance with the provisions of Section 113 (1) and (2) of the Companies (Consolidation) Act, 1908.

2. No director or officer of the company shall be capable of being appointed an auditor.

3. In the case of a company having a share capital, the auditor or auditors shall be elected annually by the shareholders.

Rules relating to the Custody, Inspection, and Certification of Documents.

D 1. A copy of every account, balance sheet, abstract, statement, or report required by the Assurance Companies Act, 1909, to be deposited with the Board of Trade shall be kept by the Registrar of Joint Stock Companies, and shall be open to inspection by any person on payment of a fee of one shilling for each inspection ; and any person may procure a copy of any such document or any part thereof on payment of 4*d*. a folio of 72 words.

2. The Assistant Registrars are hereby appointed (in addition to the Registrar) for the purpose of certifying documents under Section 21 of the said Act.

Rules relating to the Qualifications of an Actuary.

E 1. Any person signing as actuary valuation returns of life-assurance business, sinking fund or capital redemption insurance business, or bond investment business shall be either,—

(1) a Fellow of the Institute of Actuaries or of the Faculty of Actuaries; or

(2) where application is made by a company and where, in the opinion of the Board of Trade, special circumstances exist, an Associate of the Institute of Actuaries or of the Faculty of Actuaries; or

(3) the actuary at the date of making these Rules to a company under the Assurance Companies Act, 1909, having its head office within the United Kingdom or to any closed fund of such a company established in consequence of an amalgamation or transfer; or

(4) such other person having actuarial knowledge as the Board of Trade may, on the application of a company, approve.

2. Any person signing as actuary returns with regard to employers' liability business shall be either—

(1) a Fellow or Associate of the Institute of Actuaries or of the Faculty of Actuaries; or

(2) the actuary at the date of making these Rules to a company under the said Act having its head office within the United Kingdom or to any closed fund of such a company established in consequence of an amalgamation or transfer; or

(3) such other person as the Board of Trade may, on the application of a company, approve.

SECURITY TO BE FURNISHED BY UNDERWRITERS BEING MEMBERS OF LLOYD'S.

The security to be furnished under the Eighth Schedule to the Assurance Companies Act, 1909 (B) and (C), 2 (b), by underwriters being members of Lloyd's, shall be furnished to the satisfaction of the Committee of Lloyd's. F

FORM OF CERTIFICATE TO BE FURNISHED ON AUDIT OF ACCOUNTS OF UNDERWRITERS BEING MEMBERS OF LLOYD'S.

The following Form is hereby prescribed as the Form of Certificate to be furnished by auditors of the accounts of underwriters being members of Lloyd's carrying on fire or accident insurance business who have elected to comply with the conditions set out in clause 2 of the part of the 8th Schedule to the Assurance Companies Act, 1909, applicable to fire and accident insurance business. G

To the Committee of Lloyd's.

WE have examined the Books for the above Accounts for the year ending 31st December, 19 , in accordance with the "Instructions for the guidance of Auditors" drawn up by your Committee and approved by the Board of Trade. In our opinion, so far as the Liabilities and Assets shown in the Books are concerned, the Assets shown in the Books and those deposited with Lloyd's Committee and those since provided, belonging to each name, are correctly valued and available and sufficient to meet his liabilities as therein shown, and to wind up his outstanding Underwriting Accounts. The Liability of the current Underwriting Accounts has been calculated on the basis of the proportion of settlements to Premiums actually made in respect of the years 19_, 19_, and 19 .

We have verified, by actual inspection or Banker's Certificate, the Investments and Cash at the Bankers at 31st December, 19 , and have compared the Brokers' balances with the Ledger, and in arriving at the Brokers' balances, discount has been taken into account and provision made for any debts whose recovery in full is doubtful. The funds also are held in trust under a Deed of Trust, duly executed, approved by your Committee.

All the information we required has been supplied to us, and so far as our examination of the Books has gone, they appear to have been properly kept.

Dated 19 .

(Signed)

Accountants approved by the Committee of Lloyd's.

Forms of Annual Statements to be furnished by Underwriters.

H The following Forms are hereby prescribed as the Forms of Statements to be furnished by Underwriters in respect of assurance business effected by them under the Eighth Schedule of the Assurance Companies Act, 1909.

Forms of Statements to be furnished by Underwriters under the Eighth Schedule to the Assurance Companies Act, 1909.

(A.)—Life Assurance.

Revenue Account for the Year ending 19 .

	£ s. d.		£ s. d.
Amount of life assurance fund at the beginning of the year.		Claims under policies paid and outstanding :—	
Premiums		By death	
Interest and dividends		By maturity	
Other receipts (accounts to be specified) . .		Surrenders	
		Brokerages	
		Expenses of management	
		Other payments (accounts to be specified) . .	
		Amount of life assurance fund at the end of the year, as per balance sheet.	
£		£	

Note.—Items in this Account to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the Underwriter's risks.

Balance Sheet on the 19 .

Liabilities.	£ s. d.	Assets.	£ s. d.
Life Assurance Fund (as per Revenue Account) . .		Deposit with Lloyd's trustees	
Claims admitted or intimated, but not paid* . . .		Other assets (to be specified)	
Other sums owing* (accounts to be specified) . . .			
£		£	

* These items are included in the corresponding items in the Revenue Account.

LIFE ASSURANCE—(*cont.*).

Summary and Valuation of the Life Assurance Policies as at , 19 .

Description of Transactions.	Particulars of the Policies for Valuation.			Net Liability.
	Number of Policies.	Sums assured.	Office Yearly Premiums.	
ASSURANCES.				
For whole term of life . .				
Other classes (to be specified).				
Extra premiums payable . .				
Total assurances . .				
Deduct re-assurances (to be specified according to class in a separate statement).				
Net amount of assurances .				
Adjustments, if any (to be separately specified).				
Total of the results . .				

Valuation Balance Sheet as at , 19 .

Dr.	£	Cr.	£
To net liability under Life Assurance transactions (as per summary statement).		By Life Assurance Funds (as per Balance sheet).	
To surplus, if any . .		By deficiency, if any . .	

The undermentioned particulars are also to be furnished annually :—

(1) The principles, bases, and methods adopted in the calculation or estimation of the net liability, in respect of each class of assurance, as set out in the Valuation Summary.

(2) The published table or tables of premiums for assurances of different classes in use at the valuation date.

(3) The average rate of interest yielded by the assets, whether invested or uninvested, constituting the life assurance fund, calculated upon the mean fund of the year, without deduction of income tax.

(4) The methods adopted in the calculation of surrender values, the classes of assurance in respect of which, and the conditions as to duration of assurance or otherwise upon which, such values are granted.

(B.)—Fire Insurance.

Revenue Account for the Year ending , 19 .

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of fire insurance fund at the beginning of the year :—			Claims under policies paid and outstanding . .		
Reserve for unexpired risks . .			Brokerages		
Additional reserve (if any) . .			Expenses of management		
			Contributions to fire brigades		
Premiums			Other payments (accounts to be specified) . .		
Interest and dividends			Amount of fire insurance fund at the end of the year as per balance sheet :—	£ s. d.	
Other receipts (accounts to be specified) . .			Reserve for unexpired risks being per cent. of premium income for the year.		
			Additional reserve (if any) . .		
	£			£	

NOTE.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Underwriter's risks.

Balance Sheet on the , 19 .

Liabilities.	£ s. d.	Assets.	£ s. d.
Fire Insurance Fund		Deposit with Lloyd's Trustees	
(As per Revenue Account.)		Other assets (to be specified)	
Outstanding claims*			
Other sums owing*			
(Accounts to be specified.)			
	£		£

* NOTE.—These items are included in the corresponding items in the Revenue Account.

(C.)—Accident Insurance.

Revenue Account for the year ending , 19 .

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of accident insurance fund at the beginning of the year :—			Payments under policies, including medical and legal expenses in connection therewith . .		
Reserve for unexpired risks . .			Brokerages		
Total estimated liability in respect of outstanding claims . .			Expenses of management		
Additional reserve (if any) . .			Other payments (accounts to be specified) . .		
				£ s. d.	
Premiums			Amount of accident insurance fund at the end of the year as per Balance Sheet		
Interest and dividends			Reserve for unexpired risks being per cent. of premium income for the year . . .		
Other receipts (accounts to be specified) . .			Total estimated liability in respect of outstanding claims . .		
			Additional reserve (if any) . .		
	£			£	

Note.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurance of the Underwriter's risks.

Balance Sheet on the , 19 .

Liabilities.	£ s. d.	Assets.	£ s. d.
Accident Insurance Fund		Deposit with Lloyd's Trustees	
(As per Revenue Account.)		Other Assets (to be specified)	
Other sums owing*			
(Accounts to be specified.)			
	£		£

* Note.—These Items are included in the corresponding items in the Revenue Account.

ACCIDENT INSURANCE—(*cont.*).

Statement of the Estimated Liability in respect of Outstanding Accident Claims arising in the year of Account, and in the preceding year or years; computed as at the end of the year in which the claims arose, and as at the end of the year of Account; with particulars as to the number and amount of the claims actually paid in the intervening period.

I.—Claims arising during the year of account ending , 19 .

(*a*) Particulars as to Claims arising, and settled, during the year of Account:—

Class of Claim.	No. of Claims.	Total amount paid.	
		By Sums insured.	By Weekly Allowance.
(1)	(2)	(3)	(4)
(i) Fatal claims . . . . . (ii) Non-fatal claims			
Total			

(*b*) Particulars as to claims arising during and outstanding at the end of the year of Account:—

Class of Claim.	No. of Claims.	Amount paid during Year of Account.	Estimated Liability.
(1)	(2)	(3)	(4)
(i) Fatal claims . . . . . (ii) Non-fatal claims, involving payment of sums insured. (iii) Non-fatal claims, involving payment of temporary weekly allowances:— With maximum duration, not exceeding 26 weeks. With maximum duration exceeding 26 weeks, but not exceeding 52 weeks. And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted. (iv) Non-fatal claims, involving payment of yearly allowances during permanent total disablement.			
Totals			

ACCIDENT INSURANCE—(*cont.*).

II.—Outstanding Claims which arose during the *first year* preceding the year of account ending , 19 .

Particulars of Claims.	Estimated Liability in respect of Claims Outstanding as at the above Date.		Claims paid during the Period of One Year between the above Date and the End of Year of Account.				Estimated Liability in respect of Claims Outstanding as at the End of Year of Account.		Totals of Columns (3), (4), and (5).	
			Terminated within such Period.		Not terminated within such Period.					
(1)	(2)		(3)		(4)		(5)		(6)	
	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.
(i) Fatal claims .										
(ii) Non-fatal claims, involving payment of sums insured.										
(iii) Non-fatal claims involving payment of temporary weekly allowances:—										
With maximum duration not exceeding 26 weeks.										
With maximum duration exceeding 26 weeks, but not exceeding 52 weeks.										
And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.										
(iv) Non-fatal claims, involving payment of yearly allowances during permanent total disablement.										
TOTALS . .										

NOTE.—If temporary weekly allowances are granted by the Company for periods exceeding 52 weeks, particulars are to be furnished, in a form or forms similar to II. above, showing, in respect of claims involving such extended allowances, the estimated liability as at the end of the year in which such claims arose, and as at the end of the year of account; and the number and amount of such actual claims paid during the intervening period of two (or more) years; distinguishing claims terminated, and not terminated, within such period.

III.—Summary of estimated liability, in respect of claims outstanding as at the end of the year of account—

As per column (4) of Statement I. (*b*) . . . . . £

„ „ (5) „ II. . . . . .

„ „ (5) of further schedules in the form of Statement II. (if required).

In respect of yearly allowances during permanent total disablement, outstanding at the end of the year of account, but not included in the above Statements . } £

Total estimated liability, in respect of outstanding claims as at the end of the year of account, as per Revenue Account . . . . . } £

(D.)—Employers' Liability Insurance.

Revenue Account for the year ending , 19 .

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of Funds at the beginning of the year, viz. :—			Payments under policies including medical and legal expenses in connection therewith . . .		
Reserve for unexpired risks . .			Brokerages		
Total estimated liability in respect of outstanding claims . .			Expenses of Management		
Reserve for contingencies (if any) .			(Other payments to be specified.)		
				£ s. d.	
Premiums			Amount of Funds at the end of the year, as per Balance Sheet, viz. :—		
Interests and Dividends			Reserve for unexpired risks, being per cent. of the premium income for the year . . .		
(Other receipts to be specified)			Total estimated liability in respect of outstanding claims . .		
			Reserve for contingencies (if any) .		
	£			£	

Balance Sheet on the , 19 .

Liabilities.	£ s. d.	Assets.	£ s. d.
Employers' Liability Insurance Fund . . . . (As per Revenue Account.)		Deposit with Lloyd's Trustees	
Other sums owing* . . . . . (Accounts to be specified.)		Other Assets (to be specified)	
	£		£

* Note.—These items are included in the corresponding items in the Revenue Account.

EMPLOYERS' LIABILITY INSURANCE—(*cont.*).

A.

(*a*) Number of Policies issued during the year . . . . . .
(*b*) Number of Policies in existence at the end of the year . . . . . .

B.

Estimated Liability in respect of Claims outstanding at commencement of the Year as per Revenue Account.

Class of Claim.	Number.	Estimated Liability.
		£
Fatal Claims		
Non-fatal Claims :—		
(*a*) Cases which had then continued for periods *not* exceeding six months		
(*b*) Cases which had then continued for periods exceeding six months		
Total . . .		

EMPLOYERS' LIABILITY INSURANCE—(*cont.*).

C.

Amounts paid during the year :—

(*a*) In respect of claims outstanding, as shown in statement B, and settled during the year.

Class of Claim.	Number.	Amount paid.		
		Weekly Payments.	Lump Sum Payments.	
			Settled by Agreement.	Paid into Court.
Fatal Claims		£	£	£
Non-fatal Claims :—				
(*a*) Cases whose total duration did *not* exceed six months .				
(*b*) Cases whose total duration exceeded six months . .				
Total . . .				

(*b*) In respect of claims arising and settled during the year.

Class of Claim.	Number.	Amount paid.		
		Weekly Payments.	Lump Sum Payments.	
			Settled by Agreement.	Paid into Court.
Fatal Claims		£	£	£
Non-fatal Claims :—				
(*a*) Cases whose total duration did *not* exceed six months .				
(*b*) Cases whose total duration exceeded six months . .				
Total . . .				

EMPLOYERS' LIABILITY INSURANCE—(*cont.*).

D.

Estimated Liability in respect of claims outstanding at end of the year (as per Revenue Account) with Statements of amounts already paid during the year in respect of such claims.

Class of Claim.	Number.	Amount paid during the year.	Estimated Liability.
		£	£
Fatal Claims			
Non-Fatal Claims :—			
(*a*) Cases which had then continued for periods *not* exceeding six months			
(*b*) Cases which had then continued for periods exceeding six months			
Total			

Signed

Underwriter.

(E.)—Bond Investment Business.

Revenue Account for the Year ending , 19 .

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of Bond Investment and Endowment Certificate Fund at the beginning of the year.			Claims under bonds and certificates, paid and outstanding		
Additional reserve (if any)			Brokerages		
			Expenses of management		
Premiums			Other payments (accounts to be specified)		
Interest and Dividends				£ s. d.	
Other receipts (accounts to be specified)			Amount of Bond Investment and Endowment Certificate Fund at the end of the year, as per Balance Sheet.		
			Additional reserve (if any)		
	£			£	

NOTE.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Underwriter's risks.

Balance Sheet on the , 19 .

Liabilities.	£ s. d.	Assets.	£ s. d.
Bond Investment and Endowment Certificate Fund (As per Revenue Account.)		Deposit with Lloyd's Trustees	
Claims admitted or intimated but not paid*		Other assets (to be specified)	
Other sums owing* (Accounts to be specified.)			
	£		£

* These items are included in the corresponding items in the Revenue Account.

BOND INVESTMENT BUSINESS—(*cont.*).

Summary and Valuation of the Bond Investment Policies or Endowment Certificates as at 19 .

Description of Transactions.	Particulars of the Policies or Certificates for Valuation.			Net Liability.
	No. of Policies.	Sums Assured.	Office Yearly Premiums.	
Total existing Policies or Certificates				
Deduct re-assurances . .				
Net Totals				
Adjustments (if any) . .				
Total of the results . .				

Valuation Balance Sheet as at 19 .

Dr.	£	Cr.	£
To net liability under Bond Investment and Endowment Certificate transactions (as per summary statement) . . .		By Bond Investment and Endowment Certificate Fund (as per balance sheet)	
To surplus (if any) . .		By deficiency (if any) .	

The undermentioned particulars are also to be furnished annually :—

(1) The principles, bases, and methods adopted in the calculation or estimation of the net liability in respect of policies or certificates existing at the valuation date, as set out in the valuation summary.

(2) The published table or tables of rates of contribution for bond investment policies and endowment certificates which are in use at the valuation date ; with full particulars as to the terms and conditions on which advances are made under such policies or certificates, whether on security of house property or land, or otherwise.

(3) The average rate of interest realised by the assets, whether invested or uninvested, constituting the bond investment and endowment certificate fund, calculated upon the mean fund of the year, without deduction of income tax.

(4) Full particulars as to the terms and conditions upon which surrenders of policies and certificates are granted, with specimens of the values allowed in respect of different durations, and different unexpired terms at the date of surrender.

(5) Full particulars as to the terms and conditions upon which redemption of advances is granted, with specimens of redemption values in respect of bonds or certificates of different durations, and having different unexpired terms, at the date of redemption.

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PRINTED BY
WILLIAM CLOWES AND SONS, LIMITED,
LONDON AND BECCLES.